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DECIDED IN THE

COURTS OF LAST RESORT

OF THE SEVERAL STATES.

SELECTED, REPORTED, AND ANNOTATED

BY A. C. FREEMAN.

VOLUME 109.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1906.

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CASES
IN THE
SUPREME COURT
OF
ALABAMA.

JOHNSON v. STATE.

[141 Ala. 7, 37 South. 421.]

WORDS AND PHRASES—"Until."—The use of the word "until" generally implies an intention to exclude the day to which it refers, unless the contrary appears from the context of the statute or instrument in which such word is used. (p. 18.)

JUDGMENTS after End of Term.—If a statute provides that a certain term of court shall continue "until" a specified day, the proceedings and judgment in a trial before such court on the day succeeding that named in the statute are coram non judice and void, and will not support an appeal. (p. 19.)

Goodhue & Blackwood, for the appellant.

M. Wilson, attorney general, for the state.

⁸ HARALSON, J. The act to declare the powers and jurisdiction of the city court of Gadsden provides that there shall be two regular terms in each year, and may continue in session until the business thereof is disposed of. Regular terms of said court shall be as follows: "Beginning on the third Monday in January in each year, and continuing until the last Saturday in June, and on the third Monday in September in each year, and continuing until the third Saturday in December": Acts 1900-01, p. 1291.

The defendant was tried on the 19th of December, 1903, which was the third Saturday in December. He did not, in the lower court, question the right of the court to try him on that day, and in this court contends that the word "until" employed in the statute excluded the day on which he was tried, and, therefore, the proceedings were coram non judice and void. If the term of the court ended on Friday, and the

defendant was tried on Saturday, after the term had ended, the fact that defendant did not object to being tried on that day did not preclude him from raising this question in this court.

The well-settled rule is, that the use of the word "until" generally implies an intention to exclude the day to which it refers, unless the contrary appears from the context of the statute or instrument in which the word is used: 26 Am. & Eng. Ency. of Law, 1st ed., 9, and authorities there cited, note 1.

In *Kendall v. Kingsley*, 120 Mass. 94, it was said: "It may be assumed . . . that the preposition 'until,' like 'from' or 'between,' generally excludes the day to which it relates: *Nichols v. Ramsel*, 2 Madd. 280; *Wicker v. Norris*, Cas. Hardw. 116; *Bemis v. Leonard*, 118 Mass. 502, 19 Am. Rep. 470; *Atkins v. Boylsten Ins. Co.*, 5 Met. 439, 39 Am. Dec. 692. But such general rules of construction must yield to the intention of the parties, apparent on the face of the whole instrument, as applied to the subject matter": *Anderson's Law Dictionary*, tit. "Until."

9 The charter of a bank was continued in force until the first day of January, 1850, and it was held that the word "until" was used in an exclusive sense, and that the charter expired on December 31, 1849: *People v. Walker*, 17 N. Y. 502.

Under a statute providing that bids from all persons should be received "until" the 1st of July, 1849, it was held that the time for receiving bids terminated when that day began: *Webster v. French*, 12 Ill. 302.

When time was given beyond the term for filing a bill of exceptions, until a day named, it was held that the filing of the bill on such a day was not within the time limited: *Corbin v. Ketcham*, 87 Ind. 138.

There is nothing in the statute to indicate that the third Saturday in December, the day on which the trial occurred, was included within the limits of the term. Unaided by anything in the context of the statute to the contrary, we must be governed by what the legislature said, and presume that they said what they intended to say. "When a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. Possible or even probable meanings, where one

is plainly declared in the instrument itself, the courts are not at liberty to search elsewhere": Cooley on Constitutional Limitations, 69, 70; State v. McGough, 118 Ala. 159, 24 South. 395.

The judgment below is void and will not support an appeal. It must therefore be dismissed.

In the Computation of Time, the word "until," when used in a statute, is ordinarily taken as implying an intention to exclude the day to which it refers: See the monographic note to State v. Michel, 78 Am. St. Rep. 386.

DAVIS v. STATE.

[141 Ala. 84, 37 South. 454.]

CONSTITUTIONAL LAW—Stock Law.—A statute entitled an act to prevent stock from running at large in a certain county, and providing that whenever ten freeholders in any particular part of such county shall petition the probate judge thereof for an election therein to determine whether stock shall be prohibited from running at large, he shall order such an election, is not unconstitutional as a delegation of legislative powers. Under such statute and petition all of the qualified voters in the proposed district have a right to vote at the election, and they may either approve or defeat the recommendation of the petitioners. (pp. 20, 21.)

STOCK LAWS—Indictment for Violation.—An indictment for the violation of a district stock law prohibiting animals from running at large within a designated territory need not allege the various proceedings required by the statute to be had in establishing a stock law in such district. (p. 21.)

INDICTMENT Need not Set Up the Proof in the case, and need only charge the commission of the offense in the language of the statute. (p. 21.)

STOCK LAWS.—Indictment for Violation of a local or district livestock law conferring jurisdiction upon a justice of the peace within such district of prosecutions for a violation of such law, is not subject to the objection that the crime is a misdemeanor, triable only by a justice of the peace when the jurisdiction conferred by the statute upon the justice is not exclusive and all misdemeanors are indictable offenses. (p. 22.)

EVIDENCE—Judicial Notice of Local Laws.—If a statute, local in its nature, extends to all persons who may come within the territory described, the courts will take judicial knowledge thereof. (p. 22.)

STOCK LAWS—Violation—Evidence.—If a person is charged with the violation of a stock law prohibiting animals from running at large in a certain district, the minute entry in the proper court of the result of an election for, and the establishment thereby of, such district, is admissible in evidence. (p. 22.)

Goodhue & Blackwood, for the appellant.

M. Wilson, attorney general for the state.

⁸⁷ HARALSON, J. The indictment was found under the act of December 7, 1900 (Acts 1900-01, p. 170) amending an act "to prevent stock from running at large in several beats and parts of beats in Etowah county, approved February 8, 1898: Acts 1898-99, p. 683."

The indictment was demurred to on many grounds, the first of which was that it was based on an unconstitutional law. This contention proceeds on the alleged ground, as stated in the brief of counsel, that the act "does not confine either the boundaries within which the stock law is to be operated, or the persons who are to determine by their votes whether or not the law shall go into effect, but attempts to delegate to any ten or more freeholders who may see fit to write in a petition the ⁸⁸ power to determine the boundaries of the proposed stock district and the voters who shall participate in the election."

The first section of the act provides: "That whenever ten freeholders or householders in any beat or part of beat in Etowah county shall petition the probate judge of said county asking that an election be held in said beat or part of said beat to decide whether in said beat or part of said beat stock shall be prohibited from running at large, the probate judge shall order an election in such beat or part of beat described in said petition and at a place to be designated in said petition, and shall notify the public that an election will be held at said voting, not less than twenty nor more than thirty days from the publication, specifying the day of election, to decide whether in said beat or part of beat described in said petition stock shall be prohibited from running at large," etc.

The criticism of the act is not well made. The act does provide, not that "ten freeholders or householders shall have the power to determine the boundaries of the proposed stock district"; but it simply bestows on them the right to petition for an election to be held in the beat or part thereof designated in the petition, at which the qualified voters of the beat or part of the beat designated shall be allowed to vote. So the petitioners have no right to determine the boundaries of the district, since the qualified voters may approve or defeat the recommendation of the petitioners, and they are the ones who, at last, determine the boundaries of the district. If compe-

tent for the legislature to authorize, in this manner, the establishment of a stock district, it was just as competent for it to authorize a part of the beat to do so. The legislature in this act did authorize the establishment of such districts, dependent upon the condition of the people voting to have them, and when the condition named had been fulfilled, and the district is thereby established, it cannot be said that there was not legislative authority behind it. The act does not delegate legislative powers, but it is legislation, to take effect upon a valid condition.

~~so~~ The legislature may pass a valid statute, to take effect upon the happening of a future event, and the statute will not, on this account, be held to be unconstitutional: *Hand v. Stapleton*, 135 Ala. 156, 33 South. 689.

Many similar acts have been, from time to time, passed by the legislature, and its competency to create such laws has been frequently questioned. It has, however been uniformly held that such acts are not unauthorized delegation of legislative authority to the commissioner's courts, nor otherwise objectionable on constitutional grounds: *McGraw v. County Commrs.*, 89 Ala. 407, 8 South. 852; *Edmondson v. Ledbetter*, 114 Ala. 477, 21 South. 989.

The act is not subject to the other objection raised to it that it does not define the persons who are to determine by their votes whether or not the law shall go into effect, but attempts to delegate to any ten or more freeholders or householders the power to determine the voters who shall participate in the election. The act leaves it to a decision of a majority of the "qualified voters of said beat or part of said beat."

There is nothing in the second or third grounds of demurrer. The indictment, as stated, is under said amended act of 1900-01, and the act of September 29, 1903, has no application to this case.

The fourth, fifth and sixth grounds set up in substance that it was necessary to aver the various proceedings required by the act to be gone through with in establishing said district. This was unnecessary. It is not required that an indictment shall set up the proof in the case, but merely to charge the commission of the offense in the language of the statute which is here done.

The seventh ground was bad. The statute gives jurisdiction to the justice of the peace, but it does not make that jurisdic-

tion exclusive. All misdemeanors are indictable offenses: Code, sec. 4891.

The eighth ground was also without merit. The court takes judicial notice of such laws. The statute, though local in its nature, extends to all persons who may come within the territory described, and is a statute of which the courts take judicial knowledge: *Carson v. State*, 69 Ala. 235; *Compton v. State*, 95 Ala. 25, 11 South. 69.

⁹⁰ The minute entry of the result of the election and the establishment of the district was introduced in evidence. The defendant objected to its introduction because it showed on its face that there was a contest filed as to said election, and fails to show the verdict of a jury determining said contest; and that said minute entry fails to show that proceedings were had in accordance with the statute on the contest filed, and the probate judge had no authority after contest filed to enter the order on the minute-book declaring it unlawful to permit stock to run at large within the territory without first having determined the contest.

The bill of exceptions shows that on the 24th of April, 1902, a contest of said election was filed, and May, 1902, was set to hear said contest, and the same was duly heard upon the issue as stated in the petition for contest, and upon the hearing of the same, the court dismissed the proceedings, in favor of the contestees.

It does not appear upon what ground the court dismissed the proceedings for a contest. Neither the petition nor any of the proceedings therefor are shown. In the absence of such showing we will presume that the contest was dismissed on some proper ground: *Bodine v. State*, 129 Ala. 106, 29 South. 926; *Newell v. State*, 115 Ala. 54, 22 South. 572.

Affirmed.

Local Option Statutes, having for their object the regulation or prohibition of the sale of intoxicating liquors, have been upheld in many cases: See *State v. Common Pleas*, 36 N. J. L. 72, 13 Am. Rep. 422; *State v. Wilcox*, 42 Conn. 364, 19 Am. Rep. 536; *Fell v. State*, 42 Md. 71, 20 Am. Rep. 83; *State v. Cooke*, 24 Minn. 247, 31 Am. Rep. 344. The legislature has power to pass a conditional statute, and to make its taking effect depend upon some subsequent event, such as the vote of the people of a county: *People v. McFadden*, 81 Cal. 489, 15 Am. St. Rep. 66.

TONEY v. STATE.

[141 Ala. 120, 37 South. 332.]

CONSTITUTIONAL LAW—Labor Contracts.—A statute making it a misdemeanor for anyone under contract in writing to labor, or work land for any given time, to break his contract and enter into another one with a different person without the consent of his employer, and without sufficient excuse, and without giving notice of his old contract to the person with whom he makes the new one, is unconstitutional and void as violative of the constitutional guaranty of life, liberty and property, and as abridging the privileges and immunities of citizens. (pp. 23, 24.)

F. M. De Graffenreid, for the petitioner.

M. Wilson, attorney general, for the state.

¹²² **SHARPE, J.** Authority for the warrant under which petitioner is imprisoned does not exist unless in an act approved March 1, 1901 (Acts 1900-01, p. 1208), which purports to apply in Russell and other counties of this state, and which declares "That any person who has contracted in writing to labor for, or serve, another for any given time, or any person who has by written contract leased or rented land from another for any specified time, or any person who has contracted in writing with a party furnishing the lands, or the lands and teams to cultivate it, either to furnish the labor, or the labor and teams to cultivate the land, with stipulations, express or implied, to divide the crops between them in certain proportion, and who before the expiration of such contract and without the consent of the other party, and without sufficient excuse, to be adjudged by the court, shall leave such other party, or abandon said contract, or leave or abandon the leased premises, or the land furnished as aforesaid, and who shall also make a second contract, either parol or written, of a similar nature or character to any of said aforementioned contracts, though differing in some particulars in the terms, stipulations or period of time, with a different person without first giving notice to such person of the existence ¹²³ of the said first contract, shall be guilty of a misdemeanor, and on conviction be fined not exceeding fifty dollars, or sentenced to hard labor for not exceeding six months, one or both," etc. This enactment cannot operate consistently with the guaranties of equality, liberty, and property, made by the federal and also by the state constitution. In the state constitution as it existed when this act was passed and as it now exists, "life, lib-

erty and property" are enumerated as being among the inalienable rights of all men, and to protect the citizen in the enjoyment of "life, liberty and property" are declared to be the sole object and only legitimate end of government. In the fourteenth amendment to the federal constitution it is declared: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law." In interpretation of this, it was said in *Allgeyer v. Louisiana*, 165 U. S. 578, 579, 17 Sup. Ct. Rep. 427, 41 L. ed. 317: "The liberty mentioned in the amendment means not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, to pursue any livelihood or avocation and for the purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." In support of that interpretation the court rendering it quoted approvingly from the opinion of Justice Bradley in *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, 4 Sup. Ct. Rep. 652, 28 L. ed. 585, the following: "The right to follow any of the common occupations is an inalienable right. It was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence which commenced with the fundamental proposition that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are 'life, liberty and the pursuit of happiness'; this right is a large ingredient in the civil liberty of the citizen. I ¹²⁴ hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States."

The court further said in *Allgeyer v. Louisiana*, 165 U. S. 578, 17 Sup. Ct. Rep. 427, 41 L. ed. 317: "In the privilege of pursuing an ordinary calling or trade and of acquiring, holding and selling property must be embraced the right to make all proper contracts in relation thereto," etc. On the same subject the court said in *State v. Goodwill*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285, 6 L. R. A. 621: "A person living under the protection of this government has the right to

adopt and follow any lawful industrial pursuit not injurious to the community which he may see fit. And as incident to this is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon by the parties," etc. In the same case it was said: "The right to buy and sell property, and contract in respect thereto including contracts for labor—which, as we have seen, is property—is protected by the constitution. If the legislature, without any public necessity has the power to prohibit or restrict the right of contract between private persons in respect of one lawful trade or business, then it may prevent the prosecution of all trades, and regulate all contracts." The principles so announced are by the above-cited and other authorities recognized as correct: See *Commonwealth v. Perry*, 155 Mass. 117, 31 Am. St. Rep. 533, 28 N. E. 1126, 14 L. R. A. 325; *People v. Berrien* Circuit Judge, 124 Mich. 664, 83 N. W. 594, 50 L. R. A. 493; *City of Chicago v. Netcher*, 183 Ill. 104, 75 Am. St. Rep. 93, 55 N. E. 707, 48 L. R. A. 261.

Occupations there are in which the public have such interest as will make them subject to statutory regulation or even prohibition. The constitutional provisions referred to were not designed to interfere with the states' police powers; and within the limits set by the constitution, state and federal, the legislature is free to determine what subjects are proper to be legislated upon in conservation of order, morals, health and safety; but a constitutional right "cannot be imposed or destroyed under the guise or device of being regulated": *South & North Alabama R. Co. v. Morris*, 65 Ala. 193; *Joseph v. Randolph*, 71 Ala. 499, 46 Am. Rep. 347.

125 The act in question purports to prohibit the employé and renter to make contracts of the kind he may have abandoned except under one of three alternative conditions. The first of these, the employer in the case of the employé, or the landlord in the case of the renter, could, by withholding his consent, render unavailable; the second—the existence of an excuse for the abandonment to be judged of by the court—could never be known to be available except at the risk of, and at the end of, a criminal prosecution; the third, that of giving notice of the existing contract, would tend to prevent the making of a similar contract with a new employer or landlord, and this for reasons which are obvious, if regard be had to the risk of prosecution to which such new employer or landlord would be subject under another act in *pari materia* with

this approved on the day before the approval of this act: Acts 1900-01, p. 1225.

If the conditions prescribed by this act can be validly imposed, the door is open for the imposition of others more onerous. "Questions of power do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed": *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678.

Because of the restrictions it purports to place on the right to make contracts for employment and concerning the use and cultivation of land, this act is wholly invalid. Whether a like conclusion might be reached upon other considerations urged in the brief for petitioner, it is unnecessary to consider.

A forceful opinion opposed to the constitutionality of this act was recently rendered by Judge Jones, and is reported in 123 Federal Reporter (D. C.; Peonage Cases) 671.

The act for which petitioner is held was not a criminal offense, and therefore the judgment appealed from will be reversed and it will here be ordered that the petitioner be discharged from custody.

The Constitutionality of Statutes of a somewhat similar import to that involved in the principal case is considered in the extended note to *Booth v. People*, 78 Am. St. Rep. 243, 259.

WILLIS v. RICE.

[141 Ala. 168, 37 South. 507.]

EQUITY JURISDICTION—Relief from Probate Decree—Guardianship Settlement.—A court of equity having jurisdiction to compel the settlement of a guardianship may and will under a bill for that purpose, and under the general prayer, set aside a decree of the probate court discharging such guardian when it is shown that such decree was obtained by him through fraud or other improper conduct. (p. 29.)

GUARDIANSHIP—Accounting—Sufficiency of Bill.—A bill in equity by wards against their guardian to compel an accounting and settlement of his guardianship, which alleges that such guardian took advantage of the youth and inexperience of such wards, who are young women, and upon their attaining their majority, induced them, by reason of his influence over them, to sign a paper reciting that he had made a full settlement of his account with them, which paper is untrue in its statements, is sufficient. (p. 29.)

LIMITATION OF ACTIONS—Bill to Impeach Decree.—A bill in equity to impeach a probate decree for fraud, though not within the terms of the statute which bars a bill of review after a lapse of three years, must, by analogy, be governed by the same limitation. (p. 29.)

Thornton & Inge, for the appellant.

Ervin & McAleer, for the appellee.

¹⁷² DOWELL, J. The bill in this case is filed by Mrs. Kate Rice, nee Brasfield, and her sister, Sallie Brasfield, against the appellant, Byrd C. Willis, to compel an accounting and settlement by him of his guardianship of their estate. The bill after amendment was demurred to, and from the decree of the chancellor overruling the demurrer the present appeal is prosecuted.

The bill shows that the respondent Willis was appointed guardian for the complainants, and as such had the management and control of their estates. When he became guardian the complainants were both minors of tender years, and his guardianship continued throughout their minority, and until each respectively attained her majority. The bill further shows that a considerable amount of property, real and personal, belonging to the complainants, came into his hands, but for want of information from their guardian they were unable to definitely describe the property or to give the dates when he received the same. It is alleged that on April 10, 1891, the said Willis made a partial settlement of his accounts as such guardian in the probate court of Mobile county, whereby it was then ascertained that he was indebted to the complainant, Kate Brasfield, in the sum of eighteen hundred and fifty-one and 06-100 (\$1851.06) dollars, and to the complainant, Sallie Brasfield, in the sum of nineteen hundred and fifty-two and 71-100 (\$1952.71) dollars, since which time no account has ever been stated by their said guardian.

It is shown that subsequent to such partial settlement other property of complainants came into the hands of said Willis from different sources. The bill further charges that the respondent used complainant's money for his own account and benefit, lending out some, and with some paying off mortgages on his own property. That he used three thousand two hundred and fifty (\$3,250.00) dollars of complainant's money in the purchase of a house, and afterward, on June 7, 1900, put on record in Mobile county deeds conveying this property to the complainants at a recited considera-

tion of five thousand dollars, but that he continued to receive the rents from said property until April, 1901; that he ¹⁷³ allowed the taxes to accumulate on said property. It is also charged that as each of the complainants came of age, or shortly thereafter, the said Willis induced them to sign a paper prepared by himself, reciting that he had had a full settlement of his accounts with them, and it is further averred that he used such papers to have himself discharged as such guardian by the probate court, without any notice to the complainants. That in getting each of them to sign such paper he took advantage of their youth and inexperience, and of his influence over them, he being their guardian and their uncle by marriage. The bill then avers that no accounting in fact was ever had with complainants, nor was any ever had in the probate court. The bill further shows that after signing such papers, the complainants repeatedly tried to get a statement from the respondent, but that he always put them off, or pretended to be hurt by their lack of confidence in him. And not until some time in the year 1901, and after he had been discharged by the probate court, did he ever pretend to make to them a statement. This paper is attached to and made a part of the bill as exhibit "A." By it, it is shown in round numbers that he had as guardian received thirteen thousand six hundred and sixty-six (\$13,666.00) dollars, but gives no dates. The credit side of this statement is equally indefinite and unsatisfactory. It is charged that further effort was made through the attorney of complainants to obtain a more detailed statement from the respondent, but he refused to give it.

The special prayer of the bill is for an accounting and settlement by the respondent of his guardianship, and for subrogation where he used complainant's money to raise the mortgage from his own property. The bill also contains a general prayer for relief.

The bill was demurred to on several grounds. A casual reading of the bill is sufficient to show that the first and second assignment of the demurrer—that it affirmatively appears that one accounting and settlement has been had by the guardian—is groundless in fact. It is distinctly charged that an accounting and settlement had never been had. It is true it appears from the bill that ¹⁷⁴ the respondent was discharged by the decree of the probate court as on a settlement, but it is shown by the bill in this connection that such dis-

charge was procured by the respondent without an accounting and settlement, and on a paper prepared by himself, which he influenced the complainants to sign, and which in fact was untrue in its statements.

That the chancery court has jurisdiction to compel the settlement of a guardianship is beyond question, and the present bill being for that purpose, on the facts stated, the court may and will, under the general prayer, in order to have such settlement, set aside the decree of the probate court discharging the guardian, when it is shown that the decree was procured by him through fraud or other improper conduct. There is no merit in the assignment that it is not shown how the respondent took advantage of the complainants in the matter of signing the paper acknowledging full settlement. His relation was one of greatest confidence and trust, and called for the utmost of good faith. It was his duty to fully inform them of their rights in all respects. It charged that he took advantage of their youth and inexperience, and of his influence over them in getting them to sign the paper, which, they further charge, was untrue in its statements. This was sufficient. They were his wards, and from tender years had lived with him, and grown up under his care and control; and it requires no effort to understand how easily they might be influenced by him against their interests. The assignment that no injury is shown to have resulted to complainants by reason of the decree discharging the respondent is equally without merit.

It appears from the bill that the alleged settlement by the respondent with the complainant, Mrs. Kate Rice, and his discharge as such guardian by the decree of the probate court of Mobile county, was more than four years before the filing of the bill. A bill to impeach a decree for fraud, though not within the terms of the statute which bars a bill of review after a lapse of three years, must by analogy be governed by the same limitations: *Gordon's Admr. v. Ross*, 63 Ala. 363. No sufficient reasons are shown in the present bill to relieve it ¹⁷⁵ from the bar of three years as to the complainant, Mrs. Rice, and the demurrer to the bill on this ground should have been sustained. But this is not the case as to the other complainant, Miss Sallie Brasfield. The alleged settlement with her and discharge by decree of the probate court of the guardian occurred within three years of the filing of the bill. Nor is she chargeable with laches under the facts stated in the

bill. The bill shows that after signing the said paper prepared by her said guardian, and under the circumstances averred, she repeatedly sought to have a statement of her account, and this within a reasonable time, which he refused to give. She furthermore endeavored to obtain a statement through her attorney, and failing in this, the present bill was filed. In all of this we are unable to see that she was guilty of laches. In support of the views expressed in the foregoing opinion, see *Voltz v. Voltz*, 75 Ala. 555; *Baines v. Barnes*, 64 Ala. 375; *Jackson v. Harris*, 66 Ala. 566; *Malone v. Kelley*, 54 Ala. 532; *Kyle v. Perdue*, 95 Ala. 579, 10 South. 103.

It follows that the decree must be reversed, and a decree here rendered sustaining the demurrer, and with leave to the complainants to amend their bill.

Relief in Equity from the Orders and Decrees of probate and other courts having exclusive jurisdiction over the estates of decedents and minors and other incompetent persons, is the subject of a recent monographic note to *Froebrich v. Lane*, 106 Am. St. Rep. 639-647. Relief in equity, other than by appellate proceedings, against judgments and decrees, is the subject of an extended note to *Little Rock etc. Ry. Co. v. Wells*, 54 Am. St. Rep. 218-266. And the vacation of judgments and decrees on motion when not specially authorized by statute is the subject of an extended note to *Furman v. Furman*, 60 Am. St. Rep. 633-663.

ROBERTSON v. MONTGOMERY BASEBALL ASSN.

[141 Ala. 348, 37 South. 388.]

INJUNCTION Against Injunction.—A court of equity will not grant an injunction for the purpose of preventing a defendant in that injunction suit from bringing an action for injunction against the complainant therein, on the ground that the latter will suffer irreparable injury from erroneous and improper judicial action. (p. 32.)

Graham & Steiner, H. Nelson and R. L. Harmon, for the appellant.

349 McCLELLAN, C. J. The Montgomery Baseball Association and W. H. Ragland are complainants in, and W. T. Robertson et al. are respondents to, this bill. It seeks injunctive relief only, and this of a character peculiar and anomalous. Its sole purpose is to prevent the respondents

from interfering with the playing of baseball by the Montgomery team of the Southern League at Highland Park in the city of Montgomery under the control of Ragland as assignee of said league's "franchise" granted to the Montgomery Baseball Association. This apprehended interference is threatened, the bill shows, only by and through the means of writs of injunction which, it is averred, the respondents will endeavor to have issued on a bill or bills to be filed by them. It is averred that none of the respondents have any rights to be conserved by such bill or bills and restraining process thereon; but that they are moved thereto by suggestions of malice against the complainant or by the motive, also illegitimate, of forcing the playing of the games of ball in said league on the line of street railway of the Montgomery Traction Company, one of the respondents. The prayer of the bill is that the respondents be enjoined from taking any steps to enjoin the complainants, their agents, employés, etc., from playing the Montgomery games of ball of said league "arranged and under the control of the said Ragland," etc.

350 Of course, the averment of improper motives on the part of respondents is not of importance. If they have rights requiring to their conservation the injunctive arm of the chancery court, that relief will not be denied merely because they are moved to the invocation of that jurisdiction by malice or some improper consideration. "The law does not inquire into the motives which lead a man to do what he has a right to do": *Clark v. Clapp*, 14 R. I. 248. "It is said that the plaintiff sues at the instigation of the General Navigation Company, but the courts look to the rights and not the motives of parties": *Coleman v. Railway Co.*, 10 Beav. 1, 12.

Leaving, therefore, the averment as to respondent's motives to one side, when they shall come to a circuit or city judge or chancellor with their bill or bills and apply for an injunction against these complainants in respect of the playing of said games of baseball, the sole inquiry will be whether they show themselves entitled to that relief. If they are entitled to it, they should not be enjoined against praying for it. If, as this bill undertakes to show, they have no case entitling them to such injunction, it is not to be assumed that the writ will be awarded, but to the contrary. Assuming that the present bill shows, as its allegations are intended to show, that these respondents have no right to an injunction against the playing of ball by Ragland under present arrangements,

it is manifest that the only danger which can possibly, in point of fact, threaten the rights of the complainants is the danger of some high judicial officer of the state erroneously and improperly ordering the writ of injunction in a case and upon facts which do not warrant such a decree; and in legal contemplation that is no danger at all. Courts should not, and cannot properly, proceed, upon the theory that other courts or judges will act erroneously, or exercise their discretion, when that is appealed to, ill-advisedly or improperly. Thus it is said by Mr. High: "It is to be observed, however, that mere apprehension or fears on the part of the person seeking relief that the defendant may institute actions against him in the future will not warrant a court of equity in enjoining the bringing of such actions. ³⁵¹ Nor will a court of equity powers grant an injunction for the purpose of preventing a defendant in the injunction suit from bringing an action for injunction against complainant in that suit, since equity will not entertain jurisdiction upon the ground that another court of competent jurisdiction may decide improperly": 1 High on Injunctions, sec. 64; Wolfe v. Burke, 56 N. Y. 115; Wallack v. Society for Reformation of Juvenile Delinquents, 67 N. Y. 23; Dayton v. Relf, 34 Wis. 86; Schell v. Erie Ry. Co., 51 Barb. 368.

The bill before us, proceeding, as it does, alone on the theory that complainants will suffer irreparable injury from erroneous and improper judicial action upon prayer for injunction in bills which respondents threaten to file, and seeking only injunctive relief forestalling such apprehended future miscarriage of justice and maladministration of law, presents no case of equitable cognizance. The injunction issued on the filing of the bill should have been dissolved for want of equity in the bill, and the motion to dismiss the bill for want of equity should have been granted.

We have not at all considered the ultimate merits of the controversies between these parties indicated in the pleadings shown by the transcript.

The decree refusing to dissolve the injunction and the decree overruling the motion to dismiss the bill for want of equity will be reversed; and a decree will be here entered dissolving the injunction and dismissing the bill.

Injunctions against the breach of contracts to perform personal services are discussed in the monographic note to Philadelphia Ball Club v. Lajoie, 90 Am. St. Rep. 646-651.

STEWART v. WILSON.

[141 Ala. 405, 37 South. 550.]

MORTGAGES—Reformation of after Foreclosure and Sale.—Judicial foreclosure extinguishes a mortgage, and the fact that property is omitted therefrom by mistake in the execution of the instrument furnishes no ground for reformation in equity of either the mortgage or the decree of foreclosure, and this although the officer selling under the decree of foreclosure included in his sale the land in controversy. (p. 33.)

T. P. Savage, for the appellants.

Cooke & Cooke, for the appellee.

⁴⁰⁰ **SHARPE, J.** By the proceedings had in foreclosing the mortgage of Dugger to Hughes the right of the parties to the mortgage, including the transferee, Simpson Grocery Company, became fixed and the mortgage itself was extinguished: *Stephenson v. Harris*, 131 Ala. 470, 31 South. 445; *Duval's Heirs v. McLoskey*, 1 Ala. 708; *Waldron v. Letson*, 15 N. J. Eq. 126. The mortgage having so become extinct, the fact that property was omitted therefrom by mistake in the execution of the instrument furnished no ground for reformation in equity of either the mortgage or the decree of foreclosure: See *Schwickerath v. Cooksey*, 53 Mo. 75; *Miller v. Kolb*, 47 Ind. 220; *Waldron v. Letson*, 15 N. J. Eq. 126; *Stephenson v. Harris*, 131 Ala. 470, 31 South. 445. The decision in the last cited case is authority conclusively opposed to the maintenance of this bill. From its influence the case is not removed by the mere fact that the register ⁴¹⁰ included in his sale the land in controversy. The register's power to sell was bounded by the decree he was executing and his acts in respect to that power were nugatory as against all persons not consenting thereto. In the bill there are no averments of facts which, as against the defendant heirs of Dugger, can operate as an estoppel or imply an agreement to or ratification of the register's sale of land not decreed to be sold, and hence considerations such as seem to have induced injunctive relief in *Waldron v. Letson*, 15 N. J. Eq. 126, are lacking here.

Decree affirmed.

REFORMATION OF SHERIFF'S DEEDS.

I. Power to Reform Generally, 34.

II. Mistake in Description, 34.

III. Defective or Void Deed, 36.

IV. Deeds Under Mortgage Foreclosure, 36.

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I. Power to Reform Generally.

Although there is some conflict in the cases, the decided weight of authority is in support of the proposition that a mistake or defect in a sheriff's deed cannot be aided and the deed reformed in equity. The reason given for this rule is, that a sheriff in the sale of lands, under execution or order of court, acts in the exercise of a statutory power, and if his deed contains a false description or is otherwise defective, a court of equity is without jurisdiction to aid it and pass the title. The following cases squarely hold that a sheriff's deed containing a mistake or defect cannot be reformed: *Martin v. Dollar*, 32 Ala. 422; *McCall v. White*, 73 Ala. 562; *Tatum v. Croom*, 60 Ark. 487, 30 S. W. 885; *Russell v. Williamson*, 67 Ark. 80, 53 S. W. 561; *Landon v. Morris* (Ark.), 86 S. W. 672; *Rogers v. Abbott*, 37 Ind. 138; *Lewis v. Owen*, 64 Ind. 446; *Keepfer v. Force*, 86 Ind. 81; *Conner v. Wells*, 91 Ind. 197; *Bowen v. Wickersham*, 124 Ind. 404, 19 Am. St. Rep. 106, 24 N. E. 983; *Griffin v. Durfee*, 29 Ind. App. 211, 64 N. E. 237; *Moreau v. Detchemendy*, 18 Mo. 522; *Ware v. Johnson*, 55 Mo. 500; *Hall v. Klepzig*, 99 Mo. 83, 12 S. W. 372; *Mason v. White*, 11 Barb. 173; *Fisher v. Owens*, 132 N. C. 686, 44 S. E. 369; *Dickey v. Beatty*, 14 Ohio St. 389.

Respectable authority is not wanting, however, to sustain the contrary proposition, namely, that a sheriff's deed may be reformed in equity, especially when the mistake therein consists simply in a misdescription of the land conveyed: *Steward v. Pettigrew*, 28 Ark. 372; *Miller v. Craig*, 83 Ky. 623, 4 Am. St. Rep. 179; *Thomas v. Dockins*, 75 Ga. 347; *Wise v. Brooks*, 69 Miss. 891, 13 South. 836; *Zingsem v. Kidd*, 29 N. J. Eq. 516; *Bartlett v. Judd*, 21 N. Y. 200, 78 Am. Dec. 131; *Butler v. Clark*, 66 Hun, 444, 29 Abb. N. C. 413, 29 N. Y. Supp. 415; *Stites v. Wiedner*, 35 Ohio St. 555.

II. Mistake in Description.

Undoubtedly the great weight of authority establishes the doctrine that a sheriff's deed containing a mistake as to the description of the property cannot be reformed in equity, and the reason generally given why such an action cannot be maintained is, that it would contravene the well-established rule that courts of equity cannot aid the defective execution of statutory powers. This rule is thus stated in *Bright v. Boyd*, 1 Story, 478: "It is a well-settled doctrine that, although courts of equity may relieve against the defective execution of a power created by a party, yet they cannot relieve against the defective execution of a power created by law, or dispense with any of the formalities required thereby for its due execution, for otherwise the whole policy of the legislative enactments might be overturned." Adams, J., in delivering the opinion of the court in *Ware v. Johnson*, 55 Mo. 500, said that "a sheriff, in sales of land on execution, acts in the exercise of powers conferred on him by statute. His authority to make a deed is derived from the statute, and no court, except the court under whose process he acts, can supervise his proceedings. . . . It is a well-

settled principle, which needs no illustration or citation of authorities, that a court of equity cannot aid the imperfect execution of a statutory power." In the case of *Lewis v. Owen*, 64 Ind. 446, it was said: "Can a sheriff's deed be reformed in the description of the premises, or can the defects in the description be aided by extrinsic amendments? We think not. To do so would be to change the effect of the proceedings and decree upon which it is founded. A final judgment of a court cannot be affected in that way. Upon principle and by authority this question is well settled."

Equity will not reform a sheriff's deed on account of an incorrect description of the land, when the sale itself was a nullity because the judgment under which it was made was void: *Martin v. Dollar*, 32 Ala. 422. If land is transferred under judicial sale by means of a sheriff's deed, and error has been carried into the judgment, the advertisement, the appraisement, the sale and the sheriff's deed, equity cannot give relief by ordering a correction of the description, at the suit of the purchaser at the sheriff's sale or those claiming under him: *Rogers v. Abbott*, 37 Ind. 138; *Bowen v. Wickersham*, 124 Ind. 404, 19 Am. St. Rep. 106, 24 N. E. 983. "A sheriff's deed cannot be reformed because there is but one party concerned in the making of such a deed, and, consequently, there can be no mutual mistake": *Griffin v. Durfee*, 29 Ind. App. 215, 64 N. E. 237.

While a court of equity cannot, as a general rule, reform a sheriff's deed that has been defectively or improperly executed, the grantee in such deed is not without a remedy. If the deed given to a purchaser at execution or judicial sale is for any reason void or incorrect, he is entitled to have another one, which shall be valid in form and conformable to the facts in the case. If a sheriff has made a defective deed, either he or his successor in office may be compelled to execute another and correct and valid deed, and such corrected deed will ordinarily relate back to the date of the original deed: *Maxey v. Clabaugh*, 1 Gilm. 26; *Kruse v. Wilson*, 79 Ill. 233; *Thornton v. Miskimmon*, 48 Mo. 219; *Adams v. Thomas*, 6 Binn. 254. And the general rule is that the only remedy in case of a defective or incorrect sheriff's deed, is a proceeding to obtain a new deed in the court from whence the process issued: *Ware v. Johnson*, 55 Mo. 500.

Quite a number of cases hold, however, that a sheriff's deed may be reformed in regard to the description of the land conveyed to accord with the facts, where admissible evidence shows that its recitals are wrong and should be corrected. Thus it is so held in *Bartlett v. Judd*, 21 N. Y. 200, 78 Am. Dec. 131. In *Steward v. Pettigrew*, 28 Ark. 372, it appeared that the sheriff made actual entry and levy upon the proper lands of the judgment debtor, but made a mistake in his return as to the numbers of the land, and carried such mistake into his advertisement, and the land was sold and deed executed therefor and filed for record, without knowledge on the part of the purchaser of such mistake, and it was held that

such irregularity or mistake, after the deed had been acknowledged in court, cannot at a subsequent period be corrected by the law court, but is relievable in equity. In *Wise v. Brooks*, 69 Miss. 891, 13 South. 836, it is held that courts of chancery may, in proper cases, rectify mistakes in sheriff's deeds. Again, it has been held that if a sheriff conducting a judicial sale, in his advertisement and deed thereof, makes a mistake in the description, the purchaser, or those holding under him, after being in possession for twelve or fourteen years, are entitled to maintain a suit in equity against the original debtor to correct the mistake in the deed, and in such case the mistake will be corrected: *Thomas v. Dockins*, 75 Ga. 347. It has also been held that equity will relieve against a mistake in the quantity of land sold at a judicial sale, where the mistake is such that relief would have been granted had the sale been a private one: *Miller v. Craig*, 83 Ky. 623, 4 Am. St. Rep. 179; *Vanderbeck v. Perry*, 28 N. J. Eq. 367. And it has also been decided that while, as a general rule, the title of a purchaser at a judicial sale cannot be impeached in equity for errors or irregularities in the proceedings, yet where a tract of land not in fact sold and for which no consideration was paid, or intended to be paid, is by mistake included in the report of sales, such mistake may be corrected in equity as against the purchaser or his heirs, even after confirmation and deed in pursuance thereof: *Stites v. Wiedner*, 35 Ohio St. 555. It has been held that while a court of equity may have no jurisdiction to correct a mistake in the description of land in a levy indorsed upon an execution and in the certificate of sale, because there is a remedy at law by motion, yet, if the same mistake occurs in the sheriff's deed to the purchaser, a court of equity will have jurisdiction and may correct such mistake not only in the deed, but also in the levy: *Bradshaw v. Atkins*, 110 Ill. 323.

III. Defective or Void Deed.

If a sheriff's deed is defective or void, for other reason than a misdescription of the land conveyed, it cannot be reformed in equity. The deed of a sheriff for land sold under execution, which is void upon its face, cannot be reformed where the execution and proceedings thereunder contain the same imperfection: *Landon v. Morris* (Ark.), 86 S. W. 672. Where a sheriff's deed is not sealed, a court of equity cannot by its decree aid the imperfect execution: *Moreau v. Detchemendy*, 18 Mo. 522; *Hall v. Klepzig*, 99 Mo. 83, 12 S. W. 372. Or if a sheriff's deed is ineffectual for want of a seal, it cannot be reformed in an action of ejectment, especially when such equity is not set up in the complaint: *Fisher v. Owens*, 132 N. C. 686, 44 S. E. 369.

IV. Deeds Under Mortgage Foreclosure.

Upon the question as to whether equity will entertain jurisdiction to reform a sheriff's deed to property after foreclosure of a mortgage thereon and sale thereof, the cases are in hopeless conflict. Perhaps, the better rule is that maintained by the cases which

decide that such conveyance cannot be reformed in equity. The majority in number of the cases establish the rule that a sheriff's deed of conveyance of real estate, founded upon a judicial sale thereof on a decree of foreclosure of a mortgage, which does not correctly describe the property conveyed, or which contains a mistake as to the description, and attempts to convey the wrong land, cannot be reformed in equity, because to do so would change the effect of the proceedings and decree upon which such deed is founded: *McCall v. White*, 73 Ala. 562; *Lewis v. Owen*, 64 Ind. 446; *Keepfer v. Force*, 86 Ind. 81; *Runnels v. Kaylor*, 95 Ind. 503-507; *Bowen v. Wickersham*, 124 Ind. 404, 19 Am. St. Rep. 106, 24 N. E. 983. The majority of the cases maintain that when a mortgage misdescribes the property intended to be mortgaged, the mistake may be corrected by a proper proceeding before judicial foreclosure, but if the mistake has been carried into a bill filed for the purpose of foreclosing such mortgage, into the decree ordering foreclosure, into the advertisement and into the deed, the purchaser at such foreclosure sale cannot maintain a bill in equity to correct the misdescription of the land as contained in the mortgage, in the decree, and in the deed: *Stephenson v. Harris*, 131 Ala. 470, 31 South. 445; *Rogers v. Abbott*, 37 Ind. 138; *Miller v. Kolb*, 47 Ind. 220; *Angle v. Speer*, 66 Ind. 488; *Conyers v. Mericles*, 75 Ind. 443; *Davenport v. Sovil*, 6 Ohio St. 459. And this is true although the sheriff at the sale may have pointed out, as the property he was selling, the property that ought to have been described in the mortgage. The authority of the sheriff to sell is limited to the property actually described in the decree and order of sale: *Miller v. Kolb*, 47 Ind. 220. In such case the mortgagee, the purchaser at sheriff's sale under foreclosure, or those claiming under him, are not without a remedy, because where the mortgage by mutual mistake contains an erroneous description of the land intended to be mortgaged, and the subsequent proceedings on foreclosure including the sheriff's deed contain the same mistake, the mortgage is not thereby so merged in the judgment as to make the question of description one of *res judicata*, and although the mistake cannot be corrected in equity, in an action brought for that purpose, still such mistake may be corrected by bringing an action to reform the mortgage and then again foreclosing it as reformed: *Conyers v. Mericles*, 75 Ind. 443; *McCasland v. Aetna Life Ins. Co.*, 108 Ind. 130, 9 N. E. 119; *Davenport v. Sovil*, 6 Ohio St. 459.

Some authority exists in support of propositions directly opposed to those set forth above. Thus it has been held that the omission of part of the premises from the description in a sheriff's deed on the foreclosure of a mortgage covering the entire premises may be corrected in equity: *Zingsen v. Kidd*, 29 N. J. Eq. 516.

It has also been held that a court of equity will reform a mortgage by correcting a mistake therein, and after it has been merged in a decree of foreclosure and the mortgaged property has been sold will, if the mistake in the mortgage has been carried into the decree

and sheriff's deed, reform them. It will go back to the original mistake and correct all subsequent mistakes which grow out of it, and reform the mortgage, the decree of foreclosure and the sale and deed thereunder, so as to make them conform to the original intention of the parties: *Quivey v. Baker*, 37 Cal. 465. This case has been cited with approval and followed in *Greeley v. De Cottes*, 24 Fla. 475, 5 South. 238, *Parker v. Starr*, 21 Neb. 680, 33 N. W. 424, and *Marks v. Taylor*, 23 Utah, 152, 63 Pac. 897. In the case last cited it appeared that property was so described in a mortgage by inadvertence that a portion meant to be mortgaged was not included in the description. On foreclosure and sale of the property, the decree of foreclosure, notice of sale, and the deed described the land as set out in the mortgage. The mortgagee who bought the property believed that the property offered for sale was that intended to be mortgaged, and bought it with that understanding. An action was brought to reform the mortgage, decree, and sheriff's deed so as to include the land omitted, and the relief was granted, and this judgment was first affirmed on appeal, but a rehearing was subsequently granted, and such judgment was then held to be erroneous because it invested the purchaser with title to property which was never advertised, offered for sale, or sold to him, and which might have been purchased by others at a higher figure had it been correctly described in the notice of sale. In delivering the opinion on rehearing the supreme court of Utah, through Boskin, J., said

“The decree of the lower court, if affirmed by this court, would invest the respondent with the title to property which was neither ordered to be sold, advertised, or offered for sale, or sold by the sheriff to her. It is true that she thought that the property intended to be mortgaged was the property offered for sale, and evidently bid in the property with that understanding, but it does not appear that other bidders, if any others were present at the sale, had the same understanding. If the property included in the reformed mortgage had been advertised for sale, it is not improbable that a higher bid than the respondent's would have been made by some other person. All judicial sales of real property must, under the provisions of section 3254 of the Revised Statutes, ‘be made at the courthouse of the county in which the property, or some part thereof, is situated,’ and not upon the premises. It does not appear in this case, as in the cases of *Quivey v. Baker*, 37 Cal. 465, and *Waldron v. Letson*, 15 N. J. Eq. 126, cited by us in the former opinion, that the sheriff, in making the sale, pointed out to the bidders or persons present the property which he was about to sell. In the former case, the court in its opinion said: ‘In the decree of foreclosure and order of sale there was the same erroneous description; but in making the sale the sheriff pointed out to the bidders the property in contest as that which he was about to sell, being ignorant of the mistake in the description.’ In the latter case the chancellor in the opinion said: ‘The complainant claims

to be protected in the possession and enjoyment of the premises for which he bid at the sheriff's sale, and for which he paid the purchase money. They are the same premises which it was understood and believed, by persons present at the sale, were being sold. . . . I proceed upon the assumption, which is fully justified by the evidence, that it was understood, not only by the purchaser, but by the bidders and persons generally at the sale, that the entire lot was being sold, and that the price for which it was struck off was the price for which the entire would have sold.' Upon a careful review, we are satisfied that that part of the decree which reforms the decree of foreclosure and the sheriff's deed is erroneous, and that following that portion of the former which reforms the mortgage a decree foreclosing the mortgage as reformed should have been made, instead of the decree reforming the decree of foreclosure of the mortgage as executed and the sheriff's deed: *Conyers v. Mericles*, 75 Ind. 443-448''; *Marks v. Taylor*, 23 Utah, 470, 65 Pac. 203. Although the rule laid down in *Quivey v. Baker*, 37 Cal. 465, namely, that where there is a mistake in the description of property in a mortgage, and the same mistake has been carried into the decree of foreclosure, and the sheriff's deed, conceding that relief might have been granted by motion in the original case, yet a court of equity has jurisdiction to go back to the original transaction and to reform the mortgage, as well as the decree and deed, so as to make them conform to the original intention of the parties, was affirmed, with approving citation of that case in *Busey v. Moraga*, 130 Cal. 586, 62 Pac. 1081; still the soundness of such rule seems to have been doubted in the late case of *Hull v. Calkins*, 137 Cal. 84, 69 Pac. 838, in which it was held that a court of equity has no jurisdiction to reform a commissioner's deed executed under the judgment in an action to foreclose a trust deed, and an assignment to the trustee of a contract, by inserting the contract in the commissioner's deed, which by mistake was omitted from the judgment. The mistake of the officer in the exercise of his power might be rectified, but when he acts in accordance with the power conferred in the judgment, a mistake in his deed cannot be corrected in equity. In delivering the opinion in this case the court said:

"It is assumed, and in fact alleged, in the complaint, that the sale of the lands described in the judgment, which included, in the general description of the Sespe rancho, the lands previously conveyed to the Pacific Improvement Company, did not operate to transfer the contract with that company, or the rights of More to the payments therein stipulated; and—as otherwise the plaintiff would have no cause of action—this assumption must, for the purposes of this appeal, be admitted. Assuming, then, this to be the case, the object of the suit is, not only to amend the judgment, but to reform the commissioners' deed by making it purport to convey property that had not been sold, and which the commissioners were not authorized by the writ to sell. This, it is obvious, cannot

be done. Where there is a mistake in a conveyance by the owner of the land himself or by his agent, the deed may be reformed. But the commissioners to sell were not the agents of the plaintiff except to the extent of the power conferred upon them by the order of sale, and there was, therefore, lacking that essential element to the reform of a contract, an actual contract to be embodied in the reformed instrument. A sheriff or other officer's mistakes in the exercise of his power may doubtless be rectified; but when he acts in accordance with his power there is no mistake to be corrected or contract to be reformed: Code Civ. Proc., sec. 684; Heyman v. Babcock, 30 Cal. 367; 2 Notes on Cal. Rep. 580; Miller v. Kolb, 47 Ind. 220; Armstrong v. Short, 95 Ind. 326; Conyers v. Mericles, 75 Ind. 443; McCasland v. Aetna Life Ins. Co., 108 Ind. 130, 9 N. E. 119; Ray v. Ferrell, 127 Ind. 570, 27 N. E. 159; Davenport v. Sovil, 6 Ohio St. 459. Many cases are cited by the appellant's counsel in support of his contention to the contrary, but none have application to this case. In one of them a mortgage was reformed (Bledgett v. Hobart, 18 Vt. 414); in others, a judgment amended, and a resale ordered (Snyder v. Ives, 42 Iowa, 157; First Nat. Bank v. Wentworth, 28 Kan. 183; McClure v. Bruck, 43 Minn. 305, 45 N. W. 438); and in another the successors of the judgment debtor were, upon the facts of the case, enjoined from interfering with the purchaser (Waldron v. Letson, 15 N. J. Eq. 126). In three of them only was there an amendment of a sheriff's deed: Quivey v. Baker, 37 Cal. 465; Greeley v. De Cottes, 24 Fla. 475, 5 South. 239; Parker v. Starr, 21 Neb. 680, 33 N. W. 424. In these cases, as in the case of Waldron v. Letson, 15 N. J. Eq. 126, the equities of the case were very strongly in favor of the purchaser or his successors in interest, and, as in that case, may have justified the actual decision; but it is difficult to perceive on what recognized principle of equity the court was justified in amending the sheriff's deed": Hull v. Calkins, 137 Cal. 84, 69 Pac. 838.

BIRMINGHAM SOUTHERN RAILWAY COMPANY v. LINTNER.

[141 Ala. 420, 38 South. 363.]

HUSBAND AND WIFE—Personal Injury to Wife—Recovery by Husband.—Although a statute provides that "the earnings of the wife are her separate property," it does not of itself emancipate her from any services, which before its passage she owed her husband as head of the family and as her husband, and for any wrongful act of a stranger which deprives him of them he is entitled to recover for the consequent loss and injury. (pp. 41, 42.)

HUSBAND AND WIFE—Personal Injury to Wife—Right of Husband to Recover.—If a wife is injured in her person by the

wrongful act of a stranger, a proximate, legal consequence of such injury is the expense to which the husband is put in the alleviation of her sufferings and the cure of her hurts, and such expense is a loss to the husband, for which the wrongdoer is answerable to him in damages. (p. 42.)

HUSBAND AND WIFE—Wrongful Injury to Wife by Stranger.—If personal injury inflicted upon a wife by the wrongful act of a stranger is such as to deprive her husband of her society, aid and comfort, and of his right of consortium, he is entitled to recover therefor. (p. 42.)

NEGLIGENCE—Recovery Entire—Action.—One entitled to recover for the consequences of a wrongful or negligent act may recover all the damages that that act has proximately inflicted upon him, although the injuries may be diversified in character, and may include both personal injury and injury to property. (p. 42.)

NEGLIGENCE—Complaint—Evidence.—It is no objection to a count in a complaint to recover for personal injury and for injury to property caused by one act of negligence, that different evidence must be resorted to in proof of the respective claims. (p. 43.)

NEGLIGENT INJURY OF WIFE—Recovery by Husband—Evidence.—If a husband suffers the loss and impairment of his wife's services and society in consequence of personal injuries inflicted upon her, the extent and duration of her injuries have direct bearing on the measure of damages, and evidence is admissible that she is still suffering from such injuries at the time of the trial. (p. 44.)

RAILROADS—Contributory Negligence.—A person is not guilty of contributory negligence in failing to hear a railroad train when he stops and listens for it. (p. 44.)

NEGLIGENT INJURY OF WIFE—Recovery by Husband.—If a husband sues to recover damages for the loss of the services and society of his wife caused by negligent injury inflicted upon her by a stranger, he cannot recover in that suit for any loss of services or society of his wife which may occur after the time of the trial in the absence of evidence of the value thereof. (pp. 44, 45.)

A. G. and E. D. Smith, for the appellant.

Bowman, Harsh & Beddow, for the appellee.

⁴²⁷ McCLELLAN, C. J. "The earnings of the wife are her separate property; but she is not entitled to compensation for services rendered to or for the husband, or to or for the family": Code, sec. 2521. The whole scope and purpose of this enactment manifestly is to vest in the wife her earnings in service rendered to third persons, strangers to the household. It in no degree emancipates her from her household duties, nor authorizes her to enter upon such alien service as would conflict with and prevent the performance of her duties incident to the domestic establishment, the care, comfort and convenience of the family—the duties, in short, which before the statute she owed to the husband as the husband and head of the family. These duties she owes now just as she did at

the common law; and while the husband may allow her to pre-termit them and engage wholly or to any less extent in outside service, the earnings of which belong to her, without such emancipation by the husband she owes these services to him now as before, and for any wrongful act of a stranger which deprives him of them he is entitled to recover for the consequent loss and injury. Nor does this or any other statute absolve the husband from the duty of caring for the wife "in sickness and in health." If she be injured in her person by the wrongful act of a stranger, a proximate, legal consequence of such injury is the expense to which the husband is put in the alleviation of her sufferings and the cure of her hurts; and such expense is a loss to the husband for which the wrongdoer is answerable to him in damages: 15 Am. & Eng. Ency. of Law, 861; Henry v. Klopfer, 147 Pa. St. 178, 23 Atl. 337; Tuttle v. Chicago etc. R. R. Co., 42 Iowa, 518; Filer v. New York etc. R. R. Co., 49 N. Y. 47; Douglas v. Gausman, 68 Ill. 170.

The husband, also, of course, has a legal right to the society of the wife, involving all the amenities and conjugal incidents of the relation. This right of society may be invaded by an act which while leaving to the husband the presence of the wife, yet incapacitates her ⁴²⁸ for the marital companionship and fellowship, and such incapacity may be deprivation of her society differing in degree only from total deprivation by her death. For such impairment, so to say, of the wife's society, of his right of consortium, such deprivation of the aid and comfort which the wife's society, as a thing different from mere services, is supposed to involve, he is entitled to recover.

It may be stated as a very general, if not universal, proposition that one who is entitled to sue at all for the consequences of a wrongful act may recover all the damages that such act has proximately inflicted upon him. His cause of action is the one wrongful act of the defendant. We know of no principle of law or decided case which requires him to split this one cause of action into two or more because the injuries he sustains may be diversified in character. To the contrary, he must lay all he has suffered in one action, or failing in that he foregoes his claim for such part of the injury as he does not count upon. The alleged wrongful act complained of here inflicted damnifying injuries—that is, injuries damnifying to the husband, upon the person of his wife, and it also injured or destroyed certain property of the

husband, his horse and buggy which his wife was using at the time of the alleged collision. Very clearly the claim of damages for all these injuries was properly laid in one complaint and all in each count of the complaint. The case of *Brunsdon v. Humphrey*, L. R. 14 Q. B. 141, relied on for appellant in this connection, holds that two actions may be brought when the same negligent act results in injury to the person and to the property of the plaintiff, but it does not hold that damages for both the personal and property injury could not be recovered in one and the same action. To the contrary, that a recovery might be had for both in one count is apparently conceded in the opinions of both Brett, M. R., and Bowen, L. J.; and the other member of the court, Lord Chief Justice Coleridge, repudiated the opinions of both his associates, and holds that only one action could be maintained. To our minds the conclusion of Lord Coleridge is eminently correct, and our ~~own~~ own cases are in accord with it: *Foster v. Napier*, 73 Ala. 595; *South and North Alabama R. R. Co. v. Henlien*, 56 Ala. 368; *Firemen's Ins. Co. v. Cochran*, 27 Ala. 228.

It is, of course, no objection to a count for personal injuries and for injuries to property that different evidence has to be resorted to in proof of the respective claims, any more, indeed, than where the claim is for injuries to two or more items of property, as a horse and a buggy and the harness attaching the one to the other. So the consideration that the burden of proof of the wrong as to personal injuries may be upon one party while as to the injury to property it may be upon the other does not enforce the conclusion that both claims cannot be laid in one count. Such a state of things could be easily accommodated in the charge of the court so as to present no difficulty in the way of a proper verdict. Hence our conclusion that the suggestion made for appellant that on the claim in this complaint which is rested on the loss of the wife's services and society, it was upon the plaintiff to prove defendant's negligence, while as to the injury to property, the fact of injury by collision with defendant's engine being shown, defendant's negligence is presumed and the burden is upon it to overturn that presumption by proof of due care and diligence, is not of importance, even assuming that the burden of proof is differently placed in respect of the two classes of injuries. But, in our opinion, this is not the legal fact—the assumption is unfounded. Under section 3443 of the code, the presumption of defendant's negligence arose

as well in respect of the injuries to the person of plaintiff's wife as in respect of the injury to his property, and that presumption obtained on the trial of his claim for damages, consequent upon the injuries to her person, for the loss of her services and society and for the expense he was put to in her care and treatment. The statute, in other words, characterizes the act as *prima facie* negligent for all the purposes of actions by whomsoever instituted for the recovery of damages proximately resulting therefrom.

Upon the theory of the case, viz., that plaintiff suffered the loss or impairment of his wife's services and ⁴²⁰ society in consequence of the injuries inflicted upon her, the extent and duration of her injuries had a direct bearing upon the extent of his loss to be measured by the jury in their assessment of his damages; and the court properly received evidence to the effect that she was still suffering from the injuries. It is quite true that the rights of action for this suffering in and of itself is by statute vested in her; but that is not to say that the husband is without redress for the damnifying collateral consequences of her hurts to him.

It will suffice to say in respect of the declination of the court to allow inquiries into the relations of client and attorney between the witness Goss and the attorneys for this plaintiff, the purpose of which was to show bias of this witness against this defendant at least, cannot be affirmed to be an abuse of the court's discretion in such matters.

Charges which proceeded on the idea that Mrs. Lintner was guilty of contributory negligence, in that she failed to hear the train when she stopped and listened for it, were properly refused: *Kansas etc. R. R. Co. v. Weeks*, 135 Ala. 614, 34 South. 16.

Charge 17 requested by defendant should have been given. Nothing was claimed or could be recovered for the pain and suffering and physical incapacity—past, present or future—of Mrs. Lintner herself considered as elements of damages sustained by her; recovery here could be had only for the consequential results of her injuries which inflicted damages upon the husband. In respect of her services and society and the loss or impairment thereof to her husband, he was entitled to recover to the extent of such loss or impairment in point of time and degree. There was evidence of such loss or impairment up to the trial and of the consequent damages to the plaintiff; but there was no evidence that such deprivation

would continue beyond the trial, and no data whatever was afforded by the evidence upon which the jury could assess the extent or quantum of future damages to plaintiff from future loss of her services. Upon this state of case, the court should have instructed the jury, as requested by the defendant, "that plaintiff ⁴³¹ cannot recover in this action for any losses of the services of his wife which may occur in the future."

Reversed and remanded.

Haralson, Dowdell and Denson, JJ., concurring.

Where a Wife Sustains Personal Injuries through the wrongful or negligent act of another, her husband is entitled, by the common law, to recover such damages as he suffers from the loss of her society and services, and he may also recover for the expenses incident to her sickness, such as the cost of medical attendance, nursing, and the like: See the monographic note to *Carey v. Berkshire R. R. Co.*, 48 Am. Dec. 619; *Holleman v. Harward*, 119 N. C. 150, 56 Am. St. Rep. 672; *Furnish v. Missouri Pac. Ry. Co.*, 102 Mo. 669, 22 Am. St. Rep. 800. As to how far this doctrine has been modified by modern married women statutes, see *Kelly v. New York etc. R. R. Co.*, 168 Mass. 308, 60 Am. St. Rep. 397; note to *Shaddock v. Clifton*, 94 Am. Dec. 593.

CHASTANG v. CHASTANG.

[141 Ala. 451, 37 South. 799.]

ADVERSE POSSESSION—Elements of.—The essential elements of adverse possession are that it must be hostile, under claim of right, actual, open, and notorious, exclusive and continuous. If any of these constituents is wanting, the possession will not effect a bar to the legal title. (p. 49.)

ADVERSE POSSESSION—Evidence to Show.—A person claiming to hold land adversely must show by some evidence that he is holding the particular piece of land to which he claims title, and to show that, there must be some evidence of the exact boundaries of the land claimed by him. (p. 49.)

ADVERSE POSSESSION—Evidence to Show.—If a person claims adversely under a paper color of title, he will be considered to hold in accordance with the boundaries fixed by the paper, but if he has no paper title, then he can hold only that which he has reduced to actual possession, and in allowing the clear muniments of title to be overcome by parol proof of adverse possession, the proof must be as clear and definite as to what particular tract of land is claimed to be held, as would be required by conveying it by deed. (p. 49.)

ADVERSE POSSESSION—Evidence of Cutting Timber.—Without paper title or some other evidence to define the boundaries of land claimed, evidence as to indiscriminate cutting of timber, without designating the particular place, or how often cut at that

place, or how much land was cut over, and without proof of the continuous exercise of such right, is insufficient to constitute adverse possession. (p. 50.)

ADVERSE POSSESSION.—Payment of Taxes is not evidence of possession, but in connection with evidence of actual possession is admissible to show claim of ownership and the extent of the possession. (p. 51.)

TAX RECEIPTS, Unless Ancient Documents, are not self-proving, and must be proved the same as any other receipts. (p. 52.)

ADVERSE POSSESSION—Constructive Possession.—If a person holding the legal title to land obtains constructive possession thereof, no subsequent constructive possession thereof by another, even under color of title, can overlap the possession of the former. (p. 53.)

ADVERSE POSSESSION—Constructive Possession.—Nothing short of actual, open, notorious and exclusive possession by another can interrupt the constructive possession which has attached to the legal title. (p. 53.)

ADVERSE POSSESSION—Interruption.—If the holder of the legal title to land enters under a claim of right and holds such possession, even jointly, with another person, it is nevertheless an interruption of the continuous adverse possession of the latter. (p. 53.)

G. L. and H. T. Smith, for the appellant.

⁴⁵⁵ **SIMPSON, J.** This was an action in the nature of an action of ejectment brought by appellee, Pauline Chastang, against appellant, Adele Chastang.

The title of the plaintiff was based on a claim of adverse possession of twenty years, while the defendant derived her title through her ancestor, who held a complete paper title from the United States government, being a patent from the government to her father, dated November 15, 1854. There is no pretense that any of the land, except three or four acres (to which appellant admits adverse possession was established), has ever been inclosed until about five years ago, when the defendant inclosed it, by building a wire fence.

It is proved also that defendant's father, Zeno Chastang, took possession of the tract of land under the United States patent, by building on a portion of it a house, in which he and his family continued to live successively up to the time of the commencement of this suit.

⁴⁵⁶ The plaintiff proved that her ancestor, Theodore Collins, had a house on the three or four acre tract, which was inclosed by a fence, and that he lived there most of his life, having entered it about forty-five years ago, but a short time before he died he moved away and lived with his daughter, the plaintiff, on another tract of land. But it seems to be proven

by the evidence that, as to the three or four acre tract, the adverse possession was continuous. As to the remainder of the tract, the son of Theodore Collins testified that his father claimed a strip of about twenty-four acres, but he does "not know exactly where the line is," but told him "not to go west of a certain tree," which tree was about thirty-five feet from where the wire fence now is, but the witness does not say in what direction. He states that the land which his father claimed ran north and south, with a branch on the north. He and other witnesses testify that at different times Theodore Collins cut firewood for his own use and for selling to the steamboats, and rail timber, from the land outside the rail fence.

There is no testimony showing any acts indicating any distinct boundary to the land supposed to have been claimed by Theodore Collins, nor do the witnesses testify definitely as to just where he cut wood, except that most of them say he cut wood outside the rail fence; one says he cut some north and some south of the rail fence. The plaintiff says he cut wood all over it, and one witness says he cut wood "in any old place."

The witness Andre, who is eighty years of age, states that Theodore Collins has been dead twenty-five years; that he lived on the land described in the complaint over twenty-five years; that he was in possession of the land described from the time he moved on it till he died. Zeno Chastang (father of defendant) lived on the place west of Collins; witness heard a conversation between Collins and Zeno Chastang, in which Zeno pointed out the line, and told the boys who were cutting timber, "This is the land; that on the west is my land; don't go over there; on the other side is Collins'." Witness describes this land as being about a quarter of a mile from ⁴⁵⁷ the lower corner to the upper corner, nearly square, a little larger north and south than east and west. He states also that Zeno required Collins to move his fence, so that each man should "have his own fence about his own land," and that this was done leaving the alley between them. This was about forty years ago, "before the war."

There seems to be no proof of any acts of ownership by the heirs of Collins, since his death, except that his son in law, Juzang, and his sons lived in the house, and did not use the land (outside the inclosure) except to get firewood, and that a man named Graham occupied it for a while and

one of the witnesses got some poles once for Graham to repair the fence; that the witness was stopped from getting rails on said land, about thirty steps south of the Collins rail fence by defendant, she claiming that it was her land.

The defendant's witnesses show that Zeno also claimed the land; that he got wood off it, and that it was the custom of the country to get wood anywhere; that about eighteen or twenty years ago the heirs of Zeno divided the lands of their father's estate, excepting this land; that they were about to divide this also, but Theodore Collins' wife told them she had a deed from their father, and, while they denied that she had said deed, they did not divide this land, but waited for her to find the deed.

Nothing seems to have been done in regard to this land by either party, so far as the evidence states, since that time, until about five years before the trial of the case (January 29, 1903), when the defendant built a wire fence around the land.

Plaintiff also introduced in evidence a number of tax receipts, running back as far as 1855, but not for every year since that time. Most of them give the value of the real estate but not the amount of taxes paid; a few give the amount of taxes paid and not the value of the real estate. The only one of which indicates anything about the amount of land paid on are receipts for 1851—twenty acres; 1855—twenty-four acres, and 1861—twenty-four acres. None of them indicate where the land is.

⁴⁵⁸ The defendant requested in writing that the court give the following charge, which request was refused, to wit: "The court charges the jury that they cannot, under the evidence in this case, find for the plaintiff as to any land which was not included within the rail fence which surrounded the house of Theodore Collins or within the fence surrounding the garden or field of the plaintiff, Pauline Chastang."

All titles in the United States emanate originally from the government of the United States, and when a party has a patent from the government, or a direct chain of conveyances from the government to the present holder, he has what is called a complete title.

Passing over other ways by which he may lose this title, his title or his right to assert it may be lost by adverse possession or prescription in favor of some other party. But when the law places such high dignity upon a regular documentary title, and requires strict formalities to evidence it,

it necessarily follows that it requires clear and definite proof of those things which rest in parol to overcome it.

Hence, the essential elements of adverse possession are: 1. The possession must be hostile and under claim of right; 2. It must be actual; 3. It must be open and notorious; 4. It must be exclusive; and 5. It must be continuous. If any of these constituents be wanting, the possession will not effect a bar to the legal title: 1 Am. & Eng. Ency. of Law, 2d ed., 795; Murray v. Hoyle, 97 Ala. 588, 11 South. 797; Ross v. Goodwin, 88 Ala. 390, 6 South. 682; Eureka Co. v. Normont, 104 Ala. 625, 16 South. 579; Goodson v. Brothers, 111 Ala. 589, 20 South. 443; Normant v. Eureka Co., 98 Ala. 181, 39 Am. St. Rep. 45, 12 South. 454.

It seems so evident that it has not been deemed necessary to state it in any case that the party claiming to hold adversely must show by some evidence that he is holding the particular piece of land to which he claims title, and to show that there must be some evidence showing the exact boundaries of the land claimed by him.

If a man claims title under a deed purporting to convey five acres in the northeast and six acres in the southeast ⁴⁵⁰ quarter of a certain section, the court will say that is too indefinite, because no one can tell where the boundaries of said subdivisions are.

So the courts have always held that if a man claims adversely under a paper color of title, he will be considered to hold in accordance with the boundaries fixed by the paper, but if he has no paper title, then he can hold only that which he has reduced to actual possession, and it would seem that when the courts are allowing the clear muniments of title to be overcome by parol proof of adverse possession, they should at least require the proof to be as clear and definite as to what particular tract of land is claimed to be held as would be required by conveying it by deed.

Then if witnesses testify that each of them saw a man cutting timber somewhere on a twenty acre tract of land, without designating where each one saw him, nor how often he cut on that particular place, nor how much land he cut over at that point, how could it be said from that testimony that he was indicating that he claimed the entire twenty acre tract of land? Even if one saw him cutting in the northeast corner, one in the southeast corner, one in each other corner, and one in the middle, that would simply be one

act in cutting at each place, and no evidence of continuous exercise of the right of either place.

It is true that there may be such a continuous and persistent cutting of timber or wood from a tract of land as to be evidence of a claim of ownership, and an advertisement to the world that the party is occupying the entire tract, and if he is doing it in such a way and under such circumstances as to show to the world that he is claiming it as his right, it will ripen into title by adverse possession or prescription. But we hold that, without paper title or some other evidence to define the boundaries of the land claimed, such acts of cutting timber as are detailed by the witnesses in this case are not sufficient to bar the legal title held by the defendant. The only witness who attempts to fix any boundaries (Andre), while he states that the land he is talking about is the entire twenty (or twenty-four) acre tract, yet when he describes the boundaries as pointed out in the conversation between Collins and Zeno, it was simply a ⁴⁶⁰ boundary line at one point, and that point would seem to be at or about the three or four acre tract, which is not included in what we are saying, for he states that Zeno required Collins to move his fence "so that each man would have his own fence about his own land," and that afterward there was a lane between them. The undisputed evidence is that the three or four acre tract was all that was fenced, and that there was a lane or alley between it and Zeno's land.

Evidence of the cutting of timber is admitted as a circumstance to be taken into consideration with other evidence in determining the fact and the extent of adverse possession. So, also, the payment of taxes is admissible as a circumstance, but the tax receipts in this case do not aid in pointing out the land claimed.

We hold, then, that in this case, in addition to the foregoing considerations, there being as much evidence showing such acts of ownership on the part of the defendant's father, who held the legal title, as there was on the part of plaintiff's ancestor, that the entire evidence in this case was wanting—1. In pointing out definitely the land which was claimed to have been adversely held; 2. In showing any claim of right; 3. In showing such continuous and notorious acts of ownership as the law demands: *Childress v. Calloway*, 76 Ala. 128; *Burks v. Mitchell*, 78 Ala. 61; *Goodson v. Brothers*, 111 Ala. 589. 20 South. 443; *Bynum v. Hewlett*, 137 Ala. 333, 34 South. 271.

When from the whole evidence there is an entire absence of any fact which is essential to recovery, it is the duty of the court to give the general charge in favor of the defendant, on request in writing. Hence, the charge requested by the defendant should have been given.

The assignments of error numbered from 2 to 23, inclusive, charge that the court erred in permitting the introduction of the tax receipts as evidence.

The general principle of law with regard to receipts is that, while they are, as against the maker, evidence of the payment as stated, yet, as to strangers to the transaction, "a receipt is incompetent evidence of such fact": 23 Am. & Eng. Ency. of Law, 2d ed., 981.

⁴⁶¹ But an exception has been made in cases where "the person to whom the payment is made is pointed out by law, and such person is required by law to give a receipt": 23 Am. & Eng. Ency. of Law, 2d ed., 981. And this principle has been held to apply to tax receipts: *Ferris v. Boxell*, 34 Minn. 262, 25 N. W. 592; *Johnstone v. Scott*, 11 Mich. 232.

According to our own decisions the payment of taxes is not evidence of possession, but, in connection with evidence of actual possession, is admissible to show claim of ownership and the extent of the possession: *Jay v. Stein*, 49 Ala. 514.

In this case the proof was made by the testimony of a witness, as to the payment of taxes: *Baucum & Jenkins v. George*, 65 Ala. 259; *Green v. Jordan*, 83 Ala. 220, 3 Am. St. Rep. 711, 3 South. 513.

In the case of *Trufant v. White*, 99 Ala. 526, 13 South. 83, the proof of the payment of taxes was made by producing the tax-books. It will be observed that in none of these cases was any point made as to how the tax receipt was to be proved, or whether it was self-proving.

It is stated in 27 American and English Encyclopedia of Law, second edition, 753, that, "like receipts from other public officers, tax receipts prove themselves," but an examination of the authorities referred to does not seem to bear out this remark.

In the case of *McReynolds v. Longenberger*, 57 Pa. St. 13, the party was claiming under the tax deed, and after introducing the record evidence of assessment, a sale of the lands, offered to prove the contents of tax receipts over thirty years old, which had been burned, and the court admitted the testi-

mony on the ground that they were ancient documents, were unblemished, had been found in the proper custody, etc.

In *Richards v. Hatfield*, 40 Neb. 879, 59 N. W. 777, the statute requiring the fact of payment to be entered in a book and a receipt given, and went on to provide that when the receipt should be lost or destroyed, the entry in the book might be read, and the only question before the court was whether, in the absence of any entry on the book, any ⁴⁶² other evidence of the payment of taxes might be introduced.

The case of *Adams v. Osgood*, 55 Neb. 766, 76 N. W. 446, under the same statute, holds that when the fact of the levy or assessment is disputed in the pleading, the tax receipt is not sufficient to establish the fact of levy or assessment. In the case of *Ellen v. Ellen*, 16 S. C. 132, it is not stated how the tax receipts were proved.

The law is unquestionable in regard to receipts generally that they shall be proved, like all other papers introduced in evidence, and, unless there is some statutory provision making the receipt of the tax collector self-proving, we hold that, if it is an ancient document, it may be received under the usual requirements in such cases, and if it is not, it must be proved just as any other receipt would.

Our statutes have provided for making certain books and official papers self-proving, but this is not one of them.

The twenty-third assignment of error is to the sustaining of the objection to the question by defendant to *Piere Chastang*, "How often did you get firewood there?" The witness and others had testified to the continued use of these lands by his father and himself, by the same acts which had been testified to as to *Collins*, and as tending to rebut the idea that similar acts on the part of *Collins* indicated an adverse holding of the land, it was material to prove that the owner of the legal title was doing the same acts on the same land, and the extent of his acts. The court erred in excluding this testimony.

There was no error in the refusal of the court to permit *Adele Chastang* to testify that she heard her father say that he had paid taxes on the land, and that it was hearsay.

The charge referred to in the twenty-fifth assignment of error was erroneous. This charge was calculated to confuse the minds of the jury, by stating a hypothetical case, not in accordance with the facts as testified to, and as shown in the latter part of the charge itself. It then assumes that *Pauline*

Chastang had such a possession as would be in law adverse possession. It ignores the necessity ⁴⁶³ of exclusiveness in the possession, in connection with the proof that the heirs of Zeno Chastang, who held the legal title, had already acquired possession of this land, under the United States patent, and were continuing to manifest their possession by acts equally notorious as those of plaintiff. But this charge is not likely to be given again on another trial of the case, so that it is unnecessary to point out further defects.

The charge referred to in the twenty-sixth assignment of error is liable to the construction that if Zeno Chastang admitted that Theodore Collins was claiming the land in dispute, then he could not manifest his own continued claim under his legal title by acts of possession, which would be clearly wrong. Or even if "admitted his claim" could mean that Zeno verbally admitted that Collins' claim to the land was valid, that could not preclude him from claiming rights under his own legal title, while it might be a circumstance to explain his subsequent acts.

Referring to the twenty-seventh and twenty-eighth assignments of error, the principles heretofore referred to in our remarks upon the request for the general charge by the defendant show that these charges should have been given. The evidence is incontestible that Zeno Chastang held the legal title from the government, and entered under the title, built a house in which he and his family continued to reside. This gave him the constructive possession of the entire tract, and no subsequent constructive possession, even under color of title, could overlap his possession. Nothing short of an actual, open, notorious and exclusive possession by another could interrupt the constructive possession which was attached to the legal title: 1 Am. & Eng. Ency. of Law, 2d ed., 869-871, and notes; Sedgwick & Wait on Trial of Title to Land, 2d ed., sec. 753; *Burks v. Mitchell*, 78 Ala. 61.

The charge referred to in the twenty-ninth assignment of error asserts a correct principle of law.

While it is true under our decisions that a temporary interruption by a mere trespasser, if speedily redressed, will not interrupt the continuity of the possession, as to him, yet this principle does not apply to the holder of ⁴⁶⁴ the legal title entering under a claim of right; and if he make such entry and hold such possession, even jointly with the other party, it is nevertheless an interruption of the continuous adverse

possession of the other party: *Doe ex dem. Farmers' Heirs v. Eslava*, 11 Ala. 1028; *Ladd v. Dubroca*, 61 Ala. 25; *Sedgwick & Wait on Trial of Title to Land*, secs. 741, 745; 1 Am. & Eng. Ency. of Law, 2d ed., 836, and note; *Louisville etc. R. R. Co. v. Philyaw*, 88 Ala. 264, 6 South. 837.

For the errors indicated the judgment of the court is reversed and the cause remanded.

McClellan, C. J., Tyson and Anderson, JJ., concurring.

To Constitute Adverse Possession, there must ordinarily be open, notorious, exclusive, and continuous possession under a claim of title: See the monographic note to *De Frieze v. Quint*, 28 Am. St. Rep. 158-162; *Wilson v. Braden*, 56 W. Va. 372, 107 Am. St. Rep. 927, and cases cited in the cross-reference note thereto. Resort must be had to the usual and ordinary conduct of owners of such land as that which is involved, to determine what acts constitute adverse possession. A possession which accords with the ordinary management of similar lands by their owners ordinarily furnishes sufficient evidence of adverse possession: *Clithero v. Fenner*, 122 Wis. 356, 106 Am. St. Rep. 978, and cases cited in the cross-reference note thereto.

Adverse Possession Under Color of Title usually draws to the actual possession of a part the constructive possession of the entire tract which it describes and professes to convey. But the possession of a claimant who has no color of title is usually confined to his *possessio pedis*: See the monographic note to *Power v. Kitching*, 88 Am. St. Rep. 703; *Louisville etc. R. R. Co. v. Gulf of Mexico Land etc. Co.*, 82 Miss. 180, 100 Am. St. Rep. 627, and cases cited in the cross-reference note thereto.

McKEE v. WEST.

[141 Ala. 531, 37 South. 740.]

VOLUNTARY CONVEYANCES are Valid as between the parties thereto, and fraudulent and voidable only as to existing creditors of the grantor. The only infirmity in the title of such a grantee is its liability to be impeached by such creditors, and as to all others it is perfect, and when it has passed into the hands of an innocent holder, even such infirmity is cured, and the title becomes indefeasible. (p. 56.)

VOLUNTARY CONVEYANCES—Presumption—Notice to Subsequent Purchaser.—The law sanctions a conveyance based upon a good, as distinguished from a valuable, consideration, and it is presumed that such a conveyance is valid, and not a fraud upon the rights of anyone. The mere fact that a purchaser from the holder of such a title has notice that it was not founded upon a pecuniary consideration, is not sufficient to make it his duty, at his peril, to inquire whether the title of his grantor was not fraudulent, but

he has a right to act on the legal presumption that such voluntary conveyance was honestly made until some other fact is brought to his knowledge to raise a suspicion in his mind that such conveyance is fraudulent. (p. 57.)

W. Cunningham, for the appellant.

McDaniel & Powell and W. H. Taylor, for the appellee.

⁵³³ DOWDELL, J. The bill in this case is filed by a creditor and seeks to have a certain deed executed by the debtor and a certain mortgage executed by the grantees of the debtor set aside as fraudulent. The bill charges that Mrs. M. J. Williams, being at the time indebted to the complainant, made a voluntary conveyance of the lands described to her two daughters, Mrs. Mattie Langford and Emma Williams, the consideration of love and affection being expressed on its face, and that said ⁵³⁴ grantees then conveyed said lands by mortgage to the respondent McKee. Actual fraud is not charged on McKee, nor is it pretended that he had knowledge when he took his mortgage of any indebtedness existing from Mrs. M. J. Williams to the complainant, when she executed the deed of gift to her daughters.

The respondent by special pleas set up the defense of bona fide purchaser for value without notice of complainant's equity. The cause was submitted upon the sufficiency of the pleas, and a decree was rendered holding the pleas insufficient, and from this decree the present appeal is prosecuted.

The setting down of the pleas for hearing upon their sufficiency was an admission of the facts averred in them: 16 Ency. of Pl. & Pr. 620. The averments of facts necessary to be stated in setting up the defense of a bona fide purchaser were sufficiently pleaded within the rule heretofore laid down by this court in the following named cases: Wood v. Holly Mfg. Co., 100 Ala. 326, 46 Am. St. Rep. 56, 13 South. 948; Gresham v. Ware, 79 Ala. 192; May v. Wilkinson, 76 Ala. 543; Hooper v. Strahan, 71 Ala. 75; Craft v. Russell, 67 Ala. 9.

The theory of the complainant is, and upon this theory his contention is based, that the deed from Mrs. Williams to her two daughters being a voluntary conveyance, was per se fraudulent and void as to existing creditors, and that a subsequent conveyance by them to one with notice of the fraudulent character of the first conveyance would likewise be void as to such creditor, and subject to be set aside at his instance on a bill by

him in equity for that purpose. And it is further contended that the voluntary conveyance expressing on its face only a good consideration—that is, of love and affection—puts the subsequent purchaser on notice of its fraudulent character. The question presented by this latter contention is the determining one in the case. The plea setting up the defense of bona fide purchaser admits a knowledge of the contents of the deed from Mrs. Williams to her two daughters, and that the consideration therein expressed is for love and affection, but the plea denies any notice of the existence of complainant's debt, ⁵³⁵ or notice of any fact calculated to put the respondent upon inquiry.

It has been held, and so decided by some courts, that a purchaser from a fraudulent grantee occupied no higher or better position than the fraudulent grantee, where such conveyance was assailed by a creditor. The question was considered in *Thames v. Rembert's Admr.*, 63 Ala. 561, where cases are cited holding such doctrine, but this court has declined to follow that rule, and is now thoroughly committed to the more equitable and reasonable doctrine of affording protection to a bona fide purchaser for value without notice of the fraud, from a fraudulent grantee. In *Bump on Fraudulent Conveyances*, second edition, page 482, the principle is thus stated: "Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, in a legal sense, is not utterly void, but merely voidable. The transfer, however, is good between the parties. As against the debtor it is effectual, and the fraudulent grantee has a title and a right to alienate. The only infirmity in his title is its liability to be impeached by creditors. As to all others it is perfect, and when it has passed into the hands of an innocent holder, even this infirmity is cured, and the title becomes secure and indefeasible," citing in the footnote the decisions of many courts, and among them this court.

It is not to be questioned that a voluntary conveyance—that is, one founded upon the consideration of love and affection—is valid between the parties. When the grantor, at the time of its execution is indebted, the law stamps such conveyance per se fraudulent as against his existing creditors, and subject to be set aside when assailed by them. It is not the voluntary nature of the conveyance alone which renders it in law fraudulent, but that fact, when accompanied with the additional fact of indebtedness on the part of the grantor at the

time of its execution. Where no actual fraud exists with reference to future or subsequent creditors in the execution of the conveyance, and no existing or present indebtedness on the part of the grantor, no one would ⁵³⁶ for a moment question the validity of a conveyance having and expressing on its face the consideration of love and affection. The law sanctions such a conveyance, and there is no room for any presumption of fraud solely from the fact that a good, as contradistinguished from a valuable, consideration is expressed in the deed. In a deed from a parent to a child, the fact that the consideration of love and affection is expressed is not enough in and of itself alone, and in the absence of knowledge of any other fact or circumstance calculated to excite inquiry, to put the purchaser upon notice that the deed is fraudulent. The doctrine is stated as follows in Bump on Fraudulent Conveyances, second edition, page 485: "The law sanctions a conveyance founded upon the consideration of blood or of marriage merely. The legal presumption, therefore, is that such a conveyance is valid and not a fraud upon the rights of anyone. The mere fact that a purchaser from the holder of such a title has notice that it was not founded upon a pecuniary consideration is not sufficient to make it his duty at his peril to inquire whether the title of his grantor was not fraudulent. On the contrary, he has a right to act upon the legal presumption that such a deed of gift or voluntary settlement was honestly made until some other fact is brought to his knowledge to raise a suspicion in his mind that the conveyance is fraudulent": Citing *Frazer v. Western*, 1 Barb. Ch. 220; *Sparrow v. Chesley*, 19 Me. 79; *Gobber v. Boyd*, 22 Pitts. L. J. 89.

Admitting the facts to be true as stated in the special pleas, the respondent McKee is in equity entitled to protection as a bona fide purchaser without notice. It follows, therefore, that the decree holding the pleas insufficient must be reversed, and one will be here rendered holding the pleas sufficient.

McClellan, C. J., Haralson and Denson, JJ., concurring.

Voluntary Conveyances are generally regarded as prima facie fraudulent as to existing creditors of the grantor: See the monographic note to *Hagerman v. Buchanan*, 14 Am. St. Rep. 746. As to the effect of the absence of an actual fraudulent intent, see *Matthews v. Thompson*, 186 Mass. 14, 104 Am. St. Rep. 550, and cases cited in the cross-reference note thereto.

A Purchaser for Value and without notice from one who was a purchaser with notice, becomes a purchaser bona fide and entitled

to protection as such: *London v. Youmans*, 31 S. C. 147, 17 Am. St. Rep. 17; *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430. As to the application of this rule to purchasers from the grantee in a conveyance in fraud of creditors, see *Hamilton Nat. Bank v. Halstead*, 154 N. Y. 520, 30 Am. St. Rep. 693; *Anderson v. Blood*, 152 N. Y. 285, 57 Am. St. Rep. 515.

SCHLOSS & KAHN v. WESTCHESTER FIRE INSURANCE COMPANY.

[141 Ala. 566, 37 South. 701.]

INSURANCE, FIRE.—Conditions Against Alienation of the property insured, contained in fire insurance policies, are ordinarily intended to provide only against changes in ownership which might supply a motive to destroy the property, or which might weaken the interest of the insured in protecting it. Hence dealings with the property not calculated to produce any such effect do not, by reason of such conditions, avoid the policy. (p. 58.)

INSURANCE, FIRE—Condition Against Alienation.—A sale by, and resale to, the owner of property insured against fire, all being one transaction and without change of possession, do not violate a condition in the policy, that any change in either the title or possession of the subject matter of the insurance shall render the policy void. (p. 59.)

INSURANCE, FIRE—Proof of Loss—Authority of Agent.—Local insurance agents who issue the fire policy sued on and furnish blank forms for proof of loss under direction of the insurance adjuster, and who have written authority to "receive proposals for, and make insurance policies to be countersigned by them, to renew policies, to consent to assignments and transfers, and to perform all lawful acts and business of such agency, subject to the rules, regulations and instructions of the insurance company, prima facie have authority to receive proof of loss required by the policy as a condition precedent to recovery thereon. (p. 59.)

Powell, Hamilton & Steinhart and T. Richardson, for the appellants.

Harmon, Dent & Weil, for the appellee.

⁵⁷⁴ SHARPE, J. Conditions in policies of insurance against alienation of the insured property are ordinarily construed as intended to provide only against changes in ownership which might supply a motive to destroy the property or which would weaken the interest of the insured in protecting it; hence dealings with the property not calculated to produce any such effect do not, by reason of such conditions, avoid the policy: 1 May on Insurance, sec. 273; Ostrander on Insurance, 2d ed., p. 264; Biddle on Insurance, sec. 206; *Russell v. Cedar*

Rapids Ins. Co., 78 Iowa, 216, 42 N. W. 654, 4 L. R. A. 538; German Ins. Co. v. Gibe, 59 Ill. App. 614; Lane v. Maine Mut. Fire Ins. Co., 12 Me. 44, 28 Am. Dec. 150.

Replications A, B, C and D each purport to show that the sale by Morris the insured, alleged in pleas 2, 3, 6, 9, 10, 11 and 12, respectively, was without any change of possession and was attended immediately in the same transaction by a resale of the property, which at the close of the transaction left Morris with the same title and interest he had at its beginning. This was not an alienation which could have had effect to prejudice the defendant in respect of the risk assumed by the policy, or one amounting to a change of title, interest or possession within the meaning of that clause of the policy which provided such change to be rendered the company within sixty days after the fire. The demurrers to these replications should have been overruled.

On the issue as to whether proof of loss was furnished within sixty days from the fire in accordance with the terms of the policy there was evidence that such proof was, on the sixtieth day after the fire, left with Wilson, Adams & Co., the defendant's agents at Greenville and was by them mailed on the same day to defendant's special agent at Atlanta where they were due to arrive about the end of that day; that Wilson, Adams & Co. held a commission in writing whereby they were in terms ⁵⁷⁵ authorized to receive proposals for and make insurance by policies of defendant to be countersigned by them, to renew the same, to assent to assignments and transfers and "to perform all lawful acts and business of such agency, subject to rules and regulations of the company and such instructions as may be given them from time to time by its officers or general agents." There was evidence also that defendant had issued an advertisement of its business on a blotting pad on which was printed the words "Wilson, Adams & Co., Agents, Greenville, Ala.," that these agents issued this policy and collected premiums thereon, that they had in possession blanks for proofs of loss and furnished plaintiff's attorney with the blanks on which this proof was made and that the attorney had by defendant's adjuster been referred to these agents as persons who might furnish such blanks. This evidence was not incapable of affording an inference that Wilson, Adams & Co., in receiving the proof of loss were acting within the scope of their authority, and was therefore sufficient to carry this question as one of fact to the jury: See *Syndicate Ins. Co.*

v. Catchings, 104 Ala. 176, 16 South. 46; McCullough v. Phoenix Ins. Co., 113 Mo. 606, 21 S. W. 207.

The assignments of error based on demurrers to pleas have not been insisted on by argument and are therefore not considered.

Reversed and remanded.

Conditions in Policies of Insurance against the alienation of the property are construed strictly, courts having in view the object of the insurer in inserting them. The change in title contemplated by the contract is such a change as is likely to induce the insured to be less watchful in guarding the property against fire, or as to offer him a temptation to burn it: Commercial Union Assur. Co. v. Scammon, 126 Ill. 355, 9 Am. St. Rep. 607. See, too, International Wood Co. v. National Assur. Co., 99 Me. 415, 105 Am. St. Rep. 288; Clinton v. Norfolk Mut. Fire Ins. Co., 176 Mass. 486, 79 Am. St. Rep. 325.

CASES
IN THE
SUPREME COURT
OF
ARKANSAS.

**KANSAS CITY, FORT SCOTT AND MEMPHIS RAIL-
ROAD COMPANY v. WASHINGTON.**

[74 Ark. 9, 85 S. W. 406.]

CARRIERS, Liability of Initial for Baggage.—A carrier who sells a through ticket and receives baggage for transportation over its own and connecting lines is liable for its loss by a connecting carrier, in the absence of an express contract to the contrary. (p. 62.)

C. H. Trimble, for the appellant.

J. T. Coston, for the appellee.

¹⁰ **BATTLE, J.** Josie Washington, in her own right and as next friend of her daughter, Nora Brown, brought this action against the Kansas City, Fort Scott and Memphis Railroad Company to recover the value of a trunk and its contents. The defendant sold to Nora Brown a ticket over its railroad from Deckerville, Arkansas, by way of Memphis, and thence by a connecting railroad to Argenta, in this state, and checked her trunk over the same route to the same destination. She took passage on its train, and was transported as indicated by her ticket to Argenta, but her trunk was lost on the connecting railroad between Memphis and the place to which it was checked.

The question in the case is, "Is the receiving carrier, in the absence of an express contract, liable for the loss of baggage by a connecting carrier, the receiving carrier having sold the passenger a through ticket, and checked her baggage through to her destination?" The trial court held the former liable.

Courts differ as to what is sufficient to constitute a contract by a common carrier to transport property delivered to him to its destination, when that place is beyond its route. Some courts hold that 'when a carrier receives goods directed to a place beyond his line, he, in the absence of a stipulation to the contrary, by the very act of acceptance, engages to deliver them at their destination, wherever that may be. Other courts hold that the acceptance of the goods for shipment, so directed, implies nothing more than an agreement on the part of the carrier to transport them to the end of their route, and there deliver them to a connecting carrier to complete the carriage. The first of these views is sustained by the English courts and a few of the American states, and is known as the English doctrine. The other is adopted by the decided weight of American authorities. As this court has not adopted either view, we are at liberty to adopt that which in our opinion is more reasonable.

Mr. Lawson, in his treatise on the Contracts of Common Carriers, gives the reason for the two views as follows: "In support of the first doctrine it is argued that a different rule would work a great inconvenience. A person delivering his¹¹ goods to a carrier to be sent to a certain place will generally rely on him alone to perform the service. He cannot be supposed to know the particular portion of the transit which the first carrier controls, much less the other owners or proprietors of the continuous line. He intends to make one contract, but not two or three or half a dozen. When he places his property in the hands of the carrier, he at once loses all control over it. If it is not delivered, how is he to discover at what particular portion of the route it was lost? He would be forced to rely on the statements of the carriers themselves, who would be little likely to aid him in his search. If he did succeed in fixing the responsibility, he might find himself obliged to assert his claim against a party hundreds of miles away, and under circumstances which might well discourage a prudent man, and induce him to bear his loss rather than incur the expense and trouble of pursuing his remedy against so distant a defendant. The first carrier, on the contrary, has facilities for tracing the loss not possessed by the public. He is in constant communication with his associates in the business; he has their receipts for the property delivered to them, and with no inconvenience at all could charge the loss to his negligent agent. In support of the

second doctrine it is simply answered that the extraordinary liabilities of common carriers cannot in justice be extended beyond their own routes, where alone they have an opportunity of choosing for themselves their servants, and of guarding the property intrusted to their care": Lawson on Contracts and Carriers, secs. 238-242, and cases cited; Hutchinson on Carriers, 2d ed., secs. 145a-149b, and cases cited.

We think the English doctrine more reasonable, and adopt it.

Judgment affirmed.

The Liability of an Initial Carrier for baggage beyond its own line is discussed in the monographic notes to Wood v. Maine Cent. R. Co., 99 Am. St. Rep. 359-364; Pennsylvania Co. v. Loftis, 106 Am. St. Rep. 612. The decision in the principal case is followed in Little Rock etc. Ry. Co. v. Record, 74 Ark. 125, post, p. 67.

PINE BLUFF BUILDING AND LOAN ASSOCIATION v. THALHEIMER.

[74 Ark. 63, 84 S. W. 1032.]

BUILDING AND LOAN ASSOCIATIONS—Mistakes in Favor of Holders of One Series of Stock of.—The stockholders in one series of stock of a building and loan association cannot profit by the mistakes of its officers in giving them preference over other stockholders. (p. 65.)

BUILDING AND LOAN ASSOCIATIONS.—The Mistaken Action of Officers of a Building and Loan Association in Prematurely Canceling the Stock and Satisfying a Mortgage of a stockholder does not relieve him from the further obligation of maturing his stock and paying his mortgage indebtedness. (p. 65.)

BUILDING AND LOAN ASSOCIATIONS—Laches in Seeking the Cancellation of the Release of a Mortgage.—Where, by mistake on the part of the officers of a building and loan association, a mortgage is satisfied and the stock of the borrowing member canceled prematurely and before the value equals the amount of the mortgage indebtedness, the fact that the association did not seek to have the release canceled for five years does not preclude it from obtaining that relief where it demanded payment as soon as it discovered the situation and brought suit to recover the balance due within five years thereafter. (p. 66.)

BUILDING AND LOAN ASSOCIATIONS—Remedy where Series is Prematurely Closed and Stock Canceled and the Mortgage Satisfied.—If, by mistake on the part of officers of a building and loan association, the stock of one member is prematurely canceled and mortgages given by him released, the holders of such stock are not responsible for subsequent losses and expenses. The amount short of full payment to mature the stock is the amount for which the stockholders remain liable, together with legal interest from such cancellation to the entry of judgment. (p. 66.)

Austin & Danaher, for the appellant.

White & Altheimer, for the appellees.

⁶⁴ HILL, C. J. On the 15th of July, 1890, I. A. Thalheimer became a stockholder in the plaintiff corporation, a building and loan association, and on the 31st of July, 1890, he became a borrower therefrom. He was a member of series 3, and executed the usual building and loan contract, agreeing to make the stated payments until the stock matured, in that way repaying the advancement. The contract was secured by mortgage on real estate, in which his wife, Henrietta Thalheimer, joined. In April, 1896, at the end of seventy months of the existence of series 3, the secretary and auditor declared its stock matured and closed it, paid the investing stockholders, and canceled the loans of borrowing stockholders. There had been no meeting of the board of directors since April 23, 1896, and this action was predicated entirely on the secretary's and auditor's statement. The president joined the secretary in satisfying of record the mortgages, this one being satisfied August 31, 1896.

There was no express authority from the board, and none given in the by-laws, for the president and secretary to satisfy mortgages; but this course seemed to have been customary. The secretary says that in January, 1897, in checking over the books, he found that series 3 had been prematurely closed. On the 4th of March, 1897, there was a meeting of the board of directors, a new secretary was elected, and on the 9th of March, 1897, the board selected an expert building and loan accountant to examine its books. On the 27th of April, 1897, the accountant reported fully the status of the association to the board, and his report was accepted as a true statement of its condition. He found that series 3 was closed prematurely by five or six months. He also found the former secretary short in his accounts to the extent of about two thousand five hundred dollars.

The association called upon the investing stockholders to repay the overpayments, which in all instances, except when they were insolvent, was done. The borrowing stockholders were likewise called upon to make good the difference between the face of their loans and the value of their stock, as found by the expert. On the 28th of March, 1898, the association brought suit against Thalheimer for the amount it claimed he owed in ⁶⁵ order to have his loan discharged, and asked foreclosure of the mortgage to satisfy the same. Thalheimer an-

swered, pleading payment of the loan and satisfaction of the mortgage.

On the 6th of December, 1901, the case came on for trial, and the court permitted the plaintiff to amend its complaint by adding an allegation that the satisfaction was made by mistake and asking its cancellation. After the court overruled a motion to strike out this amendment, the defendant answered it to the effect that the satisfaction was made with full knowledge of the board of directors, or, if not authorized, had been acquiesced in, and pleaded laches and negligence against plaintiff in seeking at this late date to cancel the satisfaction of the record. Judgment for the defendant, and the association brought the case here.

⁶⁶ The series of the association of which Thalheimer was a member was prematurely wound up by the secretary before the stock matured. The board of directors did not act in the matter, and the actions of the other officers in assenting thereto and attempting to effectuate the closure were perfunctory. About a year later it was discovered that the secretary was short in his settlements, and the series matured five or six months before it was entitled to have been matured. It was then impossible to rehabilitate this series into a going concern. The premature closure of it relieved the stockholders in it from fulfilling their obligation to pay until the stock was worth its face value, and thereby reduced, pro tanto, their burden of the expenses and losses of the association. This is contrary to the mutuality in profits and losses which is the dominant feature in building and loan contracts. The action of the officers in doing this was the action of the agents of all the stockholders, and the stockholders in this series could not profit by the mistakes of their agents in giving them a preference over other stockholders. Therefore it follows that equity, which works equality, would compel these stockholders to make restitution.

It is insisted that the action of the officers in canceling the stock and satisfying the mortgage cut off Thalheimer from his rights as a stockholder, and relieved him from further obligations to either mature his stock or pay his mortgage. This is a mistake. When the association demanded further payments of him, that was equally a recognition of his continued status as borrower and stockholder, so far as winding up this series was concerned, and he was entitled to all his rights as stockholder ⁶⁷ until he discharged his stock by pay-

ing its face value. The association would have been estopped from questioning his status as stockholder, had he asserted his rights and privileges.

It is contended that the association lost its rights by negligence and laches, and especially its rights to a cancellation of the entry of satisfaction, which was not specifically claimed until the amendment to the complaint was filed at the hearing, about five years after the entry was made. It seems the association demanded payment as soon as it discovered the situation, and enforced repayment, so far as it could, without suit, and this suit was brought within a year thereafter. There is no showing why the suit was so long continued in court, but no rights could be, or were, built up during its pendency which rendered the repayment an injustice, or changed the status of any party. The amendment, while coming late, presented no new phase of the controversy, and it was not an abuse of discretion to allow it to be made at that time. It follows that the judgment must be reversed.

It does not satisfactorily appear that the correct amount is demanded of Thalheimer. It seems that the amount is ascertained from a computation based entirely on payments to become due from borrowing members, and it does not appear that the series was not to be responsible for losses and expenses after it prematurely terminated. The court on a retrial must ascertain the exact status of the series at the time it was mistakenly closed. The amount short of full payment to mature the stock is the amount which Thalheimer should pay, which amount should bear six per cent interest from that date until judgment. No possible profits can enter into it, for the series was disabled from earning profits from that time. This excludes any burdens accruing after the time when the series was mistakenly closed, because it had gone out of existence, and its members had no further control or voice in the management until the error was discovered, and then only for the purpose of winding up properly what had been improperly wound up.

The case is reversed and remanded, with directions to proceed to ascertain the amount due, as herein directed, and to foreclose in satisfaction of the same.

Battle, J., did not participate.

Features of the Law especially applicable to building and loan associations will be found discussed in the monographic notes to *Robertson v. Homestead Assn.*, 69 Am. Dec. 150-166; *Curtis v. Granite State etc. Assn.*, 61 Am. St. Rep. 24-30.

LITTLE ROCK AND HOT SPRINGS WESTERN RAILROAD COMPANY v. RECORD.

[74 Ark. 125, 85 S. W. 421.]

CARRIERS OF PASSENGERS—Liability for Baggage on Connecting Lines.—In the absence of an agreement to the contrary, an initial carrier is liable to a passenger for baggage on connecting lines, where such carrier sells him a through ticket and checks his baggage through to the point of destination. (p. 69.)

CARRIERS OF PASSENGERS, Limiting Liability of by Conditions Printed on Ticket.—A passenger who purchases a through ticket without knowledge of a condition printed on the back thereof limiting the liability of the initial carrier to its own line is not bound by such condition. (p. 70.)

CARRIERS OF PASSENGERS.—Baggage is Whatever a passenger takes with him for his personal use and convenience according to the habits and wants of the particular class to which he belongs with reference either to the immediate necessities or to the purposes of the journey. (p. 70.)

CARRIERS OF PASSENGERS.—Whether Two Shotguns are Baggage when they are taken by a passenger on a journey, to be used in hunting, is a question for the jury. (p. 70.)

Dodge & Johnson, for the appellant.

James E. Hogue, for the appellee.

126 **WOOD, J.** This is a suit by Record to recover of appellant for the loss of a valise and its contents, alleged to be worth six hundred and forty-five dollars and thirty cents. Record purchased of appellant, at Hot Springs, Arkansas, a through coupon ticket from Hot Springs to Durant, Indian Territory, and paid full price therefor. Appellant checked his baggage through to Durant, and it was lost after appellant had delivered it to a connecting carrier. The valise contained personal apparel and two shotguns. The guns were alleged to be worth two hundred and fifty dollars. The proof tended to show that appellee was taking the guns along to hunt with. He "sometimes hunted," and expected to use his guns when an opportunity presented. A ticket which was shown to be a copy of the ticket sold to appellee was read in evidence by appellant as follows:

"Issued by the Little Rock and Hot Springs Western Railroad. One passage, of class indicated, to point on Missouri, Kansas and Texas Railway between punch marks, when officially stamped on back hereof, and presented with coupons attached. Subject to the following contract: In consideration of the reduced rate at which this ticket is sold, I, the

undersigned, agree to and with the several companies over whose lines this ticket entitles me to be carried as follows, to wit: 1. That in selling this ticket the Little Rock and Hot Springs Western Railroad Company acts only as agent, and is not responsible beyond its own line. . . . 8. That baggage liability is limited to wearing apparel not exceeding one hundred dollars in value. 9. That I will not hold any of the lines named in this ticket liable for damages on account of any statement not in accordance with this contract made by an employé of said lines.”

¹²⁷ Other conditions were indorsed on the back of the ticket, but it is unnecessary to set them out. At the bottom of the printed matter on the ticket is a blank space for the signature.

There was evidence on the part of the appellant tending to show that the ticket was sold at reduced rates, and evidence on behalf of appellee tending to show that he paid full price for the ticket. The ticket was not signed by appellee, and his evidence tends to show that he did not read the conditions on it; did not know what they were.

The appellant asked, among others, the following instructions:

“If you find from the evidence that the defendant sold to plaintiff a ticket to a point beyond its own line, with printed stipulations thereon limiting its liability to what occurred on its own line; and if you also find that the defendant safely delivered plaintiff’s baggage to the C., O. & G. Ry., you must find for the defendant.

“You are instructed that the guns mentioned in plaintiff’s complaint and sued for in this action are not baggage, and defendant is not liable for their loss.

“You are instructed that if you find from the evidence that stipulations limiting the liability of defendant were plainly printed on the ticket sold to plaintiff, he would be bound by them if he saw them, whether he signed the contract or not; and if you find that he saw the stipulations you must find for the defendant.”

The court refused these and others presenting practically the same question in different form, and gave as the law of the case the following:

“1. Baggage is whatever a passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with

reference to the immediate necessities or to the purposes of the journey.

"2. If you find from the evidence in this case that the defendant contracted to transport the plaintiff and his baggage from Hot Springs to Durant, and furnished him with a ticket limiting its liability only to its road, by a printed stipulation on the face of such ticket, then such a stipulation would not be availing, unless the defendant has shown either that the plaintiff signed such agreement or knew of such a stipulation.

¹²⁸ "3. The first question for the jury to determine is, What was the contract between the plaintiff and defendant? Did the defendant agree to carry the plaintiff and his baggage all the way from Hot Springs, Arkansas, to Durant, in the Indian Territory, or did it act only as agent for the other connecting lines? If you find that the contract was to carry plaintiff and his baggage only to some other connecting carrier, and the evidence shows that the baggage of such passenger was delivered to some other connecting line mentioned in the ticket, and was not lost on the line of the road of the L. R. & H. S. W. R. R. Co., then your verdict should be for the defendant. But if you find that the contract between the plaintiff and the defendant was to carry the plaintiff and his baggage all the way from Hot Springs to Durant, and that the baggage was lost, your verdict should be for the plaintiff, although the evidence would show that the baggage was lost either on the defendant's road or on one of the connecting lines."

All exceptions were saved. The verdict was for appellee for five hundred dollars.

¹²⁹ 1. This court, in the recent case of *Kansas City etc. Co. v. Washington*, 74 Ark. 9, 85 S. W. 406, decided that, in the absence of any express contract to the contrary, the initial carrier is liable to a passenger for the loss of baggage where such carrier sold the passenger a through ticket, and checked his baggage through to the point of destination, although the loss occurred on the line of some connecting carrier.

2. Was the appellee in this case bound by the condition on the back of the ticket, to wit, "that in selling this ticket the Little Rock and Hot Springs Western R. R. Co. acts only as agent, and is not responsible beyond its own line?" The court instructed the jury that if they found that the plaintiff (appellee) knew of this condition, they should find for the

defendant (appellant). There was evidence to justify a finding that appellee did not know of the condition. Some courts hold that a carrier's liability cannot be limited by words on a ticket or check, or by other notice, even if brought to the knowledge of the passenger, unless he agrees to it: *Baltimore etc. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617; *Camden etc. R. Co. v. Burke*, 13 Wend. 611, 28 Am. Dec. 488; 4 Elliott on Railroads, sec. 1661. But here, in view of the evidence and the verdict, we have the case of a passenger who accepted the ticket and baggage check without any knowledge of the conditions limiting the carrier's liability to its own line. In such a case it is clear that he would not be bound by such conditions; and we are not called upon to decide, and do not decide, what would be the effect if the passenger had knowledge of such conditions printed on the ticket when he accepted ¹⁸⁰ it. See the following: 4 Elliott on Railroads, sec. 1593; 3 Wood on Railroads, 346; 2 Fetter on Carrier of Passengers, sec. 399; 6 Cyc. 570.

3. As to whether or not the shotguns were baggage was submitted to the jury upon a correct instruction: *Kansas City etc. R. Co. v. State*, 65 Ark. 363, 67 Am. St. Rep. 933, 46 S. W. 421, 41 L. R. A. 333; 4 Elliott on Railroads, secs. 1644 et seq., 1648, and cases cited.

Finding no error in the judgment, it is affirmed.

The Liability of an Initial Carrier for Baggage beyond its own line, including conditions in the passenger's ticket limiting the carrier's liability for baggage to its own line, is discussed in the monographic notes to *Pennsylvania Co. v. Loftis*, 106 Am. St. Rep. 612; *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 359-364. See, too, *Kansas City etc. R. R. Co. v. Washington*, 74 Ark. 9, ante, p. 61.

Weapons Carried by a Passenger for protection or for amusement in hunting have been regarded as baggage: See the monographic note to *Wood v. Maine Cent. R. R. Co.*, 99 Am. St. Rep. 351.

NATIONAL COTTON OIL COMPANY v. YOUNG.

[74 Ark. 144, 85 S. W. 92.]

NEGLIGENCE, Question of, When Eliminated by Special Verdict.—Where a jury is instructed to state in the verdict whether alleged foreign matters in stock feed were incorporated therein by the negligence of the defendant or by accident, and finds in favor of the plaintiff, but announces the belief that such matter got into the feed by accident, such finding negatives negligence on the part of the defendant. (p. 72.)

SALES.—The Warranty that Articles Sold Shall be Merchantable and Reasonably Fit for the Purposes for Which They Were Intended does not Exist where the purchaser has the opportunity to inspect and the defect complained of could have been discovered by him as easily as by the vendor. (p. 73.)

SALE OF FOODSTUFFS Containing Iron, Nails, and Other Foreign Substances—Warranty.—Where cotton-seed hulls and cotton-seed meal are sold to be fed to livestock, and the purchaser has an opportunity for inspection, there is no implied warranty of fitness; and the vendor is not liable for injuries to the purchaser's cattle caused by such articles containing wire, nails, and other foreign substances, the seller not being guilty of any negligence. (p. 73.)

SALE OF FEEDSTUFFS for Cattle, Warranty of Fitness not Implied.—On the sale of feedstuffs for cattle, there is no implied warranty that they are fit for that purpose, nor that they do not contain matters injurious to cattle. (p. 74.)

Scott & Head, for the appellant.

A. A. Foster and Webber & Webber, for the appellee.

144 HILL, C. J. J. E. Young sued the oil company for the value of two cows, alleging that they had died from eating feedstuffs purchased by him of the oil company.

145 The evidence showed that he had bought a load of cotton-seed hulls and a sack of cotton-seed meal from the oil company, and had loaded the hulls into his wagon himself with a large fork, direct from the factory. He mixed the meal with the hulls, and fed the mixture to his cows, and they died shortly afterward. An examination of one of them disclosed nails, pieces of wire and other foreign substances in the throat and stomach. The meal and hulls were then examined, and similar metallic substances were found in both. The oil company was a manufacturer of cotton-seed oil and the by-products of cotton-seed, among others, hulls and meal, which were used for cattle feed, and sold for that purpose, and known to have been intended for that use by Young when he purchased. The products were manufactured and for sale when Young came to the mill and bought. Evidence was

adduced by the oil company tending to prove that it was impossible for such foreign substances as found in these articles to have got into them during the process of manufacture, and necessarily that such substances got into the meal and hulls after they were manufactured. There was some evidence tending to show that there was negligence in the putting up for sale of the hulls and meal, and from which the jury might have inferred that the foreign articles got into the feedstuff from the negligence of the employés of the oil company.

The court gave this direction to the jury: "The jury will, in the event they find for the plaintiff, please state in their verdict whether the foreign matter alleged to have been in the hulls and meal was incorporated herein by any negligence of the defendants or its servants or by accident." The jury responded: "We, the jury, find for the plaintiff, J. E. Young, the sum of one hundred dollars (\$100), and believe the foreign matter got into the feed by accident."

The defendant prayed for judgment on the verdict, but the court rendered judgment on it for the plaintiff, and the defendant (the oil company) appealed.

¹⁴⁷ The case was submitted to the jury upon two propositions—one for negligence in allowing the foreign substances to get mixed with the feedstuff, and the other an implied warranty of the soundness and fitness for the purpose intended.

The judgment might well be sustained upon the evidence, had it been for the plaintiff upon the issue of negligence alone. *French v. Vining*, 102 Mass. 132, 3 Am. Rep. 440, is a direct authority to sustain such an action. But the special finding that there was no negligence, and that the foreign matter got into the feedstuff by accident, eliminates that question from this case.

It is contended that the special finding does not amount to anything more than a finding that the foreign matter was incorporated by accident, as contradistinguished from design. The position is not tenable, in view of the plain direction to find negligence or accident, and the finding of accident necessarily finds there was no negligence. A similar conclusion on a strikingly similar use of the words "accident" and "negligence" was reached in *Henry v. Grand Ave. Ry. Co.*, 113 Mo. 525, 21 S. W. 214.

This case, therefore, depends entirely upon whether there was an implied warranty that the feedstuff was reasonably fit for the purpose intended. This court recently dealt with one

of the implied warranties of a manufacturer and said: "When a manufacturer offers his goods for sale, where the opportunity of inspection is not present before the purchase, the vendee necessarily relies on his knowledge of his own manufacture. In such cases the law implies a warranty that the articles shall be merchantable and reasonably fit for the purpose for which it was intended": *Main & Co. v. Dearing*, 73 Ark. 470, 84 S. W. 640. This rule is invoked here. It is inapplicable. This is not a case where the opportunity ¹⁴⁸ of inspection is not present, and where the vendee necessarily relies on the knowledge of the manufacturer. Here the discovery of the foreign substance was equally open to the buyer as to the seller; in fact, more so to the buyer, as he loaded the hulls with a fork into his wagon, and mixed small quantities of meal from the sack into the hulls at each feeding.

The warranty of the merchantable character of the articles only extends to executory contracts, because the goods cannot then be selected or inspected; hence the rule of caveat emptor cannot apply, and the warranty is implied: 2 *Mechem on Sales*, secs. 1340, 1341, 1349. Mr. Benjamin, in his work on *Sales*, says that the implied warranty of the fitness of goods for the use intended does not apply where the manufacturer becomes a dealer; or where a known, described and defined article is ordered of the manufacturer, and he furnishes such article, there is no implied warranty of its quality; but that it does apply where an opportunity for inspection is not present, or where reliance is placed on the judgment and skill of the manufacturer: Benjamin on *Sales*, sec. 658. These rules all accord with *Main & Co. v. Dearing*, 73 Ark. 470, 84 S. W. 640, and the previous decisions of this court therein cited, and do not extend the warranty to the case at bar.

The implied warranty is sought to be upheld on the warranty of feedstuffs. Blackstone says there is an implied warranty that goods intended for food are wholesome: 3 *Blackstone's Commentaries*, 165. It is usually stated that the goods are wholesome and fit for human food: 2 *Mechem on Sales*, sec. 1356. The implied warranty is sometimes denied, and the rule, where enforced, has many limitations. For full statement of it and its limitations, see Benjamin on *Sales*, pages 691, 693; *Mechem on Sales*, section 1356 et seq. The implied warranty in such case is an exception to the common-law rule of caveat emptor, and is sustained upon principles of public policy requiring dealers in food intended for human

use to examine it and see that nothing deleterious to life or health is found therein. This exception is not extended to feedstuff for cattle: *Lukens v. Freund*, 27 Kan. 664, 41 Am. Rep. 429. This case is almost a counterpart of the case at bar. It was an action for the value of a cow whose death was caused by metallic substances in bran purchased of a miller, bran ¹⁴⁹ being one of the by-products of the mill. The questions of liability for negligence in allowing the metal to get in the bran, the duty of a manufacturer and dealer, and whether the warranty of feedstuff applies to cattle feed, were all presented, and decided as herein. The case is well reasoned and supported by authorities therein reviewed, and the opinion delivered by that eminent jurist, Mr. Justice David J. Brewer.

The judgment is reversed, and judgment entered here on the special finding of the jury in favor of the appellant.

Mr. Justice Riddick dissents.

There Ordinarily is No Implied Warranty of Quality on a sale of goods where the buyer has an opportunity of inspection: See the monographic note to *Gold Ridge Min. Co. v. Tallmadge*, 102 Am. St. Rep. 608.

There Ordinarily is an Implied Warranty, on the sale of food articles for domestic consumption, that they are wholesome. There is a difference of judicial opinion, however, as to whether this rule applies to a sale of food for livestock: See the monographic note to *Gold Ridge Min. Co. v. Tallmadge*, 102 Am. St. Rep. 623-625.

MINNEAPOLIS FIRE AND MARINE MUTUAL INSURANCE COMPANY v. NORMAN.

[74 Ark. 190, 85 S. W. 229.]

INSURANCE CORPORATIONS, Ultra Vires Contracts of.—

Where a foreign insurance corporation complies with the laws entitling it to do business within the state, citizens thereof dealing with it in that state are not guilty of negligence in failing to ascertain its charter powers, and it cannot escape liability on its contracts with such citizens on the ground that it was not authorized to enter into them. (p. 76.)

INSURANCE CORPORATIONS—Ultra Vires.—Where a contract of insurance has been fully performed on the part of a policyholder and the insuring corporation has received all the benefits of the contract, it cannot escape liability on the plea of ultra vires. (p. 77.)

CORPORATIONS, Ultra Vires, Sureties of, Whether may Plead.

Where a foreign insurance corporation has given a bond as pre-

scribed by the laws of the state into which it enters for the purpose of doing business, its sureties on such bond cannot escape liability on the ground that a policy issued by it was ultra vires, where such defense could not be maintained by the corporation. (p. 78.)

Cantrell & Loughborough, for the appellants.

Pugh & Wiley, for the appellee.

¹⁹⁰ HILL, C. J. The appellant makes this statement of the issues presented: "The record shows that plaintiff had a policy of fire insurance in the Minneapolis Fire and Marine Mutual Insurance Company on property in Parkdale, Arkansas; that he paid the premium for the policy, and that while the policy was in force the property was damaged by fire; that his loss was adjusted by an adjuster for the Minneapolis Fire and Marine Mutual Insurance Company. These defendants were sureties on the bond given by the Minneapolis Fire and Marine Mutual Insurance Company to the state of Arkansas, and the fire loss occurred while the bond was in force. These defendants pleaded and proved that the Minneapolis Fire and Marine Mutual Insurance Company had authority by its charter to do only a mutual fire insurance business, and argued ¹⁹¹ that the policy sued on was an ultra vires contract of the corporation, and as such the bond was not liable to a claim upon the policy. The charter and the insurance laws of Minnesota were in evidence, and are in the transcript for appeal."

The insurance company has failed, and a receiver represents it. The bond of the sureties is conditioned as required by section 4339 of Kirby's Digest, which is the bond covering insurance by "stock companies," as distinguished from mutual companies, for which a form of bond is designated in section 4348.

In determining the case it is assumed that the facts alleged by the appellants, to wit: That the policy in question, which was of standard form used by stock companies, was not such a policy as the insurance company was authorized to issue, and that it was not authorized to issue standard form policies, but only mutual form policies, and that such facts appeared from the articles of incorporation on file in the auditor's office at the time the bond was given, and when the policy was issued.

The sureties testified that they expected the insurance company to do a mutual business. Clay Sloan, then auditor of state, testified that he would not have licensed the insurance

company to do business in the state unless it gave such a bond as the one sued on. He required this class of bond from all foreign insurance companies, whether mutual or not, as a condition precedent to doing business in the state.

¹⁹² A mutual insurance company, authorized to insure property upon the assessment or mutual plan, enters the state, gives the bond required of stock companies issuing standard policies, and proceeds to do an insurance business on the standard insurance lines, instead of the mutual or assessment lines. Its charter is filed with the auditor when it qualifies to do business in the state. Is such company and the sureties on its bond liable for loss under a standard policy?

The appellant contends that the contract of insurance was *ultra vires*, and not binding on the insurance company; that, even if binding on the insurance company, the sureties on its bond are not liable, because they had a right to expect the insurance company would do a lawful business, and their obligation bound them only to indemnify against its lawful contracts, not its *ultra vires* ones.

Judge Thompson says: "The plaintiff may rightfully presume that the defendant has complied with the statutes entitling it to do business within the state. It has been observed that one of the objects of such statutes is the protection of the people against worthless foreign companies; and that, as the domestic citizen is not required to see that the foreign corporation has observed the laws before he enters into a contract with it, there is no reason, founded in public policy, which will enable a solvent foreign corporation, which has violated the domestic law in making contracts and receiving the consideration therefor from an innocent citizen, to escape liability for its performances by setting up its own turpitude": 6 Thompson on Corporations, sec. 7960.

Applying these principles to the case at bar, then, no negligence in failing to ascertain the charter powers of the insurance company can be imputed to the policy holders. The insurance company came clothed with authority from the state of Arkansas, through the action of these sureties, with authority to write the ¹⁹³ policy in question; and, as Judge Thompson expresses it, "the domestic citizen is not required to see that the foreign corporation has observed the laws before he enters into a contract with it."

A mutual building and loan corporation of Minnesota went into the state of Wisconsin, and there deposited, as a condition

precedent under the laws of Wisconsin to do business in that state, securities of the value of one hundred thousand dollars. The association failed, and a contest ensued between the receiver of the association, acting for all the stockholders and a receiver acting for the Wisconsin stockholders, who claimed these securities for their benefit. After holding it was within the power of the association to enter into such obligation in favor of the state of Wisconsin, the court then considered the ultra vires defense pleaded thereto, and said: "It is well settled that a corporation cannot avail itself of the defense of ultra vires when the contract in question has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance of the contract. . . . And, in general, the plea of ultra vires will not be allowed to prevail, whether interposed for or against a corporation, when it will not advance justice, but, on the contrary, will accomplish a legal wrong" (citing authorities): *Lewis v. American Sav. etc. Assn.*, 98 Wis. 203, 73 N. W. 793, 39 L. R. A. 559. This case was carried to the supreme court of the United States on writ of error, and there the writ was dismissed on the ground that there was nothing in the decision violative of any rights guaranteed by the constitution, statutes or treaties of the United States: *Hale v. Lewis*, 181 U. S. 473, 21 Sup. Ct. Rep. 677, 45 L. ed. 959. In speaking of life insurance certificates claimed to be invalid as ultra vires, the supreme court of Iowa said: "These certificates are not to be treated as valid for the purpose of collecting assessments, and invalid for the purpose of escaping liability": *Matt v. Roman Catholic Mut. Protective Soc.*, 70 Iowa, 455, 30 N. W. 799. The supreme court of Illinois said of an insurance contract: "Where the contract has been fully performed by the party contracting with the corporation, and the corporation has received the benefits from such contract, it cannot invoke the doctrine of ultra vires to defeat an action brought against it on such contract": *Bloomington Benefit Assn. v. Blue*, 120 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331. To the same effect, and as against sureties, is *Kadish v. Garden City etc. Assn.*, 151 Ill. 531, 42 Am. St. Rep. 256, 38 N. E. 236. In *Emmet v. Reed*, 8 N. Y. 312, the court held that an ultra vires act of the president and secretary could not be repudiated after the company had reaped the benefit of it. The industry of counsel in this case, and the others submitted with it, has brought a long line of cases presenting every

phase of this subject, and these are selected as illustrative of the general rules, and many more to the same effect will be found cited in the briefs.

But it is alleged that, even if the company is estopped to plead its ultra vires, these sureties are not. The court of appeals of New York disposes of that question in this language: "The defendant cannot be permitted to show that this bond is invalid on the ground that it was issued by the corporation for a purpose not authorized by its charter. The guaranty of payment of the bond by the defendant imports an agreement or undertaking that the makers of the bond were competent to contract in the manner they have, and that the instrument is a binding obligation upon the makers": *Remsen v. Graves*, 41 N. Y. 471. Many authorities are cited to sustain this statement. The insurance company and those representing it are estopped to avail themselves of the ultra vires contract it made. The sureties have given life and force to the ultra vires act of doing business on the standard plan, instead of the mutual plan. They have sown the seed, and must reap the harvest of thistles.

The judgment is affirmed.

The Doctrine of Ultra Vires in its application to the contracts of private corporations is discussed in the monographic note to *In re Assignment Mutual etc. Ins. Co.*, 70 Am. St. Rep. 156-180. It is now generally conceded that the defense of ultra vires cannot be set up by a corporation when a contract has been performed by the other party and it has enjoyed the benefit of the performance, at least if the contract is not prohibited by positive law or good morals: *White v. Commercial etc. Bank*, 66 S. C. 491, 97 Am. St. Rep. 803, and cases cited in the cross-reference note thereto; note to *In re Assignment of Mutual etc. Ins. Co.*, 70 Am. St. Rep. 169. As to the application of this doctrine to the contracts of insurance companies, see *In re Assignment Mutual etc. Ins. Co.*, 107 Iowa, 143, 70 Am. St. Rep. 149; *Wuefler v. Trustees of Grand Grove etc.*, 116 Wis. 19, 96 Am. St. Rep. 940; *Twiss v. Guaranty Life Assn.*, 87 Iowa, 783, 43 Am. St. Rep. 418.

FINLEY v. MOOSE.

[74 Ark. 217, 85 S. W. 238.]

PROHIBITION, When Will not Issue.—If the existence or nonexistence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine, a writ of prohibition will not be granted, though the superior court is of the opinion that the question of jurisdiction was wrongfully determined by the inferior court and that its rightful determination would have ousted that court of jurisdiction. (p. 81.)

JURISDICTION, Prohibition Will not Issue to Determine.—If a court has jurisdiction of the subject matter and not of the person, the remedy is by appeal and not by prohibition. (p. 82.)

Ashley Cockrill, for the petitioner.

Robert L. Rogers, attorney general, for the appellee.

217 WOOD, J. This is an application to this court for a writ of prohibition, seeking to prohibit the judge of the Pope circuit court from proceeding with the trial of the case of the State of Arkansas v. Waters Pierce Oil Company, pending in that court.

The petition is presented by Andrew M. Finley, as an old stockholder and late president of the Waters Pierce Oil Company, and the Waters Pierce Oil Company, a corporation of Missouri. The petition represents that a complaint was filed in the Pope circuit court April 7, 1900, against the Waters Pierce Oil Company, a corporation organized under the laws of Missouri in 1878, **218** alleging that said corporation since March 6, 1899, had violated the anti-trust act of 1899 in the county of Pope; that on September 17, 1900, service was issued by the circuit court clerk of Pope county, and that the summons was served September 19, 1900, on E. D. Irwin, agent of said corporation; that prior to the issuance of the summons, E. D. Irwin, the agent, and Andrew M. Finley, its late president, suggested in writing that the Waters Pierce Oil Company, the corporation against which the complaint had been filed, had before that time been duly dissolved under the laws of Missouri, and its affairs wound up; that no business had been done since, and that E. D. Irwin had not been its agent for any purpose since May 31, 1900. The petition alleged that the dissolution of the old corporation had been in good faith, and not for the purpose of evading any law of the state of Arkansas. The petition further showed that on May 29, 1900, another corporation was organized in Missouri with the

same name, but different corporators, and that the last corporation on July 5, 1900, filed a certified copy of its articles of incorporation with the Secretary of State for the state of Arkansas, and also filed with him a certificate naming an agent upon whom summons might be served, and obtained from the Secretary of State a license to do business in this state. The petition further disclosed that the plaintiff, the state of Arkansas, in the complaint filed in the Pope circuit court, demurred to the suggestions in abatement, and read in evidence an amended complaint, filed November 13, 1900, in which it alleged that the dissolution of the old corporation and formation of the new was a fraudulent scheme to evade its legal debts and liabilities. The petition further alleged that the circuit court overruled the pleas in abatement, and ordered the defendant Waters Pierce Oil Company to answer the complaint; that thereupon the petitioner herein, the Waters Pierce Oil Company, the new corporation, filed its motion to quash the issuance and service of summons, so far as it affected the new corporation, and entered its appearance only for the purpose of the motion, and suggested that the service of process as to it was void, because the complaint on which it issued was filed before the corporation was in existence. The motion to quash the service was overruled, and the defendant company given until the November term, 1901, of said court to file its answer.

²¹⁹ The petitioners set up these facts, and allege that they have no remedy to prevent the Pope circuit court from exercising jurisdiction, and compelling the new corporation to answer the complaint filed against the old corporation. They say that no final judgment has been rendered in the Pope circuit court from which an appeal will lie, and they ask that a writ of prohibition be issued to prevent the Pope circuit court from taking jurisdiction of the new corporation, and proceeding with said cause.

A temporary writ was issued by this court, and a rule was served on the circuit judge, Honorable W. L. Moose, to show cause why the writ should not be made permanent. To this no response has been made, and the cause is now submitted for decision upon the petition.

It appears that an issue of fact was presented to the circuit court as to whether the dissolution of the old corporation and the formation of the new was a fraudulent scheme for the purpose of evading the laws of Arkansas. If it was a fraudulent

scheme to dodge liability under the anti-trust law of Arkansas, as the amended complaint alleged, ²²⁰ then the circuit court would have jurisdiction; and it had power to determine whether or not such dissolution and reorganization was for the fraudulent purpose of evading the penalties provided by our statute. If the existence or nonexistence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine, a prohibition will not be granted; though the superior court should be of opinion that the questions of fact have been wrongly determined by the court below, and, if rightly determined, would have ousted the jurisdiction: Shortt on Prohibition, 450.

The court had jurisdiction of the subject matter; and if not of the person, that question could and should have been raised on appeal, and not by the extraordinary writ of prohibition. Prohibition is only granted when the usual and ordinary forms of remedy are insufficient: High on Extraordinary Legal Remedies, secs. 770, 771; Weaver v. Leatherman, 66 Ark. 211, 49 S. W. 977.

The temporary writ is quashed, and the petition is denied.

The Writ of Prohibition is the subject of an extended monographic note to State v. Superior Court, 40 Wash. 555, 110 Am. St. Rep.

BALDWIN v. WILLIAMS.

[74 Ark. 316, 86 S. W. 423.]

LIMITATION OF ACTIONS.—Courts of Equity are Bound by the Statute of Limitations and must give effect to it when pleaded. (p. 82.)

FRAUDULENT CONVEYANCES, Effect of.—A conveyance made with intent, and for the purpose, of cheating or hindering creditors of the grantor, though good between the parties, is void as to such creditors. The grantee holds the legal title in trust for them, and, at their instance, equity will set aside the conveyance and subject the land to the payment of their debts. (pp. 83, 84.)

LIMITATION OF ACTIONS to Avoid Conveyances Made to Defraud Creditors.—If a grantee under a deed made to defraud creditors of the grantor takes possession of the property and holds it adversely to all claimants for the period of limitation, the creditors are barred of their right to subject it to the payment of their debts; but so long as the grantee allows the grantor to hold possession, or so long as he holds possession for the benefit of the grantor and not adversely, the statute does not begin to run against creditors. (p. 84.)

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R. I. Floyd, for the appellant.

H. P. Smead and H. S. Powell, for the appellees.

317 **McCULLOCH, J.** Action by appellant, Baldwin & Co., Limited, against appellees, H. G. P. Williams, J. T. Pratt and W. J. Hill, commenced February 21, 1900, to cancel as fraudulent deeds of conveyance executed by appellee Williams to Pratt and Hill, dated November 17, 1892, and January 16, 1893, respectively, and to subject the lands conveyed thereby to satisfaction of a judgment rendered by the circuit court of Union county on March 12, 1893, in favor of appellant against appellee Williams.

The court below decided that the cause of action was barred by limitation, and dismissed the complaint.

It is very clearly established that the conveyances were made by an insolvent debtor without consideration and for the fraudulent purpose of defeating the payment of his debts. The chancellor so found, and the testimony abundantly sustains his finding in that respect.

Was the action to set aside the conveyance barred by the statute of limitations?

Courts of equity, like courts of law, are bound by the statute of limitations, and must give effect to it when pleaded: *McGaughey v. Brown*, 46 Ark. 25.

318 The first inquiry presented is whether the statute begins to run from the recording of the fraudulent deed when the creditor has notice thereof, or from the date of change of possession thereunder; and if the latter period puts the statute in motion whether the possession must be hostile to the grantor in the deed, as well as to his creditors.

The text-writers state the rule that the conveyance must be recorded, or there must be a change of possession, before the statute will begin to run, and that it begins to run from the happening of either of these two events, whichever first occurs: *Wait on Fraudulent Conveyances*, sec. 292; *Bump on Fraudulent Conveyances*, sec. 571. The decisions cited in support of the text state the same rule broadly, but in none of them is it expressly decided that the recording of the conveyance, without possession taken thereunder, or with possession not shown to be adverse to the grantor, will be sufficient to set the statute in motion. The supreme court of Mississippi, in the case of *Abbey v. Commercial Bank of New Orleans*, 31 Miss. 434, held that where a judgment

debtor fraudulently caused lands to be conveyed to his wife and child, but remained in possession and use thereof, the statute did not run against a creditor who had no notice of the fraud; but it does not appear from the statement of facts or opinion in that case whether or not the deed had been recorded. The supreme court of Nebraska, in the case of *Wright v. Davis*, 28 Neb. 479, 27 Am. St. Rep. 347, 44 N. W. 490, held, under a section of the code providing that suits of the kind must be commenced within four years after the discovery of the fraud, that the statute began to run when the fraudulent deed was placed of record, where the creditor had notice thereof or could by reasonable diligence have discovered it, even though the debtor remained in possession of the land. The question seems to have there turned upon the language of the statute. In *Belt v. Ragnet*, 27 Tex. 471, the reasoning of the court would lead to the conclusion that recording the deed would not put the statute in motion if possession of the land was retained by the grantor. The court there said: "As a necessary consequence, no length of possession by the debtor has any effect upon the rights of the creditor, so long as his debt remains unsatisfied, and his remedy for its collection is not lost by his laches; and as the fraudulent vendee gets no title against the creditor by the conveyance, he can only bar his recovery by such adverse possession ³¹⁹ as will give him title. When, as between husband and wife, there is no visible change in the control and apparent ownership of property, it seems difficult to perceive by what fiction of law she can divest the title out of her husband by limitation. In this case the fact of her claim was not brought home to the creditor, nor was implied notice given of it by the record of her title, if it would have that effect."

Under the statutes of this state a judgment is enforceable against the property of the debtor at any time within ten years from the date of rendition thereof (*Kirby's Digest*, secs. 3215, 5073); and all property owned by the debtor during that period, or held in trust for him, is subject to execution issued upon the judgment. As long as the property is held by the debtor or by another for him, it is not beyond the reach of his creditors. A conveyance made with intent and for the purpose of cheating or hindering creditors of the grantor in the collection of their just claims, though good between the parties thereto, is void as to such creditors.

The grantee in such conveyance holds the legal title as a trustee for creditors, at whose instance a court of equity will set aside the conveyance and subject the lands to the payment of the debts. If the grantee takes possession of the property, and holds it adversely to all claimants for the full period of limitations, the creditors are barred of their right to subject it to the payment of their debts; but so long as he allows the debtor (his fraudulent grantor) to hold possession, or so long as he holds possession for the benefit of his grantor, and not adversely, the statute does not begin to run against creditors.

This court, in *Ringo v. Woodruff*, 43 Ark. 469, held that seven years' adverse possession was necessary to bar an action to foreclose a mortgage on real property, and that the possession, whether held by the mortgagor or a subsequent vendee from him, "must be actual, open, continuous, hostile, exclusive, and accompanied by an intent to hold adversely and 'in derogation of' and not in 'conformity with' the right of the true owner or mortgagee, and must continue for the full period prescribed by the statute of limitations." The statute of limitations has, since that decision, been amended as to suits to foreclose mortgages; but the principle is, we think, the same as to suits by a judgment creditor to set aside the fraudulent conveyance of his debtor. There must be an actual, adverse holding of the property for ³²⁰ the statutory period before he is barred of his right to subject the property to the payment of his debt, so long as the enforcement of the judgment is not barred by the ten years' statute.

The proof is sufficient, we think, to establish the fact that appellee Hill held actual possession of the property conveyed to him from the date of the conveyance. He occupied the premises at the time of the conveyance as tenant of the grantor, but paid no rent thereafter, and held the property as his own.

There was no evidence of a visible change of possession of the property conveyed to appellant Pratt. The grantor, H. G. P. Williams, remained in possession up to the commencement of this suit as agent, he claims, of his wife who rented from Pratt. It is manifest that the possession of Pratt, if any is shown at all, was colorable only, and not with any intent to hold the premises as his own. He paid nothing for the property. His claim to have borrowed the money from the wife of the grantor, without executing to her any note or other evi-

dence of the debt, and without any definite agreement concerning repayment of same, is too unreasonable to be credited. The conveyance and change of possession were alike colorable only, and insufficient either to cut off the right of creditors, or put the statute of limitation in motion.

The decree is affirmed as to appellee Hill, but as to appellee Pratt and the property conveyed to him the same is reversed, and remanded with directions to enter a decree in accordance with the prayer of the complaint.

The cost of the appeal will be divided equally between appellant and appellee Pratt.

Conveyances in Fraud of Creditors are usually binding on the parties (Kirby v. Royner, 138 Ala. 194, 100 Am. St. Rep. 39), but not on the creditors: Scott v. Farmers' etc. Bank, 97 Tex. 31, 104 Am. St. Rep. 834; Matthews v. Thompson, 186 Mass. 14, 104 Am. St. Rep. 550; Hillyer v. Le Roy, 179 N. Y. 369, 103 Am. St. Rep. 919; Rickards v. Rickards, 98 Md. 136, 103 Am. St. Rep. 393; Mason v. Perkins, 180 Mo. 702, 103 Am. St. Rep. 591.

The Statute of Limitations is held by some authorities not to run against a creditor's right of action to set aside a fraudulent conveyance until he recovers a judgment: Brown v. Campbell, 100 Cal. 635, 38 Am. St. Rep. 314; Weaver v. Haviland, 142 N. Y. 534, 40 Am. St. Rep. 631. But compare Wright v. Davis, 28 Neb. 479, 26 Am. St. Rep. 347; Hawley v. Page, 77 Iowa, 289, 14 Am. St. Rep. 275. Where a debtor conveys land to his wife and children, who remain in the actual possession thereof, claiming it as theirs, for more than seven years, a suit by creditors attacking the conveyances will be barred in Tennessee: Welcker v. Staple, 88 Tenn. 49, 17 Am. St. Rep. 869.

ST. LOUIS, IRON MOUNTAIN AND SOUTHERN RAILWAY COMPANY v. ADAMS.

[74 Ark. 326, 86 S. W. 287.]

DAMAGES FOR PERSONAL INJURY—Size of Family.—In action for personal injuries claimed to have been suffered from the defendant's negligence, it is error to permit the plaintiff to prove the size of his family, and thereby show that it consists of ten or twelve persons. It will be presumed that this evidence aroused the sympathy of the jury and enhanced the damages beyond the amount which the law permits. (p. 87.)

DAMAGES, Allowing Plaintiff to Remit and then Affirm the Judgment.—Where evidence has been erroneously admitted tending to enhance the amount of plaintiff's damages, but there is no doubt of his right of recovery, the appellate court may, in its discretion, name a sum which is clearly not excessive, and, as a matter of grace to the plaintiff, allow him to accept judgment for that sum, instead of a new trial. (p. 89.)

Dodge & Johnson, for the appellant.

T. J. Oliphant, for the appellee.

327 **BATTLE. J.** T. R. Adams brought this action against the St. Louis, Iron Mountain and Southern Railway Company to recover damages caused by the negligence of the defendant. He alleged in his complaint that on the seventh day of March, 1900, he was traveling from his home toward Little Rock in a wagon drawn by two mules and loaded with country produce; that it was dark, about 8 or 9 o'clock, when he approached the crossing **328** of the public road by the defendant's railway; that when near the track he stopped and looked and listened, and, seeing no approaching train, moved on the crossing, and when his wagon was upon the track, a train of the defendant's, consisting of an engine and boxcar, the latter being in front of the engine with no light or signal on the same, suddenly came upon him, and struck his wagon, knocked it off the track, overturned it, and threw him on the ground, bruising and greatly injuring him.

The defendant answered, and denied all the allegations in the complaint, and alleged that plaintiff's injuries were caused by his own contributory negligence.

The plaintiff recovered a judgment for two thousand dollars, and the defendant appealed.

The evidence adduced at the trial showed that the appellee, traveling in a wagon drawn by mules, in the night-time, about 8 or 9 o'clock, drove his wagon upon appellant's railway, where it crosses the public road, upon which he was traveling, and that a train of the appellant, consisting of an engine and three or four boxcars, the latter in front of the former, the engine pushing the cars, struck the wagon, overturned it, and injured the appellee. The evidence tended to show that no signals of the approach of the train were given at the time of this collision, and that no lookout for persons or animals in front of the same was kept, and no lights on the foremost car were exhibited; and that the injury received impaired his earning capacity.

In the course of this trial appellee asked this question: "How much family have you had to support?" to which appellant objected; its objection was overruled; and it excepted. He, appellee, being the witness, answered: "From ten to twelve. I have had twelve children." He was further asked: "How much help did you have from those children in making

crops!" He answered, "I haven't had a great deal until this year. I have a boy sixteen years old, and this boy I have here—they are all the boys I have big enough." The question and answer as to size of his family and the number of his children were inadmissible and prejudicial. This evidence did not tend to show an increase of his earning capacity, but of his expenses. As to this evidence, we say, as the court said of similar evidence in *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460, 26 L. ed. 141: "The manifest object of ³²⁹ its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, money, as well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all the circumstances, a fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family it is impossible to determine with absolute certainty; but the reasonable presumption is that it had some influence upon the verdict." And we add, whatever may have been the object of its introduction, the effect was the same, and prejudicial: See, also, *Kreuziger v. Chicago etc. Ry. Co.*, 73 Wis. 158, 40 N. W. 657, and cases cited.

As the judgment will be reversed, we make no comment upon the sufficiency of the evidence. The opinion heretofore delivered in this case is hereby withdrawn.

Reversed and remanded for a new trial.

ON MOTION OF PLAINTIFF TO BE ALLOWED TO ENTER A REMITTITUR.

RIDDICK, J. We have heretofore decided that the judgment of the circuit court in this case should be reversed, and a new trial ordered, on account of error in the admission of evidence which, to quote from the opinion delivered, was "calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted." The court was of the opinion that the evidence was sufficient to warrant a verdict against the defendant, and that the error committed did not affect the finding of the jury on the question of whether the defendant was liable for the injury suf-

ferred by plaintiff, but that it probably enhanced the damages found by the jury.

The counsel for plaintiff now asks leave to be allowed to enter a remittitur for such sum as will relieve the judgment of any excess in the way of damages and remove the effects of the error in the admission of improper testimony. The first ³³⁰ question presented is whether a judgment for any amount can be permitted to stand in a case of this kind where there has been improper evidence admitted. The tendency of the late decisions, says Mr. Sutherland in his work on Damages, "is in the direction of unqualified support for the practice which allows the appellate and trial court, in cases in which excessive damages have been awarded and in which the plaintiff is entitled to substantial damages, to indicate the excess and give him the option to remit or take judgment for the residue, or to be awarded a new trial": Sutherland on Damages, 3d ed., sec. 460.

A question of remittitur was considered by this court in a recent case, where it was said that the "theory upon which a remittitur is allowed is that the appellant has no just complaint, save that the damages are excessive, and that, inasmuch as the appellate court can say that the given verdict is excessive, it can designate an amount that will not be, and give the successful party the option to remit the excess or submit to a new trial." But in that case the court held that the remittitur could not be allowed, because the error complained of might, in the opinion of the majority of the judges, have affected the verdict on the question of whether the defendant was liable for damages or not: *St. Louis etc. Ry. Co. v. Waren*, 65 Ark. 619, 48 S. W. 222.

The court in that opinion was discussing a case in which the damages were held to be excessive; but a remittitur may be permitted not only to cure the excess in a verdict which is plainly excessive, but also to cure any possible effect of evidence improperly admitted, the effect of which may have been to unduly enhance the amount of the damages. For, to quote the language of a late decision of the supreme court of Wisconsin, "there is no good reason to restrict the practice so as to exclude any case, whether on contract or sounding in tort, where the plaintiff is clearly entitled to recover, and a sum can be named which, in all reasonable probability, will not exceed the amount which a jury will ultimately give him": *Baxter v. Chicago etc. Ry. Co.*, 104 Wis. 307, 80 N. W. 644.

Where the right to recover is clear, and has been established by the verdict of a jury, and where the errors committed in the trial go only to the enhancement of the amount of the verdict, and do not affect the question of whether defendant is liable or ²³¹ not, then, if the verdict be excessive, or if, on account of improper evidence, or improper argument of counsel tending to enhance the amount of damages allowed, the court is not able to say from the evidence that the verdict is not excessive, and that the defendant was not prejudiced, in respect to the amount of the damages assessed, by such improper evidence or argument, the court may, in its discretion, name a sum which is clearly not excessive, and as a matter of grace to the plaintiff allow him to accept judgment for that amount, instead of a new trial: *St. Louis etc. Ry. Co. v. Waren*, 65 Ark. 619, 48 S. W. 222; *Little Rock etc. Ry. Co. v. Barker*, 39 Ark. 491; *Baxter v. Chicago etc. Ry. Co.*, 104 Wis. 307, 80 N. W. 644; *McCarthy v. Whitcomb*, 110 Wis. 113, 85 N. W. 707; *Hocks v. Sprangers*, 113 Wis. 123, 87 N. W. 1101, 89 N. W. 113; *Rueping v. Chicago etc. Ry. Co.*, 116 Wis. 625, 96 Am. St. Rep. 1013, 93 N. W. 843; *Telegraph Co. v. Frith*, 105 Tenn. 167, 58 S. W. 118; *Trow v. Village of White Bear*, 78 Minn. 432, 80 N. W. 1117; *Wimber v. I. C. Ry. Co.*, 114 Iowa, 557; *Ribich v. Lake S. S. Co.*, 123 Mich. 401, 81 Am. St. Rep. 215, 82 N. W. 279, 48 L. R. A. 649; *Belt v. Lawes*, 12 Q. B. D. 356; 2 *Sutherland on Damages*, 3d ed., sec. 460; 13 *Cyc.* 134.

In doing this the court does not invade the province of the jury, for the court is not undertaking to state the exact amount of pecuniary loss which plaintiff has suffered, but is only naming an amount which, under the evidence, the court can see is clearly not excessive. As the matter of permitting a remittitur to be entered, and allowing the judgment to stand for the remainder, is largely a matter of discretion, the court will be less inclined to grant this privilege where the errors at the trial have been gross, or where improper conduct on the part of plaintiff or his counsel has been such as to excite the prejudices of the jury; and it will be more inclined to grant it in cases where there has been a fair and impartial trial, but where, on account of mere error in the finding of the jury, the damages allowed are greater than the evidence justifies. As the error pointed out in this case was not a very culpable one, or one that involves any reflection on plaintiff or his counsel, and as, in the opinion of the majority of the judges, the only

just ground for objection to the judgment rendered is that, on account of the improper evidence admitted, it may be, and probably is, larger than would otherwise have been rendered, and to that extent excessive. we are of the opinion that it is within our discretion to permit a remittitur to be entered, and to allow the judgment for the remainder to stand. ³³² But, before naming the amount that we think should be remitted, we will call attention to the principles by which it seems to us that the court should be guided in ascertaining the amount to be remitted. In the case of *Railway v. Hall*, 53 Ark. 7, 13 S. W. 138, where the trial court erroneously instructed the jury that they might allow exemplary damages, the learned judge, who delivered the opinion of the court refusing to permit a remittitur, called attention to the various elements that went to make up the damages in a case of tort for personal injury, such as loss of time, pain and suffering, etc., and said: "The difficulties which beset a court in determining the justness or excessiveness of a verdict based on these premises alone would not be inconsiderable. But superadd the element of punitive damages erroneously allowed, and the process by which the court is to dissect the verdict, eliminate the error, eliminate the excess of compensation, and settle upon the exact sum which plaintiff's case entitled him to have, 'passeth all understanding.' "

Now, while we do not wish to make any criticism of the decision in that case, still it does not seem to us entirely correct to say, as the judge there intimates, that the court, in naming a sum which the plaintiff may elect to take if he prefers it to a new trial, is aiming to state the exact sum which plaintiff is entitled to recover. In actions for breaches of contracts, and sometimes in other cases, it may happen that the exact amount of the excess in an excessive judgment can be ascertained from the evidence, and in these cases the court will determine the exact amount due, and will permit the judgment to stand for that amount, whatever it may be, if plaintiff will remit the excess. But in actions to recover for damages for personal injuries, where the amount of the damages is not susceptible of being ascertained exactly, it would be well-nigh impossible for the court to name exactly the amount which plaintiff is entitled to recover. To undertake to do so would be to assume the functions of a jury, and the result might be very unjust to the defendant, who would be bound by the result, while the plaintiff could accept or reject the

amount named as it suited him to do, for a court has no right to reduce a verdict of a jury and render judgment for the reduced amount unless the prevailing party consent to the reduction: *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. Rep. 696, 33 L. ed. 110; 18 Encyclopedia of Pleading and Practice, 123.

³³⁸ Looking at the matter from that standpoint, some courts hold that it is an invasion of the constitutional rights of the defendant to permit a remittitur and affirm the judgment for the remainder in actions for torts; and if the purpose of the courts were to settle the exact rights of the parties under the evidence, it would be difficult to dispute the correctness of such decisions. But the court in such cases does not undertake to state the exact sum that plaintiff is entitled to recover, and makes no pretense of doing so. What the court undertakes to do is simply to name an amount so low that there can be no reasonable ground to believe that a jury of average judgment, after considering the evidence, would, when properly instructed as to the law, allow plaintiff a less sum than that named, and which amount the court can clearly see is not excessive: *Rueping v. Chicago etc. Ry. Co.*, 116 Wis. 625, 96 Am. St. Rep. 1013, 93 N. W. 843.

The court must be certain not to put the amount too high; for, as before stated, the defendant has no option in the matter, and must submit to the judgment allowed by the court, while the plaintiff has the right to reject the offer if he chooses to do so. There is, then, little danger in putting the amount low, and the court should always go down to a sum which it can feel certain that the defendant should pay, and which under the evidence the plaintiff is clearly entitled to recover. If it should be less than the plaintiff is entitled to under the evidence, the defendant is not injured; for, if the plaintiff accepts it, defendant then gets off with less than he was liable to pay. On the other hand, as plaintiff is not compelled to accept the amount offered, he has no ground for complaint that the court, instead of reversing the case outright on account of an error for which he is partly to blame, and forcing him to undergo a new trial, gives him the privilege of taking the sum named, and by doing so of getting some substantial compensation without the trouble and expense of further litigation.

The amount recovered in this case was two thousand dollars. The error in admitting evidence in reference to the size of the plaintiff's family, which consisted of eleven children, was,

as we stated in the opinion, calculated to arouse the sympathies of the jury, and to enhance the amount of the verdict to some extent, though we do not think that it had any great effect on the verdict. But, ³³⁴ as this improper evidence was brought before the jury by plaintiff over the objection of counsel for defendant, if the judgment is affirmed, it must be after such a substantial reduction as will clearly eliminate the effect of this evidence. Bearing this in mind and guided by the rules above announced, a majority of us are of the opinion that a remittitur of seven hundred and fifty dollars will cure any possible prejudice caused by the admission of the evidence referred to. In naming twelve hundred and fifty dollars as the amount for which plaintiff may have judgment, we do not undertake to say that it represents the exact amount or all the damages to which plaintiff is entitled. We name it as the sum for which, under the circumstances, we are willing that a judgment should stand, for the reason that we are fully convinced that such sum is not excessive, and that defendant will be in no respect prejudiced by a judgment for that amount. If plaintiff shall within one week enter a remittitur of the sum named, to take effect as of the date of the original judgment, the judgment may stand as to the balance; otherwise, the case will be remanded for a new trial.

Wood, J., concurs.

McCULLOCH, J., Concurring. I agree that it was improper to permit appellee to testify concerning the number and ages of his children, but in the nature of the case it was only calculated to create in the minds of the jury a sympathy so as to cause them to augment the amount of the verdict for damages. The testimony in the record is abundant, in my opinion, to support the verdict, and we cannot say that the amount of damages allowed by the jury is excessive; therefore no prejudice resulted to appellant from the introduction of the improper testimony, and I think the judgment should be affirmed. But inasmuch as a majority of the court are against an affirmance of the case, and as my concurrence in a decision affirming the judgment only upon the entry of a remittance of seven hundred and fifty dollars by appellee will constitute a majority of the court, favoring that decision, I concur for that reason.

HILL, C. J., Dissenting. The motion to be permitted to enter a remittitur and take an affirmance for an amount which the court will not regard as excessive has called for a careful

investigation of the evidence touching the extent of the injuries ³³⁵ to Mr. Adams. I have come to the conclusion that the court erred in reversing the case, and think that it should be affirmed, notwithstanding the erroneous testimony, because that testimony has not been prejudicial. I favor rectifying the error by affirming the case, but I am not willing to cause a remittitur to be entered and affirm for a reduced amount; and, differing with my associates on this question, I shall briefly state my reasons therefor. If the testimony of Mr. Adams and his witnesses is true, the verdict is not excessive, but moderate. This testimony comes accredited by the jury, and, if we accept it, there is no excessive award. In the case of *Pennsylvania Ry. Co. v. Roy*, 102 U. S. 451, 26 L. ed. 141, which we followed, evidence just like the objectionable evidence in this case was held to be inadmissible because its tendency was to arouse the sympathy of the jury, thereby tending to enhance the award of damages. If the award is not excessive, then the error has failed to enhance the damages, and has worked no prejudice. A remittitur is only allowed when the damages are excessive, and that excess can be cured by extracting an amount which will leave the verdict responsive to the evidence. It is impossible in this case to say that the jury gave any given sum for his pain and suffering, loss of health and loss from his business, and then gave an added sum because he had eleven children dependent on him for support. Although the appellee prefers a reduced judgment to the hazard of another trial, I am not willing to establish a precedent which requires this court to delve into so uncertain a realm of conjecture. I can see no halfway ground in such case. Either the error aroused the sympathy of the jury and caused it to render a larger verdict than it otherwise would have done, or the verdict is responsive to the legal evidence alone. There is not a certain and definite sum traceable into the verdict which may be extracted and leave a legal verdict, but it is one of those intangible effects which cannot be weighed in coin. Therefore I think the case should either be affirmed, or sent back to another jury to assess the damages free of this erroneous evidence.

Battle, J., dissents, on the ground that the evidence fails to show that the plaintiff was entitled to recover.

When Damages Appear to be Excessive, a court may either grant a new trial or give the plaintiff the option to remit the excess or a portion thereof and order the verdict to stand for the residue:

Doyle v. Dixon, 97 Mass. 208, 93 Am. Dec. 80. For recent cases where this doctrine has been applied by appellate courts, see Ribich v. Lake Superior Smelting Co., 123 Mich. 401, 81 Am. St. Rep. 215; Rueping v. Chicago etc. Ry. Co., 116 Wis. 625, 96 Am. St. Rep. 1013.

The Admissibility of Evidence of the Number and Ages of the members of the plaintiff's family in actions for personal injuries is discussed in Youngblood v. South Carolina etc. R. R. Co., 60 S. C. 9, 85 Am. St. Rep. 824, and monographic note thereto.

WALLACE v. SWEPSTON.

[74 Ark. 520, 86 S. W. 398.]

LIMITATION OF ACTIONS on Guardians' Bonds.—A cause of action against a surety on the bond of a guardian does not accrue, nor does the statute of limitations commence to run, until the amount of the liability is established by the order of the probate court and an order is made by that court directing the amount to be paid over. (p. 97.)

LIMITATION OF ACTIONS on Guardians' Bonds.—Where the Guardianship Relation is Closed by the death of the guardian, or the revocation of his letters, or by the coming of age of his ward, and the probate court adjusts the accounts and establishes the amount due from the guardian, a cause of action accrues at once without any further order of court, though there is no one capable of suing. If there is then no one who can lawfully receive the amount or sue for its recovery, the cause of action is postponed, and limitations does not begin to run until there is some one capable of suing. (p. 97.)

GUARDIANSHIP, Void Order Setting Aside Revocation of Letters of.—If an order of court revokes the letters of a guardian, it terminates the guardianship, and an order made at a succeeding term attempting to reinstate him is ineffectual so far as the sureties on his bond are concerned. (p. 98.)

GUARDIAN'S BOND, Limitation of Actions upon Where His Ward Remains a Minor.—Where a cause of action accrues on a guardian's bond in favor of a minor by the settlement of accounts, and no other guardian is appointed to receive the amount due the ward, the statute of limitations does not begin to run against such ward until he reaches his full age. (p. 98.)

LIMITATION OF ACTIONS on Guardian's Bond and Against Surety not Sued.—Where the statute of limitations commences to run in favor of a guardian and his sureties, its operation is not suspended, as to a surety not sued, by the commencement of an action against the guardian and another surety. (p. 98.)

PROBATE COURT, Jurisdiction of, When not Destroyed by Suit in Chancery.—The assumption by a court of equity of jurisdiction in a suit to correct a fraud and mistake in an account of administrators and guardians does not lift the estate out of the probate court, where it is still open and where the exclusive jurisdiction of administering it is lodged by the constitution. The estate remains open in the probate court for all purposes, subject only to the jurisdiction of the court of equity to purge the account of fraud and mistake. (pp. 98, 99.)

LACHES in Proceeding Against a Surety and His Heirs.—A delay of twenty-four years and nearly ten years after the death of a surety and after the closing of the estate in bringing suit by a creditor against the heirs of such surety, who have received their ancestor's estate, for the satisfaction of their claims against him as such surety, is fatal on the ground of laches, though the suit has been brought within the period of limitations against the principal and another surety. (pp. 99, 100.)

W. M. Randolph, George Randolph and Wassell Randolph, for the appellants.

L. P. Berry, A. B. Shafer and N. W. Norton, for the appellee.

521 McCULLOCH, J. Appellants are the surviving children and heirs at law of Robert C. Wallace, deceased, from whom they inherit lands, and who was one of the sureties on the bond of John W. Guerrant, as guardian of the person and estate of appellee when she was a minor. This is a suit brought by appellee in the chancery court to recover from the estate of said deceased surety, Robert C. Wallace, on the bond of said guardian, and to enforce against the lands inherited by appellants from said Wallace one-half of the amount due appellee from the said guardian, as fixed by a **522** former decree of the chancery court of Crittenden county, surcharging his accounts in the probate court.

From a decree in favor of the plaintiff granting the relief prayed for the defendants appealed to this court. The facts alleged in the pleadings and shown by the proof are practically undisputed, and are as follows:

On October 30, 1870, John W. Guerrant was appointed guardian of the person and estate of appellee, who was then an infant and owned a considerable estate, and gave bond as such guardian in the sum of ten thousand dollars with Robert C. Wallace and J. R. Jenkins as sureties. Robert C. Wallace died April 2, 1875, while the guardianship of appellee was still pending and administration was immediately commenced upon his estate. He left a large estate, both real and personal, including these lands, which descended to his children, the appellants and two others who died subsequently, and the administration upon his estate continued, through the administrator originally appointed and an administrator de bonis non appointed later, until April 23, 1890, when it was finally closed.

On October 9, 1876, the probate court made an order revoking the letters of guardianship issued to Guerrant because of

his failure to file his general settlement accounts; and at the next term of January 8, 1877, said court made and entered an order purporting to annul the former order, and attempting to reinstate the letters of guardianship revoked by the former. On the same day the guardian filed his settlement account showing a balance in his hands of five thousand one hundred and sixty dollars and five cents as of December 24, 1875, which account was by the probate court at the October term, 1877, duly confirmed, and thereafter the guardianship was treated by the court and guardian as still pending, and the said letters as still in force.

On July 10, 1883, after the attainment by appellee of her age of majority, said guardian filed in the probate court his final settlement, and on October 10, 1883, the probate court made an order, after disallowing some of the items and vouchers therein, confirming said account, and finding a balance of twelve hundred and ninety-two dollars and sixty-three cents in hands of said guardian due his ward, and directing him to pay the same over to his ward, the appellee.

⁵²³ On August 29, 1883, appellee and her husband commenced in the circuit court of Crittenden county in chancery a suit against the guardian and J. R. Jenkins, one of said sureties on his bond (omitting therefrom the heirs and administrator of Wallace, the other surety), alleging fraud committed by said guardian in his various settlement accounts, and praying that the accounts be surcharged and corrected, and decree entered against the guardian and said surety for the proper amount due. The guardian, Guerrant, and said surety, Jenkins, both died while the suit was pending and before final decree, and the cause was revived against their respective administrators; and on May 2, 1895, after reference to a master to state the accounts and the filing of his report, a final decree was entered, in accordance with the prayer of the complaint, in favor of the plaintiff against the estate of Guerrant in the sum of fifteen thousand five hundred and eighty-one dollars and thirty-one cents, of which the sum of six thousand one hundred and twenty dollars and ninety-nine cents was also decreed against the estate of the surety, Jenkins.

An appeal to this court from that decree was prosecuted by the administrator of Jenkins, and this court decided that the guardianship ended with the order of the probate court October 14, 1876, revoking the letters; that the order reinstat-

ing the same at the next term was void as to the sureties on the bond, and that the liabilities must be fixed according to the amount due by the guardian at that time. This court modified the decree of the chancellor against the surety, and reduced the amount found to be due to the sum of five thousand one hundred and sixty dollars and five cents, the amount shown by said guardian to be due his ward by his settlement account filed 1877, without interest: See *Haden v. Swebston*, 64 Ark. 477, 43 S. W. 393.

Subsequently appellee received from the estate of Guerant the sum of two thousand one hundred and fifty-seven dollars and forty cents on January 23, 1899, and two thousand five hundred dollars from the widow of Jenkins on August 16, 1899, in compromise of all liability of said estate of Jenkins.

The present suit was commenced on August 19, 1899, and the final decree appealed from is for one-half of amount (five thousand one hundred and sixty dollars and five cents) of the former decree rendered against the estate of the guardian and other surety.

⁵²⁶ Appellants, among other defenses tendered by their answer, pleaded the statute of limitations.

It has been held in many decisions of this court that the cause of action against the surety on a guardian's bond does not accrue until the amount of the liability is established by an order of the probate court, and an order is made by said court directing the amount to be paid over; and that the statute of limitations does not commence to run against an action on the bond until that time: *Padgett v. Norman*, 44 Ark. 490; *Vance v. Beattie*, 35 Ark. 93; *Connelly v. Weatherly*, 33 Ark. 658; *Norton v. Miller*, 25 Ark. 108.

This doctrine is limited, however, so far as the prerequisite of an order to pay over is concerned, to settlements which are not final, and where the guardianship is still left continuing. Where the guardianship relation is closed and ended by the death of the guardian, or the revocation of his letters, or by the coming of age of the ward, and the probate court adjusts the accounts, and establishes the amount due from the guardian, the cause of action accrues at once, if there be some person capable of suing: *Smith v. Smithson*, 48 Ark. 261, 3 S. W. 49. If there be, then, no one who can lawfully receive the amount, or sue for its recovery, the cause of action is postponed, and limitation does not begin to run until there is some one capable of suing: *Hanf v. Wittington*, 42 Ark. 491.

The order of the probate court rendered on October 14, 1876, revoking the letters of the guardian, John W. Guerrant, terminated the guardianship. The order made at the next succeeding term of the court, attempting to reinstate him as guardian, was ineffectual for the purpose, as far as the sureties on his bond are concerned: *Haden v. Swepton*, 64 Ark. 477, 43 S. W. 393.

526 The guardian then filed his settlement account, and the court subsequently examined and confirmed it, thus establishing the amount due from the guardian to his ward, and the right of action to recover the amount accrued at that time. But appellee was then a minor, incapable of asserting her rights, and no other guardian was appointed to receive the money for her. Therefore she was not barred of her action before she came of full age. The bond being a sealed instrument, under the statute then in force the period of limitation was ten years from the accrual of the right thereon (*Mansfield's Digest*, sec. 4484); and, under *Mansfield's Digest*, section 4489, which was then in force, prescribing the period of limitations as against persons under disability, the action could have been brought within the above-named period after the removal of disability; i. e., the coming of age of the ward.

Appellee attained her age of majority June 9, 1882, more than seventeen years before she commenced this suit. If it were held that the statute of limitations was not put in motion by the order of the probate court in 1877, establishing the amount due from the guardian, there is another point, more than ten years before the commencement of this suit, from which it would have begun to run. The guardian, having continued to act as such, notwithstanding his removal by the court, filed his final settlement account on July 10, 1883, and the same was confirmed at the next term of the probate court, and an order was made on him to pay over the amount found to be in his hands to appellee. This would also have formed a point from which the statute would begin to run, even if it had not then been in motion. The statute having once been set in motion, its operation was not arrested, as to the estate and heirs of the deceased surety, Robert C. Wallace, by the commencement and pendency of the action against Guerrant, the guardian, and Jenkins, the other surety, to surcharge and falsify the accounts of the guardian.

The assumption of jurisdiction by a court of equity in a suit to correct fraud and mistakes in the accounts of adminis-

trators and guardians does not lift the estates out of the probate court where they are still pending, and where the exclusive jurisdiction to administer is lodged by the constitution. The estates are still ⁵²⁷ pending in the probate court for all purposes, subject only to the jurisdiction of the court of equity to purge the accounts of fraud and mistakes: *Hankins v. Layne*, 48 Ark. 544, 3 S. W. 821.

The orders of the probate court establishing the amount due from the guardian and the order rendered in October, 1883, directing him to pay over the funds, remained in full force, notwithstanding the suit against the guardian, and, as to all persons not made parties to that suit, the statute of limitations upon the cause of action matured by those orders of the probate court continued to run. It has been held by this court that the pendency of another suit, even between the same parties, does not prevent the statute bar from attaching as to a new action where the plaintiff has not suffered nonsuit or arrest of judgment in accordance with the terms of the statute: *Hill v. Pipkins*, 72 Ark. 549, 81 S. W. 1216. It is the opinion of this court, therefore, that appellee's cause of action is barred by the statute of limitation.

It is established by the decisions of this court that "a creditor can proceed in equity against the heirs who have received the ancestor's estate for satisfaction of his claim which has accrued after the lapse of the time limited for authenticating it against the administrator, or after the close of his administration": *Hall v. Brewer*, 40 Ark. 433; *Hendricks v. Keese*, 32 Ark. 714; *Byrd's Admr. v. Belding's Heirs*, 18 Ark. 118; *Bennett v. Dawson*, 15 Ark. 412. But suits of that kind are not to be encouraged when not brought in apt time. According to the plainest principles of equity, the appellee, in addition to the bar of the statute of limitation, is barred of recovery against appellants on account of her laches in not commencing her suit at an earlier date. A recital of the facts of this case demonstrates, without argument, the justice of that doctrine. When the suit was commenced, the surety whose estate is sought to be subjected to the payment of the amount due from the guardian had been dead twenty-four years, and administration, whereby a valuable estate was wound up, had been closed for nearly ten years; some of his heirs had parted with their inheritance, and two of them had died; the principal in the bond, the guardian, had been dead for some years. It is no excuse to say that a suit had been

brought within the period of limitation against the guardian and another surety on his bond, without proceeding against the appellants or impleading them in ⁵²⁸ any suit. At the end of that litigation appellee was adjudged the right to recover no more, as against the sureties, than the probate court had held to be due twenty years before. After this long lapse of time and the changes in the status of the parties, it seems to us to be inequitable to permit appellee to disturb the heirs of the deceased surety on her guardian's bond by subjecting the property inherited by them to the payment of a liability established so long ago.

We think, therefore, that the learned chancellor erred in not dismissing the complaint for want of equity, and the cause is reversed and remanded with directions to enter such a decree.

Relief in Equity from the orders and decrees of probate and other courts having exclusive jurisdiction over the estates of decedents and of minors and other incompetent persons, is discussed in the monographic note to *Froebrich v. Lane*, 106 Am. St. Rep. 639-647.

If a Statute of Limitations provides that actions upon a guardian's bond must be commenced within three years after a removal or discharge, unless at the time of the discharge the person entitled to sue is under legal disability, the fact that no action can be maintained until the filing of the final report of the guardian and its confirmation by the court does not prevent the running of the statute: *Berkin v. Marsh*, 18 Mont. 152, 56 Am. St. Rep. 565.

FLETCHER v. EAGLE.

[74 Ark. 585, 86 S. W. 810.]

CORPORATIONS, Directors of, Liability of for Committing Management to Its President.—The directors of a corporation are not excused from liability resulting from their committing the management of the corporation to its president on the ground that they believed him to be honest, faithful, and competent, and had reason for such belief, and no reasonable ground to believe that he was misappropriating funds to his own use or to the loss and detriment of the stockholders. (p. 102.)

JURY TRIAL.—The Rule that all Instructions must be Construed Together does not extend to instructions inherently erroneous and misleading. (p. 103.)

George Sibly, for the appellant.

Joe T. Robinson, for the appellee.

⁵⁸⁵ HILL, C. J. This was an action brought, by order of court, by creditors in the name of the receiver of the Bank of Lonoke, against directors of that bank, charging that they had become liable, under section 863 of Kirby's Digest, for intentionally neglecting and refusing to comply with their duties as directors. The complaint sets forth with particularity the alleged neglectful conduct of the directors. Issue was taken on all material matters, and the case went to the jury, who found in favor of the directors.

⁵⁸⁶ Much evidence was adduced not necessary to review here, as the court is of the opinion that there is sufficient to sustain a verdict for either side acquired under proper instructions. Many questions have been presented, and all of them considered, but no error is discovered which is prejudicial and reversible except for the giving of the sixth and seventh instructions on behalf of the defendants, and therefore a discussion of all other questions is pretermitted.

The instructions in questions are as follows:

"6. The court instructs the jury that if they find from the testimony in the case that the directors believed C. W. England, president of the bank, to be honest and faithful in the discharge of his duties, and believed him to be a competent and reliable business man, capable of discharging his duties as president of the bank, and had reason for such belief, and under such circumstances committed the management of the bank to him, and had no reasonable grounds to believe that he was misappropriating the funds of the bank to his own use, or to the loss and detriment of the stockholders, then they would not be bound by the conduct of such president, although he may have fraudulently and negligently squandered the assets of the bank.

"7. The court instructs the jury that if they find from the evidence in the case that C. W. England was believed to be by the directors an honest and faithful officer, capable of conducting the affairs of the bank, and that by mismanagement or unwise investment or speculation he squandered or dissipated the assets of the bank, then the plaintiff cannot recover of the directors on that ground."

⁵⁸⁷ The bank had been wrecked by C. W. England, whose ventures went down in the financial disasters of 1893. Prior to the failure of the bank, the evidence shows that he was a man of the highest standing in every way, and regarded as a very capable business man. Whether the failure was due to

dishonesty or unwise investment and speculation, naturally there are two opinions, and these variant phases are represented in the two instructions quoted. The vice running through each is that any circumstances justify directors in abdicating their official functions.

The circumstances mentioned in the sixth instruction, and they are sustained by the evidence, fully authorized the directors ⁵⁸⁸ to have implicit confidence in England, and justified their selection of him as president; but no circumstances justify directors in committing the management of the bank to the president, further than the duties of that office require. No matter how honest and capable the president is, the directors have their duties to perform, and cannot fail to perform them because their confidence in the president renders them unnecessary in their opinion. It was their duty as directors to perform the functions required of them by statute, common usage and the by-laws of the corporation, and any committal of management to the president, which meant a nonfulfillment of their duties as directors, was negligence for which they are liable, provided other facts fixing liability were present.

The seventh instruction carries the error mentioned and further error. The jury is told that if the directors believed England honest and faithful, and by mismanagement, unwise speculations or investments he squandered the assets, then the plaintiff could not recover on that ground. Even if this instruction be construed as a continuation of the sixth, carrying the qualifying clause that the directors had good and sufficient reasons for their faith in England, still it is misleading. While this is qualified with the statement that the directors would not be liable on the ground mentioned, yet it ignores wholly the duty of watchfulness and care imposed upon them, and turns the consideration of the jury wholly to the good faith of the directors in having confidence in England and in the failure being due to England alone.

The rule is invoked that the instructions must all be read together, and that the other instructions properly defining the care required of the directors, taken in connection with these, present the law fully, and these two but present phases of the same separately. The application of this well-established rule does not extend to instructions inherently erroneous and misleading. The jury is correctly instructed on the duty resting upon these directors, and when they become liable to creditors, and then they are directed not to find against them if they

renounced their duties as directors, and committed the management of the bank to a man in whose integrity and capacity they had the utmost confidence, owing to his high standing rendering that confidence justified. In other words, the jury were authorized to turn from ⁵⁸⁹ the application of the law resting upon them by virtue of the duties imposed, and follow this will-o'-the-wisp—the good faith of the directors in committing the entire control of the bank to the president. In any event, such instructions are misleading; but they are especially so in this case when the instructions consist of twenty-four different propositions submitted to the jury as abstract statements of law, without any effort to harmonize them and to bring sharply to the attention of the jury the issues which they are to determine. Had the issues been so defined that it would have been clear to the jury just what they were to determine, and these instructions given as justifying the directors in having confidence in the president, and thereby having no reasonable ground for believing he was misappropriating the funds, they would not be liable for such misappropriation unless they could have prevented the same by ordinary attention to their duties, then these instructions might not have been harmful. Such was the thought of counsel in presenting them to the lower court and in defending them in this court, but the qualifications that such reasonable belief would not excuse them unless they could not have prevented the dissipation of the assets by the attention to their duties required by law is conspicuous by its absence, and other instructions dealing with that question are so disconnected from them as to prevent them being read into these.

For the error in giving instructions 6 and 7 the cause is reversed and remanded.

Directors of a Corporation have no right to commit the management of the affairs of the company to a cashier, president, or other officer, or to a committee of their own number, and thereafter take no steps to keep themselves informed of what is being done with the corporate assets and the property of depositors and others intrusted to its care; and if they do so, and money or other property is lost through speculation, misconduct, or reckless extravagance, which reasonable care and attention on their part would have prevented, they are answerable: See the monographic note to *Marshall v. Farmers' etc. Sav. Bank*, 17 Am. St. Rep. 100.

SINGER MANUFACTURING COMPANY v. BOYETTE.

[74 Ark. 600, 86 S. W. 673.]

PRINCIPAL AND SURETY—Variation of Contract Which Will Release Surety.—If, under a contract of employment, the employé agrees to act as salesman and report each week, upon blanks to be furnished, the full amount of all business transacted by him, a surety on his bond to the effect that he will faithfully perform his duties is released by the fact that the employer relieves the salesman from the duty of making weekly reports. (p. 106.)

T. B. Pryor and R. T. Powell, for the appellant.

G. S. Evans, T. L. Brown and J. H. Holland, for the appellee.

⁶⁰¹ **BATTLE, J.** The Singer Manufacturing Company brought an action against Fannie A. Boyette, W. G. Hopkins and others, on a bond executed by them, to recover "five hundred dollars and ten per cent attorney's fees," the penalty named therein, and to recover against Fannie A. Boyette, individually, the sum of twelve hundred dollars. "The complaint in substance alleges: That plaintiff is a corporation organized under the laws of the state of New Jersey, and is engaged in the manufacture and sale of sewing-machines; that in the year 1900 the defendant, Fannie A. Boyette, entered its employ as salesman and collector under a written contract; that she also, together with her codefendants, entered into a bond in the sum of five hundred dollars, conditioned that she would faithfully perform her duties as such salesman and collector. That, in violation of her contract and the conditions of the bond, she had collected from divers persons owing plaintiff sums ⁶⁰² aggregating twelve hundred dollars, which she had wholly failed to account for and pay to plaintiff." It asked for judgment against her for twelve hundred dollars, and against her codefendants for the sum of five hundred dollars. Her codefendants filed a separate answer, in which they deny that she had failed to pay the plaintiff her indebtedness to it, and, among other things, alleged that it was understood that she would be required to make weekly settlements with it, and that it had failed to do so, and had permitted her account to run for more than a year without doing so. The defendant Boyette, in a separate answer, alleges that she made weekly settlements, and paid to plaintiff all amounts due it under contract.

The jury in the case returned a verdict in favor of the plaintiff against Fannie A. Boyette for five hundred and fifty

dollars, and in favor of her codefendants; and the court rendered judgment accordingly. The complaint of the plaintiff as to the proceedings of the court seems to be confined to the judgment in favor of the codefendants.

It was proved that Fannie A. Boyette entered into a written contract with the plaintiff by which she agreed, among other things, to act as "salesman" and collector for plaintiff, to devote her entire time and attention exclusively to collecting the accounts from time to time intrusted to her "by the plaintiff," and to selling the family sewing-machines and supplies made and furnished by "plaintiff" and none other; and "to give such a guaranty or security as shall be satisfactory to it for the due and faithful performance of the terms" of her contract; and "to report each week upon blanks furnished by it a full and complete account of all business which she transacts for it during said week." That she and her codefendants entered into a bond to the plaintiff in the sum of five hundred dollars, conditioned that she would faithfully perform her duties as such salesman and collector. Evidence was also adduced tending to prove that, after she had made a few weekly reports and settlements, she was relieved by the plaintiff, through its duly authorized agent, from making such reports or settlements except when she had made sales or collected money, and required her to report only once a month.

⁶⁰³ In *Hibbs v. Rue*, 4 Pa. St. 348, the court said: "The contract by which a surety becomes bound is voluntary on his part, without profit or advantage, and without having in view the prospect of gain. It is an act of benevolence to the obligor, and of convenience to the obligee; and of emphatic use to both. The obligations of social duty require, therefore, that he should be dealt with in fairness, and in a spirit of the utmost good faith. The obligor and the obligee are bound to know that, if they find it convenient to change or vary the terms of the original contract, they must seek the assent of the surety, because it is his contract as well as theirs. And if they will not do so, they must take upon themselves the hazard, and thus loosen the bonds of the surety."

In *Morrison v. Arons*, 65 Minn. 321, 68 N. W. 33, the defendant was employed by the plaintiffs as general manager, salesman and collector. They entered into a written contract, by which the defendant agreed to account or make settlements once a month as to his transactions. Arons, as principal, and others, as sureties, entered in a bond, in which plaintiffs were

obligees, which was conditioned, among other things, that Arons should faithfully and honestly perform all the duties of his employment. It was proved that no monthly settlements or accounting had been had as provided for in the contract of employment. It was held that the sureties upon the bond were thereby released from liability. The court said: "The condition in the employment contract whereby monthly accounting and settlements were agreed upon was an exceedingly beneficial one for all concerned. It was an essential feature of the contract whereby Arons agreed to conduct plaintiff's business enterprise for an indefinite period of time, his compensation to be determined by the net profits. The contract of suretyship was departed from and varied when this provision was wholly disregarded, and the case is brought directly within the rule that, if an essential condition of such a contract is not complied with, a surety is not bound": See to the same effect, *Fidelity Mutual Life Assn. v. Dewey*, 83 Minn. 389, 86 N. W. 423, 54 L. R. A. 945, and cases cited.

The stipulation for weekly settlements in this case was an essential part of the contract. The enforcement of it would have made a record of the business transactions of Mrs. Boyette, and ⁶⁰⁴ lessened litigation as to the same; and would have held her in surveillance, and checked the misappropriation by her of moneys in her hands belonging to the company, and would, probably, have led to the discovery of any misappropriation of money before it could have assumed considerable proportions. This, doubtless, was the object of the stipulation; and its enforcement would, at least, have afforded some protection to the sureties on the bond. Plaintiff, having without their consent acquiesced in the violation and breach thereof, thereby released and discharged them from all liability on the bond.

Judgment affirmed.

The Release of Sureties by a change in the duties of their principal, or a variation in the terms of his contract of employment, is discussed in the notes to First Nat. Bank v. Gerke, 6 Am. St. Rep. 458-460; First Nat. Bank v. Fidelity etc. Co., 100 Am. St. Rep. 784. The general rule is, that to discharge a surety by a change in the duties of his principal, the change must be such as to interfere with or modify the duties for the faithful performance of which the surety is bound, so as to make it inequitable to enforce his undertaking upon a state of facts not within the contemplation of the parties and not consented to by the surety: Shackmaxon Bank v. Yard, 150 Pa. St. 351, 30 Am. St. Rep. 807. See, too, Saint v. Wheeler etc. Mfg. Co., 95 Ala. 362, 36 South. 210; Singer Mfg. Co. v. Reynolds, 168 Mass. 588, 60 Am. St. Rep. 417.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PETERSON v. GIBBS.

[147 Cal. 1, 81 Pac. 121.]

QUIETING TITLE.—The Failure of the Plaintiff to Prove His Claim as Alleged and the success of the defendant in establishing some interest in the land do not entitle the latter to a nonsuit in an action to determine conflicting claims of title. The plaintiff, where he shows a legal interest, is entitled to a decree declaring and defining the interest of both parties to the action. (p. 110.)

TIMBER, Effect of Grant of with a Provision for Removal Within a Time Specified.—A grant of all the timber standing, lying, or being on a specified tract of land, providing that the grantor will remove it within ten years, and if he does not do so, that he will pay a designated yearly rental for the privilege of removal, is an absolute contract for the sale of such timber, and the failure to remove it within the time stipulated does not divest the purchaser of his title, though he has not paid rent for the subsequent period. (p. 111.)

TIMBER, Contract to Remove, When not Affected by the Prior Intention of the Parties.—A grant of the timber on a specified tract of land containing an agreement to remove it within a time specified, and if not so removed, to pay rent, is not controlled or affected by proof that it was the intention of the parties that the vendees should commence the removal within three years from the date of the instrument. (p. 112.)

McGarvey & Bledsoe, for the appellant.

McNab & Hirsch, for the respondents.

*** ANGELLOTTI, J.** This is an appeal from the judgment and an order denying a motion for a new trial. The trial court granted the defendants' motion for a nonsuit, and judgment was thereupon entered that the plaintiff take nothing by his action and that defendants recover their costs.

The principal question presented is as to the action of the court in granting defendants' motion for a nonsuit.

The action was commenced July 19, 1901, to quiet plaintiff's title to certain land in Mendocino county. Plaintiff alleged in his complaint that on July 18, 1891, one Oppenlander was the owner in fee simple of said land; that on said day Oppenlander sold and conveyed the same to him, and that he ever since has been, and now is, the owner in fee simple and in possession of all thereof. He further alleged that the defendants claim an interest therein adverse to him, but that such claim was without any right whatever. He asked that the defendants be required to set forth all adverse claims asserted by them, that such claims be determined by the decree, and that it be adjudged that defendants have no estate or interest in the property. The defendants, by their answer, filed January 15, 1902, denied that plaintiff was the owner in fee or in possession of any part of said land, and admitted and alleged that they claimed an interest therein, to the extent that they are the "absolute owners of all the timber upon the above-mentioned premises whether standing, lying or growing, with the right to do all things on said land which might be necessary for the purpose of manufacturing the timber and removing the same and to make roads and build camps thereon, and the right of ingress and egress upon and across the land, and also full rights of way for the purpose of removing said timber as the defendants might acquire ³ upon the adjoining land or lands in the vicinity of the lands described in the complaint."

They asked for a decree that plaintiff take nothing by his action, that it be decreed that defendants are the owners of all the timber upon the said land, "whether said timber be lying, standing or growing," and that they are entitled to remove the same.

Upon the trial it was shown by plaintiff that, subject to such rights as were possessed by defendants under an instrument executed by the owner of the land, on December 28, 1887, purporting to grant and convey the timber thereon and on other lands, he was the owner of all the land in dispute, under a deed of grant executed on July 18, 1891, by Oppenlander, the then owner, subject to defendants' rights, and also that he had been in possession of all the land ever since the date of his deed.

The said instrument of December 28, 1887, was one whereby the then owners had purported to "grant, bargain, sell and convey" to the defendants, "all the timber now standing,

lying or being on" certain lands of the grantors, including the land in controversy, and, in addition to such purported grant, contained the following provisions:

"And the parties of the first part promise and agree to and with the parties of the second part, that they shall have a period of ten years in which to remove the timber from the above-described lands, and they do covenant and promise to allow and empower the parties of the second part, their agents and servants, to enter in and upon the real estate upon which the timber hereby conveyed is growing or situate as above described, to cut such timber, manufacture the same into lumber, and do all things upon such land which may be necessary for the purpose of manufacturing such timber into lumber and the removal thereof, as well as the right to make roads and build camps upon such land, and also full ingress and egress have over such land for the removal of the timber hereby conveyed, and also such timber as the parties of the second part may acquire upon adjoining land or lands in the vicinity of the lands of the parties of the first part as described herein. The parties of the second part hereby covenant and agree to and with the said parties of the first part, that if the timber is not removed from the above-described lands within a ⁴ period of ten years that they will pay a yearly rental to the parties of the first part, of two hundred dollars a year thereafter for the privilege of removing such timber from the lands of the parties of the first part, with the covenants and agreements of the parties of the first part herein to continue until all of the timber is removed, and it is agreed between the parties thereto that all the privileges granted herein are to continue until such timber is removed, subject to the provisions of this agreement.

"It is further agreed by and between the parties hereto, that each of the parties hereto are to pay one-half the taxes upon all of the foregoing described real estate that may be levied upon such land for state, county, or municipal purposes during each and every year from the date hereof until all the timber is removed from such real estate."

This instrument, in consideration for the execution of which the defendants paid seven thousand dollars in cash, was the sole basis of defendants' claim. It had been duly recorded and plaintiff had full notice thereof. The deed to him contained this provision, viz.: "Excepting and reserving, however, for the benefit and use of a former grantee of mine, the

standing and down timber on the hereinafter granted land, and the privilege to work it up and to remove it from said land.”

At the time of the commencement of this action defendants had not commenced to remove any timber from the land. The defendants, who had never been notified of the transfer of the land by Oppenlander to plaintiff, had, acting under their agreement, paid Oppenlander each year after the year 1897 the sum of two hundred dollars. Plaintiff had paid all the taxes on the land, but it did not appear that any demand for reimbursement had ever been made upon defendants.

This, aside from some evidence going to show that it was the expressed intention of defendants at the time of the negotiations resulting in the agreement of December 28, 1887, to commence cutting and removing the timber in not to exceed three years from such date, was, substantially, the case made by plaintiff.

Even if it be conceded that the case shows all that is claimed for it by defendants, we are of the opinion that the motion for a nonsuit was improperly granted. At most ⁵ the plaintiff had simply failed to establish that his land was free of all valid claim on the part of defendants. He had, however, clearly shown that he was the owner in fee of the land, subject only to the interest held by defendants in the timber “standing, lying, or being” on said land on December 28, 1887, with such rights of entry, rights of way, etc., as were given by the contract of that date. Although he had not come up to the full measure of the allegations of his complaint as to the invalidity of the claim asserted by defendants, he had shown a legal title in himself sufficient to enable him to maintain the action to quiet his title to the land, such as it was, and to have the adverse claim of defendants in regard thereto fully defined and determined.

The mere fact that a defendant in an action brought under the provisions of section 738 of the Code of Civil Procedure is shown to have some valid interest or estate in the property in controversy does not warrant the denial of all relief to the plaintiff who has also shown a valid interest therein.

Such an action is brought, as authorized by the statute, “for the purpose of determining” any adverse claim that may be asserted therein by a defendant to the land in controversy, and this does not mean that the court is simply to ascertain, as against a plaintiff shown to have a legal interest, whether

or not such defendant has some interest, but also that the court shall declare and define the interest held by the defendant, if any, so that the plaintiff may have a decree finally adjudicating the extent of his own interest in the property in controversy. The object of the action is to finally settle and determine, as between the parties, all conflicting claims to the property in controversy, and to decree to each such interest or estate therein as he may be entitled to. Of course, if the plaintiff fails to show any legal interest in the property in controversy, and as to which he asserts title, he must fail altogether, and could not complain of a judgment of nonsuit, but where he shows any legal interest, he is entitled to have that interest declared by the court: See generally upon the nature and object of the statutory action to quiet title, *Stoddard v. Burge*, 53 Cal. 394; *People v. Center*, 66 Cal. 551, 5 Pac. 263, 6 Pac. 481; *Pennie v. Hildreth*, 81 Cal. 127, 22 Pac. 398; *Castro v. Barry*, 79 Cal. 443, 21 Pac. 946; *Bulwer etc. Min. Co. v. Standard etc. Min. Co.*, 83 Cal. 589, 23 Pac. 1102; *Quint v. McMullen*, 103 Cal. 381, 37 Pac. 381. By the order granting a ⁶ nonsuit, the plaintiff was in effect declared to have no legal interest whatever in the property in controversy. This was of course erroneous.

As the case made by plaintiff showed him to be the owner of the land in controversy, subject only to such interest in the timber thereon, and such rights of entry and rights of way as defendants may be determined to have under their contract, the motion for a nonsuit should have been denied. The judgment must therefore be reversed, in order that the conflicting claims of the parties to the land in controversy may be fully and finally determined and settled by a decree.

Counsel have on this appeal discussed the question as to the proper construction of the written instrument under which defendants claim an interest in the real property involved in this action. It was upon the theory that this instrument showed an absolute sale of all the timber "standing, lying, and being" on the land at the date thereof, that the learned judge of the court below granted the motion for a nonsuit.

It is proper that we should say, for the guidance of the court on a new trial, that in our judgment this was a correct construction of the instrument. It is true that the timber was sold in contemplation of its removal from the land, and that it was the understanding of all parties that it should be so removed. While there is much apparent conflict in the de-

cisions as to the proper construction of a contract for the sale of standing trees to be removed, it is well settled that such a sale may be absolute, and the agreement to remove within a specified or reasonable time merely a covenant, in which case the timber remains the property of the purchaser, although not removed within the specified time: See 28 Am. & Eng. Ency. of Law, 2d ed., p. 541; *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119. The question in each case is as to what is the contract between the parties.

Here there is absolutely nothing in the terms of the agreement which can be construed as making the removal of the timber a condition precedent to the passing of title, or as causing delay in such removal, beyond the period of ten years from the date of the instrument, or failure to pay the rental reserved or one-half the taxes, to operate as a divesting of the title conveyed.

7 The terms of the instrument literally signify an absolute conveyance of the timber, and there is nothing in the provisions relied upon by plaintiff to impair the force of the plain words of present grant. The provision to the effect that the vendees should have a period of ten years in which to remove the timber that they had purchased must be read in connection with the provision to the effect that if it is not removed within ten years the vendees "will pay a yearly rental to the parties of the first part, of two hundred dollars a year thereafter for the privilege of removing such timber," etc. This provision, together with the provision for the payment by the vendees of one-half of all taxes that may be levied upon the land from the date of the agreement until all of the timber has been removed, both of which are mere covenants in no way affecting the title, must be held to express the agreement of the parties as to the effect of any failure of the vendees to remove the timber within the designated period of ten years.

Much reliance is placed by plaintiff upon certain evidence claimed to be admissible for the purpose of showing that it was the intention of the parties that the vendees should commence to remove the timber within three years from the date of the agreement. At most, this evidence only tended to show that the vendors entered into this agreement relying upon the statement of the vendees that they expected to commence the work of removing the timber within three years. It in no degree affects the contract entered into or assists in

the construction thereof. There is nothing therein that is at all inconsistent with the clear and unambiguous provisions of the contract.

There can be no doubt that at the time of the transfer of the timber, the same was a part of the realty (Civ. Code, secs. 658, 660), nor can there be any doubt that the title to the standing timber could be transferred to and held by one who was not the owner of the land: See *Sears v. Ackerman*, 138 Cal. 583, 72 Pac. 171. Whether, by a conveyance of standing timber to be removed, the timber is in contemplation of law severed from the land and transformed into personal property (see *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119; *Turner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591), or continues^s to be an interest in the realty, it is clear to us that so long as it remains actually affixed to the land a decree quieting plaintiff's title to the real property without reserving or excepting such timber from its operation would cut off all rights of the defendants therein. Defendants are therefore entitled to have their rights in relation to the timber fully reserved from the effect of any decree that may be made.

The judgment and order are reversed and the cause remanded.

Shaw, J., and Van Dyke, J., concurred.

Growing Timber forms part of the realty and can be separated from the rest by grant or reservation: *Emerson v. Shores*, 95 Me. 237, 85 Am. St. Rep. 404. The fact that a deed to timber requires it to be removed within a definite period does not prevent the title thereto from vesting in the grantee: *Mee v. Benedict*, 98 Mich. 260, 39 Am. St. Rep. 543.

Am. St. Rep., Vol. 109—8

GETZ BROS. & CO. v. FEDERAL SALT COMPANY.

[147 Cal. 115, 81 Pac. 416.]

WRITINGS, When to be Construed Together.—Two written agreements between the same parties and the checks given by the one to the other pursuant to such agreements form substantial parts of the same contract, and should be construed together. (p. 116.)

CONTRACTS Based upon Considerations Partly Illegal.—If some of the covenants of an agreement import a base or illegal consideration and the terms of the contract are not severable, it is wholly void. (p. 116.)

TRADE, Contracts in Restraint of and in Violation of the Sherman Anti-trust Act.—A contract by which one of the parties sells to the other all the salt which the latter has on hand and all contracts or options which he may secure within two years, and by which the seller further stipulates that he will, for the period of two years, make no purchases of salt except from his vendee, nor import any to the Pacific Coast, and will discourage all such importation, and that if he violates the contract, such seller will pay five thousand dollars as liquidated damages, is in violation of the statutes of California against the restraint of trade and also of the Sherman anti-trust act, and checks given as part of the consideration for the making of such contract are not enforceable. (p. 117.)

Naphtaly, Freidenrich & Ackerman, for the appellant.

Louis Titus, for the respondent.

116 HENSHAW, J. This is an action upon two checks, each for the sum of five thousand dollars, drawn by the defendant upon the Bank of California, and payable to the order of plaintiff. The checks were drawn December 18, 1901, were presented for and refused payment December 31, 1901. Defendant for answer to the action set up as an affirmative defense that the checks were made and delivered as an integral part of a certain transaction between the parties, evidenced by written contracts. The court found the facts as set up in the answer, found further that the written contracts between the parties were against public policy, in restraint of trade, and in violation of an act of Congress known as the anti-trust or Sherman act, and gave judgment for defendant accordingly. The court's decision in this regard is presented for review upon this appeal.

The written contracts were executed upon the same day and date with the checks and as a part of the same transaction. They recited that the plaintiff owned thirteen hundred and thirty-six tons of factory filled salt, one hundred tons of coarse common salt, and eighty tons of dairy salt, all of

which were on board ship in transit from Liverpool to San Francisco, and that the defendant, Federal Salt Company, desired to purchase the same. Wherefore Getz Brothers & Co. sold all of the salt to the Federal Salt Company, which agreed to pay the original cost price of the salt, including freight, insurance, duty, and all expense of landing the salt in San Francisco, and it agreed in addition thereto to pay to Getz Brothers & Co. the sum of ten thousand dollars in cash, the receipt of which was acknowledged by Getz Brothers & Co. Getz Brothers & Co. then further agreed to assign to the Federal Salt Company all their rights to purchase salt, and all the options which they had, or might thereafter secure within a period of two ¹¹⁷ years, either in England or elsewhere, and they agreed further that any salt which they might then own, or have contracted for, or which they might thereafter purchase within two years, other than such salt as might be purchased from the Federal Salt Company, should be sold by them to the Federal Salt Company at ten per cent below the actual cost. Such was the substance of the first contract. The second contemporaneous agreement declared:

“This agreement made this 18th day of December, 1901, by and between Getz Brothers & Company, a corporation, and Louis Getz, the parties of the first part, and the Federal Salt Company, a corporation, the party of the second part, witnesseth:

“That in consideration of the sum of ten thousand (\$10,000) dollars to the parties of the first part in hand paid, the receipt of which is hereby acknowledged, the parties of the first part and each of them hereby guarantee that they and all persons or firms with or in which they may be interested, will purchase their entire demands for salt from the said party of the second part, at the list prices of said party of the second part for a period of two (2) years from the date of this contract, and they will not purchase any other salt from any other parties, and will not import or cause to be imported, or bring any salt to the Pacific Coast of North America other than such salt as they may purchase from the party of the second part. And said parties of the first part further agree that they will discourage in any possible manner any such shipments or importations of salt by any other parties.

“And whereas it would be extremely difficult from the nature of the case to ascertain the actual damages, in case

the parties of the first part violate this contract, it is hereby agreed between the parties that in case the parties of the first part violate this contract in any particular, that they will pay to the party of the second part the sum of five thousand (\$5,000) dollars as liquidated damages for such violation."

Getz Brothers & Co. were paid in full according to the terms of the contract the original cost price of the salt, including freight, insurance, duty, and all expenses of landing in San Francisco, and this action brought upon the two ¹¹⁸ checks is in fact for the ten thousand dollars stipulated in the agreements to be paid. Unquestionably the checks in suit, together with the written agreements, form substantial parts of one transaction, and are to be construed together: Civ. Code, sec. 1642. A reading of these contracts establishes that by no reasonable intendment can it be said that the ten thousand dollars was to be paid as the purchase price of the salt. To begin with, provision is made for the purchase of the salt at cost, with incidental expenses, and, in the second place, by the very terms of the contract which is above quoted, that ten thousand dollars is made the consideration of the agreement by the plaintiffs to refrain from purchasing salt from any other parties than the defendant, and to refrain from importing or causing to be imported, or in any way bringing any salt to the Pacific Coast of North America, other than such as may be purchased by the defendant. But the agreement does not even stop here. The plaintiffs engaged themselves actively to discourage any such shipments or importations of salt by any other person. And, finally, it may be said, that if, by the extremest liberality it should be held that the ten thousand dollars was in any way or to any extent to be regarded as mere profit to the seller for the cargo of salt sold to defendant, nevertheless it must be plain that it was not wholly nor separately such profit, but that part of it, at least, was a consideration for the other covenants into which plaintiffs entered with defendant. In this view, how much of the ten thousand dollars was mere profit upon the single salt sale, and how much was the consideration for the other covenants, it is clearly impossible to say, and, if it be true that the other covenants imported a base or illegal consideration, the terms of the contract not being severable, it is wholly void: *Prost v. More*, 40 Cal. 347; *Arnot v. Pittston*

Coal Co., 68 N. Y. 558, 23 Am. Rep. 190; Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. Rep. 776, 33 L. ed. 172.

That these covenants are illegal as being in restraint of trade, against the express mandate of the law of this state and of the United States, we entertain no doubt. Section 1673 of our Civil Code is as follows: "Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided ¹¹⁹ by the next two sections, is to that extent void." The only exceptions contemplated by the succeeding sections are to the effect that a vendor who sells the goodwill of his business may agree not to carry on a similar business within a single specified county or city, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein; and that a partner, in anticipation of the dissolution of a partnership, may agree not to carry on a similar business within the city where the partnership business was transacted. Saving for these two classes of agreement, all others which restrain the exercise of a lawful business, trade, or vocation, are void: Santa Clara Mill Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; Vulcan Powder Co. v. Hercules Powder Co., 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581.

The Sherman anti-trust act, by its first section, declares as follows: "Every contract, combination in the form of a trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal": 26 U. S. Stats. at Large, 647. In the contract under consideration it cannot for a moment be denied that there are present the illegal elements forbidden both by our state and our national law. There is not only the direct agreement to refrain from purchasing salt within the state, and to refrain from purchasing it abroad, but there is, moreover, a specific agreement to "discourage in any possible manner any such shipments or importations of salt by any other parties." The supreme court of the United States in construing this act has held, it is true, that while the restraint may be slight (United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 17 Sup. Ct. Rep. 540, 41 L. ed. 1007), it still must be a direct restraint upon commerce. That is to say, it must restrain primarily and not *secondarily or incidentally*: United States v. E. C. Knight Co.,

156 U. S. 1, 15 Sup. Ct. Rep. 249, 39 L. ed. 325. Both of these vicious elements are found in this contract. There is not only an obvious restraint upon trade, but the direct and primary purpose of the contract is to effect such restraint. It may be added that this precise contract has come under the review of the federal court in the case of *United States v. Federal Salt Co.* (No. 13,303, Circuit Court of the United States, ¹²⁰ Ninth Judicial Circuit). Both of the parties to this action were parties to that action, and the circuit court, decreeing the contract to be in violation of the Sherman law, granted its injunction restraining both parties to this action from "further going on, carrying out, maintaining or acting in any way, shape, manner or form" under this contract.

The judgment and order appealed from are therefore affirmed.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

Unlawful Trusts, Monopolies, and combinations are discussed in the monographic note to *Harding v. American Glucose Co.*, 74 Am. St. Rep. 235-273. The true test of the validity of a contract or combination to fix the price and control the supply of a commodity is whether it affords only a fair and just protection to the parties thereto, or whether it is so broad as to interfere with the interests of the public: *Finck v. Schneider Granite Co.*, 187 Mo. 244, 106 Am. St. Rep. 452, and see the recent cases cited in the cross-reference note thereto.

ESTATE OF HARRINGTON.

[147 Cal. 124, 81 Pac. 546.]

ESTOPPEL Against Claim of Widowhood.—A woman may raise an estoppel against the assertion of her own interest and the claim of widowhood as readily as she may estop herself from asserting any other alleged right. (p. 121.)

RES JUDICATA—Judgment, What is Within the Meaning of the Law of.—The decision of an application to a court of probate for the setting aside of a homestead out of the property of a decedent is a final determination of the rights of the parties to that proceeding, and, as *res judicata*, is entitled to the same effect as a final judgment. (p. 122.)

RES JUDICATA—Judgment, When Conclusive of Fact.—Where an issue of fact vital to a controversy has been tried between the parties litigant, and the judgment, depending for its sufficiency upon a finding of fact, has become final, that determination of fact is forever binding in every court between the parties to that litigation and their privies. (p. 122.)

MARRIAGE, When does not Create a Disability.—Where by the laws of the state a marriage contracted by a woman already married is absolutely void, such second marriage does not create any disability against her, nor diminish, as *res judicata*, the effect of an adjudication against her made after the termination of the valid marriage by the death of her husband, and before the second or void marriage had been annulled. (p. 123.)

RES JUDICATA—Judgment Due to Failure to Offer Evidence. The effect of an order denying an application to set aside a homestead out of the property of a decedent, on the ground that the applicant therein is not his widow, is not diminished by proof that such order resulted from the failure of the applicant to offer evidence then available to her. (p. 123.)

RES JUDICATA, Order Due to Failure to Offer in Evidence Laws of Another State.—When a court denied an application to set aside a homestead out of the property of the decedent on the ground that the applicant was not his widow, and its decision was based on an assumption that the laws of another state were the same on the subject at issue as those of the state wherein the decision was made, its effect as *res judicata* cannot be avoided in a subsequent proceeding by proving the laws of such other state and showing that, had they been offered and received in evidence in the first proceeding, the decision must have been different. (pp. 123, 124.)

RES JUDICATA.—An Order Denying an Application to Set Aside a Homestead out of the property of a decedent on the ground that the applicant is not his widow is conclusive against her when she seeks to have part of his estate distributed to her as such widow. (pp. 124, 127.)

M. C. Hassett and Samuel Shortridge, for the appellant.

Heller & Powers, Beverly L. Hodghead and Martin Stevens, for the respondents.

¹²⁵ **HENSHAW, J.** John P. Harrington died testate, and his estate was probated in the city and county of San Francisco. No mention was made in his will of Amelia Harrington, appellant herein. Upon the hearing of the executor's petition for distribution of the estate she appealed and filed her answer to the petition, and prayed that one-half of the residue of the estate be distributed to her as the widow of the deceased. All the devisees mentioned in the will, saving one, appeared and filed opposition to the claim of the appellant as the surviving widow of the deceased. The court made its decree settling the account of the executor and distributed the estate according to the terms of the will, finding against the appellant's alleged right of succession. Amelia Harrington ¹²⁶ moved for a new trial, which was denied, and she appeals from the decree and from the order denying her motion.

Twice before during the progress of the administration of the estate had Amelia Harrington appeared, in the one instance seeking a family allowance from the estate of deceased as his widow (Estate of Harrington, 140 Cal. 294, 98 Am. St. Rep. 51, 73 Pac. 1000); in the other, petitioning the court to set aside to her a homestead from the estate of deceased as his widow: Estate of Harrington, 140 Cal. 244, 74 Pac. 136. In both of these proceedings the devisees under the will, who appear as respondents on this appeal, contested her application, the sole question at issue being her relationship to the deceased and her status as his widow, as appears from the following excerpts from the opinion of this court in the last cited case: "This case comes within a very narrow compass, the only point involved being whether the respondent is the widow of the deceased. The lower court held that she was not, and we think that determination was correct." Again, "Her right to have the court set apart to her as a homestead property of the estate of Harrington can be based only on the fact that she is his widow." The facts touching the relationship of this appellant to the deceased are set forth in the opinion from which quotation has just been made. She had been married to Harrington. After her marriage, and in the belief that Harrington was dead, she married in Michigan one Carley. Subsequently, and upon hearing rumors to the effect that Harrington was still alive, she and Carley voluntarily separated. No annulment of the marriage was had. Upon her former appeal it was contended that as her second marriage to Carley under the laws of the state of Michigan was absolutely void ab initio, her status as the wife of Harrington had never been changed or affected by that void marriage, and that, so remaining his wife, she became upon his death his widow. The laws of Michigan were not offered in evidence in support of this contention, and under well-settled principles of law this court held that in the absence of such proof it would be assumed that the law of Michigan is like that of this state (Estate of Richards, 133 Cal. 526, 65 Pac. 1034), and that such being the condition of the law her second marriage was not void, but voidable merely. Upon the present hearing she offered, ¹²⁷ as additional evidence in support of her claim of widowhood, the laws of Michigan, declaring such a marriage to be not voidable merely, but absolutely void, and the judgment of a court of competent jurisdiction of the state of Michigan formally annulling the second marriage. The respond-

ents introduced in evidence the judgments or decrees of the court denying her right to homestead and family allowance, with the decisions of this court upon appeal therefrom, and contended that the question of her widowhood had been adjudicated against her, and that an estoppel by judgment was therefore raised against this second presentation of her claim. Whether or not the former determination of the court in probate does operate to raise such an estoppel by judgment is the question in this case.

1. Appellant contends that the status of husband and wife was created between herself and John P. Harrington in the state of Michigan, and that from this status neither could be relieved except by death or divorce, that no divorce having been granted they remained husband and wife until Harrington died, that the validity or invalidity of the marriage of appellant to Carley must be determined by the laws of Michigan, and if void under those laws was void everywhere, that it was void under the laws of Michigan, and that the matter of succession being a statutory right, fixed by law, cannot be made to depend upon any act or omission of the widow or other heir claiming an estate. All these grounds can amount to no more than a declaration that if, in law, appellant was in fact the widow of Harrington, no estoppel by conduct, by deed, or by judgment, can be raised against her to prevent her from asserting her claim. We are, however, cited to no authority supporting such a proposition, and in fact it may be safely said that no such authority can be found. So far as appellant is concerned, she may raise an estoppel against the assertion, in her own interest, of the claim of widowhood as readily as she may estop herself from asserting any other legal right. So that the sole question, as we have said, remains, and is, whether the judgment of the court in probate in the homestead proceeding raises an estoppel against her attempted litigation of the same claim of widowhood upon distribution.

Herein appellant first contends that the doctrine of *res* ¹²⁸ *judicata* does not apply to mere orders made on motions in pending proceedings and this is strictly true. But was this a mere order made on motion in a pending proceeding, or was it in its essence a final judgment? A motion is an application for an order or direction of the court not included in a judgment: Code Civ. Proc., sec. 1003. A judgment is the final determination of the rights of the parties in an action or pro-

ceeding: Code Civ. Proc., sec. 577. Section 1716 of the Code of Civil Procedure provides that "All issues of fact joined in probate proceedings must be tried in conformity with the requirements of article 2, chapter 2, of this title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court, as in civil actions." And section 963 of the Code of Civil Procedure declares that an appeal may be taken from a judgment or order "against or in favor of setting apart property or making an allowance for a widow." In her petition for a homestead this appellant put before the court her demand to valuable property of the estate, based upon her claim of widowhood. Issue was joined upon this claim, the proceeding was an adversary contested proceeding, and its outcome "finally determined the rights of the parties in that proceeding." Called by what name one may elect, the determination of the court in that matter was essentially a judgment within the meaning of the definition above given. The legislature itself regarded such a determination as a judgment when, in section 963, *supra*, it provided that an appeal might be taken from such "judgment" against or in favor of setting apart property for the widow.

2. It is next contended that as the decision in the homestead proceeding, finding and declaring that she was not the widow, was upon a question of fact, such decision did not become the law of the case. The rule undoubtedly is, that the decision of a court on appeal, as to a question of fact, does not become the law of the case, for the very obvious reason that upon a retrial of the issues in the same case the facts may be made differently to appear. But where an issue of fact vital to the controversy has been tried between parties litigant, and a judgment depending for its sufficiency upon ¹²⁰ the finding of fact has become final, that determination of fact is forever binding in every court between the parties to that litigation and their privies. Otherwise, as has been repeatedly declared by the courts, there could be no end to litigation. "If a new action could be commenced and a case retried because of the discovery of new facts after the case had been finally disposed of, there would be no end of litigation, and a case be kept in court forever": *Quirk v. Rooney*, 130 Cal. 505, 62 Pac. 825. And again: "If she failed to assert her claim properly, or to present the proper evidence

in the first suit, she will not now be permitted in a second to litigate it. The principles herein stated are elementary": *Bingham v. Kearney*, 136 Cal. 175, 68 Pac. 597. And says *Freeman on Judgments*, fourth edition, section 260: "It is sufficient that the status of the action was such that parties might have had their lawsuit disposed of according to their respective rights, if they had presented all their evidence and the court had properly understood the facts and correctly applied the law. But if either party fails to present all his proofs, or improperly manages his case, or afterward discovers additional evidence in his behalf, or if the court finds contrary to the evidence or misapplies the law—in all of these cases the judgment, until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled the controversy in accordance with the principles of abstract justice."

3. It is contended that to be such a judgment as to raise an estoppel, the judgment must have been upon the merits, and that the judgment in the homestead proceedings was not upon the merits because of the temporary disability of this appellant at that time. This temporary disability, it is asserted, lay in the fact that at the time of that hearing the court in Michigan had not entered its decree annulling the marriage. But, in truth, she was under no disability. She failed merely in the production and introduction of evidence which was as available to her at that time as it was upon the last hearing, the evidence to which we refer being the laws of the state of Michigan. Had she supported her contention that her marriage to Carley was absolutely void ab initio, by proof of the laws of Michigan, it would have been sufficient for her case, and she would of necessity have been adjudged the widow ¹³⁰ of Harrington, as was the petitioner in *Estate of Newman*, 124 Cal. 692, 57 Pac. 686. In her brief appellant states that "it was proved by the laws of Michigan, set forth in the agreed statement of facts admitted in evidence, that under those laws the pretended marriage entered into between James Carley and Amelia Harrington, in the year 1886, was absolutely void without any decree of divorce or legal process to so declare it." If that be so, then her misfortune was not that she was laboring under any disability at the time of the hearing in the homestead proceeding, but it lay simply in her failure to introduce and avail herself of evidence at hand in proof of her claim. But, as is said in *Bingham v.*

Kearney, 136 Cal. 135, 68 Pac. 597: "If she failed to assert her claim properly or to present the proper evidence in the first suit, she will not now be permitted in a second to litigate it."

4. It thus having been made to appear that the decree of the court refusing to set aside a homestead is in its essence a judgment, and that the issue, and indeed the sole matter in controversy in the proceeding, was the status of this appellant as the widow of Harrington, deceased, and it further having been made to appear that this issue was directly involved, fully litigated, and specifically decided, against the contention of the appellant, and, finally it appearing that appellant, in the homestead proceedings, was not under any disability, and that her petition was not denied for a mere failure of proof in the nature of nonsuit, there is left for consideration but one further contention of the appellant, which is, that, notwithstanding the existence of all these facts, still the judgment in the homestead proceeding is not res judicata in proceedings upon distribution. Appellant here relies upon the decision of this court in Estate of Nolan, 145 Cal. 559, 79 Pac. 428, and upon certain adjudications of sister states, and the consequences to her of an adverse adjudication prompts a review of these cases.

In Estate of Nolan, Mary Nolan had filed a petition for letters of administration upon the estate, alleging that she was the widow of the deceased. Letters of administration were issued to her, and she acted as such administratrix. No appeal was taken from this decree. Subsequently she obtained an order granting her a family allowance as widow, ¹³¹ and no appeal was taken from such order. Thereafter, on petition for partial distribution of the estate and after a hearing by all parties and after a contest for the first time raised upon the question of her status as widow, the court found that she was not, and never had been, the widow of the deceased, and distributed the estate to the heirs at law. The pretended widow acquiesced in this decision and never appealed from it. Subsequently, in the settlement of her account objections were raised to the payment of some six hundred and twenty-five dollars as family allowance under the order which long before had become final. This court decided merely that, owing to the finality of the order of family allowance, her rights under it were fixed, and that the subsequent finding and decree of the court upon proceedings for

distribution to the effect that she was not his widow could not be taken advantage of to defeat her rights under a judgment which had become conclusive in her favor. It is, however, here to be noted that in the granting of letters of administration and in the making of the family allowance, the question of her widowhood was never controverted. It was not an issue in either proceeding. In neither of those two adjudications had there been a hearing and determination upon the merits, and doubtless for this reason Mary Nolan did not plead either decree in bar of the proceedings on distribution. This case, however, must be construed with that of *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747. There this court, in Bank, had under consideration the effect of an adjudication under an application for letters of administration where the right of the petitioner was contested solely upon the issue as to whether or not she was the child of the deceased, and reviewing at length the rule and doctrine of *res judicata*, particularly as applied to determination of heirship in probate proceedings, we declared that the judgment of the court upon such hearing, if not reversed upon appeal, is a determination for all time and in all courts, so far as the parties to the proceeding are concerned. With particularity it was pointed out that so to be an adjudication upon heirship or right of succession the matter must turn upon that contested issue, and this fact must be made to appear; but when the right does so turn, and is so made to appear by the grant of administration, says Greenleaf (*Greenleaf on Evidence*, sec. 550): "The sentence ¹³² or decree upon that question is conclusive everywhere in a suit between the same parties for distribution": See, also, *Garwood v. Garwood*, 29 Cal. 514.

Of the adjudications from sister states which appellant cites as being directly in point, the first is *Bradley v. Johnson*, 49 Ga. 412. The facts in that case were, that letters of administration upon the estate of one Bradley had been issued to Emma Bradley, claiming to be his widow. An appeal was taken to the superior court and a trial by jury had, the jury rendering the following verdict: "We, the jury, find that John Johnson, applicant, is entitled to administration on the estate of Thaddeus W. Bradley, deceased." Judgment was entered on this verdict. Subsequently the alleged widow petitioned for an accounting and distribution of Bradley's estate. A trial by jury was had and the administrator interposed, by way of estoppel to the claim of the alleged widow,

the judgment in the former proceeding. The appellate court declared, in substance, that it did not appear that there had been a trial of the question of her widowhood upon its merits, and that it was decided at all could be gathered only by inference, saying: "The judgment does not decide anything more, and does not purport to decide anything more, than the fact that Johnson was entitled to the administration on Bradley's estate. That judgment is not an adjudication directly upon the point that the complainant is not the widow of Bradley, and does not purport to decide that question." Contrast this with the language of this court in *Estate of Harrington*, 140 Cal. 244, 74 Pac. 136: "This case comes within a very narrow compass, the only point involved being whether the respondent is the widow of the deceased. The lower court held that she was not, and we think that determination was correct."

In *Oldham v. McIver*, 49 Tex. 556, a mulatto woman claimed to be the widow of William Oldham, a white man, the laws of the state, civil and penal, prohibiting such marriages. The alleged widow, upon application, had caused to be set apart to her a homestead and the exempted property. The administrator sought to set aside these judgments under proceedings in certiorari. While this matter was thus pending, an action was tried touching the right of possession of the homestead property between the widow and certain outside ¹³³ claimants, renters of the homestead property, who were in possession thereof. This case went to judgment, the decision being that the renters should retain the homestead and other exempt property during the year 1869, holding it as tenants of Phillis (the alleged widow), and her children, and at the end of the year turn it over to them and pay to them its rental value for the year. "This rental value," says the supreme court of Georgia, "was the only matter submitted to or found in the trial of the case." The proceeding in certiorari from the homestead award, coming on to be heard, this judgment was pleaded as a final adjudication of her status. The supreme court of Georgia fully recognized the binding force which pertained to a decree awarding a homestead, where the question of the widowhood of the claimant was directly involved and adjudicated, using this language: "Under the law as it existed the county court was authorized to set apart to the widow and children of the deceased, if he had such, the homestead and exempted prop-

erty. This gave that court the right to ascertain the fact that she was his lawful wife, and that certain of her children were his heirs, and to make the order setting apart the property. That was an adjudication of that fact by a competent court having jurisdiction in the matter as pertaining to the estate of William Oldham, then being administered in said court. That order conclusively established that fact in any other suit or proceeding in which it was or might be involved or be put in issue, until set aside by appeal or certiorari directly." The court then proceeds to show, first, that in the action between Phillis and the renters in possession of the homestead, Phillis obtained judgment—not by a trial upon the question of the merits of her widowhood, but simply by pleading that her widowhood had been adjudicated by the order of the county court, and "upon that alone," says the court, "and not upon the trial or determination of that fact." Therefore, there was not only no adjudication upon the merits, but the very matter of her widowhood was still sub judice in the certiorari proceedings—a direct attack upon the homestead judgment—which proceedings in certiorari resulted in the defeat of Phillis' claim. It will be observed that this Texas case, so far from being a recognition of appellant's contention, distinctly declares the law as to the ¹²⁴ effect of a judgment in homestead proceedings to be such as we here hold it to be.

The last case is that of Bordwell v. Saginaw Circuit Judge, 119 Mich. 421, 48 N. W. 468. The alleged widow applied to the probate court asking for an allowance for her support. The heirs at law contested her claim of widowhood. The probate judge determined she was the widow and made her an allowance. The heirs appealed to the circuit court. The relator moved the circuit court to dismiss the appeal upon the ground that the order was not appealable. Her motion was denied. The proceeding before the supreme court of Michigan was to review the action of the circuit court, or, in other words, it was to determine the single question whether or not, under the laws of Michigan, an appeal lay from the order granting a family allowance to an alleged widow, when the question of her status was disputed. The supreme court of Michigan held that its laws permitted no such appeal. This was the beginning and the end of its determination, but, probably because of the fact that so grave a question as the status of widowhood should not be finally deter-

mined for all time, and in all proceedings, without the right of appeal which is so generally accorded in other states, the supreme court of Michigan, as obiter purely, and without discussion or citation of authority declared that the determination of the probate judge, "that relator is the widow of Mr. Bordwell is conclusive only so far as it relates to the allowances made to her pending the litigation, and is not res judicata as to her right as widow to the distributive share of the estate to which the widow is entitled." Under the different laws of this state, where an adjudication of a homestead is a judgment from which an appeal may be taken, this dictum of the supreme court of Michigan, for reasons already given, cannot be regarded as persuasive.

The decree and order appealed from are therefore affirmed.

McFarland, J., and Lorigan, J., concurred.

Hearing in Bank denied.

A Judgment, though erroneous, becomes conclusive and a bar as res judicata if not appealed from: *Lamb v. Wahlenmaier*, 144 Cal. 91, 103 Am. St. Rep. 66; *Moore v. Snowball*, 98 Tex. 16, 107 Am. St. Rep. 596. The rule of res judicata extends to every proposition assumed or decided by a court, upon which the final conclusion is based, and this includes the status of a person, where that is the subject upon which the judgment acts: *State v. McDonald*, 108 Wis. 8, 81 Am. St. Rep. 878.

COONAN v. LOEWENTHAL

[147 Cal. 218, 81 Pac. 527.]

JUDGMENT, Setoff of One Against Another on Motion.—A court has jurisdiction of a motion to set off one judgment against another. The power to proceed by motion rests upon the general jurisdiction which courts possess over their judgments and their suitors. (p. 131.)

SETOFF of One Judgment Against Another, Presumption in Support of.—Where a court directs, as against the assignee of a judgment, that there be set off against it a judgment in favor of the judgment debtor, it will be presumed on appeal that the court found that the assignee took his assignment with notice of the right to such setoff. (p. 132.)

THE ASSIGNMENT OF A JUDGMENT is Subject to the right of the judgment debtor to offset against the judgment assignee a judgment in the former's favor, of which the assignee had notice prior to the assignment. (p. 132.)

THE ASSIGNMENT OF A JUDGMENT is Subject to the Right of Setoff in favor of the judgment debtor, though at the time of the assignment he had not paid the claims out of which his right to setoff arose, as where, previous to the assignment, he was liable as a surety of the judgment creditor and subsequently paid the indebtedness for which he was such surety. (p. 133.)

JUDGMENT, Setoff of One Against Another—Rule in Equity. When a judgment creditor is insolvent, equity will allow a setoff against his judgment of a judgment in favor of his judgment debtor when a court of law would not, and in cases where, though the right to setoff had not accrued at the time of the assignment, yet the liability then existed under which the right of setoff against the insolvent debtor subsequently accrued. (p. 133.)

JUDGMENT—Right of Setoff Based on Secured Claim.—The assignment of a judgment is subject to a right of setoff in favor of the judgment debtor, though at the time of the assignment the demand on which the offset is claimed was secured by a mortgage which, after the assignment, is foreclosed, the property sold, and a judgment for the deficiency docketed. (p. 135.)

J. H. G. Weaver and Henry L. Ford, for the appellant.

J. W. Turner, for the respondent.

²¹⁹ **LORIGAN, J.** This is an appeal taken by Mary Coonan from an order setting off certain judgments against each other pro tanto.

The validity of the order is presented under this state of facts: On May 31, 1896, plaintiff, J. F. Coonan, brought an action against Loewenthal to recover something over seven thousand dollars, alleged to be due plaintiff from defendant for professional services rendered by plaintiff as attorney at law, and on August 27, 1897, plaintiff obtained a judgment for five thousand dollars and costs. This judgment plaintiff, on the same day of its entry, assigned to his wife, the appellant, Mary Coonan, the defendant having actual notice of the assignment to her at the time it was made. At the date of such assignment plaintiff Coonan was insolvent, and at the time of the making of the order herein appealed from still remained so.

The defendant appealed from the judgment of August 27, 1897, and on July 18, 1900, it was affirmed by this court. So much as to the judgment recovered by plaintiff against defendant.

Now, as to the judgment recovered by defendant against plaintiff. It appears that between September 1, 1892, and March 11, 1895, Loewenthal became surety for J. F. Coonan upon several promissory notes, payable within one year after date, the proceeds of which were received by Coonan for his

individual use and benefit, and to secure Loewenthal against loss by reason of his said suretyship, and to insure further indorsements, said Coonan executed and delivered to him four mortgages, ranging in date from March 8, 1890, to May 10, 1894, which were duly recorded.

On August 28, 1897, the day following the judgment rendered against him in favor of Coonan—the said notes being due and said Coonan having failed to pay any of them, after demand made on him, and being insolvent—said Loewenthal paid and took up all said several notes, and brought an action against Coonan to foreclose the several mortgages given as ²²⁰ security to protect him against loss from these payments. A decree of foreclosure and sale in said action was duly entered on January 20, 1899, for eight thousand seven hundred and seventy-two dollars and sixty-five cents in favor of Loewenthal, and the mortgaged property having been sold under an order of sale, a deficiency judgment in his favor was docketed against said J. F. Coonan on June 26, 1899, for the sum of six thousand five hundred and ninety-nine dollars and twenty cents. An appeal was taken from the decree of foreclosure and the judgment modified and affirmed by this court February 20, 1902.

Previous thereto, and on August 21, 1900, Loewenthal served upon said J. F. Coonan and Mary Coonan the appellant here, notice of an application to be made to the superior court of Humboldt county, in which both said judgments were rendered, for an order that the judgment for five thousand dollars entered in the suit of Coonan v. Loewenthal, in favor of Coonan, on August 27, 1897, be set off pro tanto against the deficiency judgment entered in the suit of Loewenthal against Coonan, in favor of Loewenthal, on June 26, 1899, for six thousand five hundred and ninety-nine dollars and twenty cents. But it appearing that, by reason of the appeal taken in the case of Loewenthal against Coonan, the judgment in that case had not become final, the superior court, instead of acting upon the motion, properly ordered it to be retained until such judgment should become final.

Thereafter, such judgment becoming final, said motion was renewed. Upon the hearing thereof Mary Coonan, the appellant, objected to the jurisdiction of the court to entertain the motion, which was overruled, and upon the merits, in addition to other evidence, affidavits were presented upon both sides, raising an issue as to whether the appellant was a purchaser

and assignee of the judgment recovered by her husband against Loewenthal for a valuable consideration, and without notice of any right of setoff, or other defense, existing in favor of Loewenthal at the time of the assignment.

The court upon the showing subsequently entered an order in favor of Loewenthal, directing that the amount of the judgment in Coonan v. Loewenthal, calculated to date, be credited upon the deficiency judgment docketed in Loewenthal against Coonan, and that the former judgment be satisfied of record.

It is from this order that the assignee, Mary Coonan, appeals.

It is insisted here, as it was on the hearing below, that the ²²¹ superior court had no jurisdiction to entertain the application to set off these judgments against each other on motion; that a separate action should have been instituted against appellant for that purpose.

But the authorities are against appellant on this point. In at least two decisions of this court the jurisdiction of the lower court to proceed on motion to offset judgments has been expressly sustained, and the practice which has been followed here is there sanctioned and approved. The power to proceed by motion rests upon the general jurisdiction which courts possess over their judgments and their suitors: *Porter v. Liscom*, 22 Cal. 430, 83 Am. Dec. 76; *Haskins v. Jordan*, 123 Cal. 160, 55 Pac. 786.

Counsel for appellant make their further points on this appeal on the assumption that appellant was a purchaser for value of the judgment in favor of her husband, and took his assignment without notice of respondent's alleged right of setoff. But whether she was such purchaser and took without notice was an issue in the lower court, to which evidence was addressed. The affidavit of J. F. Coonan, which furnishes the only evidence as to the consideration for the assignment, stated that it was made in payment of a pre-existing indebtedness consisting of two sums of money aggregating some two thousand dollars which he had borrowed from the appellant in the years 1883 and 1893. It does not appear that this indebtedness was evidenced by any note, or that any demand for payment was ever made, and it will be observed that it was outlawed many times over when the assignment was given. These facts, when taken into consideration with other circumstances surrounding the transaction, might well raise a question as to whether there ever was, in fact, an in-

individual use and benefit, and to secure Loewenthal against loss by reason of his said suretyship, and to insure further indorsements, said Coonan executed and delivered to him four mortgages, ranging in date from March 8, 1890, to May 10, 1894, which were duly recorded.

On August 28, 1897, the day following the judgment rendered against him in favor of Coonan—the said notes being due and said Coonan having failed to pay any of them, after demand made on him, and being insolvent—said Loewenthal paid and took up all said several notes, and brought an action against Coonan to foreclose the several mortgages given as ²²⁰ security to protect him against loss from these payments. A decree of foreclosure and sale in said action was duly entered on January 20, 1899, for eight thousand seven hundred and seventy-two dollars and sixty-five cents in favor of Loewenthal, and the mortgaged property having been sold under an order of sale, a deficiency judgment in his favor was docketed against said J. F. Coonan on June 26, 1899, for the sum of six thousand five hundred and ninety-nine dollars and twenty cents. An appeal was taken from the decree of foreclosure and the judgment modified and affirmed by this court February 20, 1902.

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debtedness, as such, existing between the appellant and her husband, sufficient to support the assignment and defeat the right of respondent, as a creditor of J. F. Coonan, to a setoff. But without further discussing this matter of consideration for the assignment, there was, as we say, also an issue as to whether the appellant did not take the assignment with notice. Upon this issue, while it is contended by respondent that the evidence was, in legal effect, one way, and in support of his claim that she took with such notice, it was at least conflicting, and in support of the order of the lower court directing ²²² the setoff, it must be assumed that if the court did not find that appellant was not a purchaser for value, it at least found she took the assignment with notice of defendant's right of setoff. In order that appellant might be protected under the assignment against respondent's claim, it was at least necessary that she be both a purchaser for value and without notice, and as the evidence warranted the court in finding against her at least upon the latter point, it must be presumed, in support of the order directing the setoff, that it did so. This being true, her assignment did not affect the right of respondent to insist upon a setoff against the judgment obtained against him by the assignor, J. F. Coonan: *Porter v. Liscom*, 22 Cal. 430, 83 Am. Dec. 76.

It is, it is true, insisted by respondent that even if appellant were a purchaser for value and in good faith, nevertheless she took the assignment burdened with the right of respondent to assert his claim of setoff. As, however, it must be assumed in support of the order that she at least took with notice, we are not called upon to discuss a proposition which is not necessarily involved in the consideration of the appeal, or essential to its disposition.

As, then, the effect of the order of the lower court was to find that appellant took with notice of respondent's rights and in subordination to them, further consideration of this appeal would be unnecessary if it were not for the claim of appellant that at the time of the assignment to her there existed no right of setoff in favor of respondent. In this regard it is insisted that no such right existed because at the time of the assignment the respondent had not actually paid the money due upon the notes for which he had become the surety of J. F. Coonan, and, further, because respondent was protected in his suretyship by the mortgages given him by J. F. Coonan, and no personal liability existed between them,

or could exist until, by foreclosure of said mortgages, it should be ascertained whether the property mortgaged was sufficient security for the amount involved.

We do not think this position of appellant is maintainable. The fact that Loewenthal had not actually paid the notes at the time of the assignment to appellant is not controlling.

While Loewenthal's demand against Coonan had not accrued ²²³ because the notes had not been actually paid, still the contracts upon which Loewenthal's liability rested for such payment were then in existence. The notes upon which he was surety were overdue, unpaid by Coonan, and the latter was insolvent.

Under these circumstances, whatever the rule at law may be, in equity the right of setoff is recognized as existing. The insolvency of a debtor is one of the principal grounds upon which the intervention of a court of equity to grant an equitable setoff rests, and when such insolvency exists a court of equity will allow the setoff notwithstanding the assignment, when a court of law would not, and in cases where, though the right to a setoff had not actually accrued at the time of the assignment, yet a liability then existed under which a right of setoff against an insolvent debtor subsequently accrues: *Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042; *Warren v. Whittaker*, 6 Mich. 136, 72 Am. Dec. 65; *Nashville Trust Co. v. Bank*, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710; *Wood v. Steele*, 65 Ala. 439; *Krause v. Beitel*, 3 Rawle, 199, 23 Am. Dec. 116; *Central A. Co. v. Buchanan*, 33 C. C. A. 598, 90 Fed. 461; *Ellis v. Kerr* (Tex. Civ. App.), 23 S. W. 1050; *North Chicago Mill Co. v. St. Louis Ore etc. Co.*, 152 U. S. 596, 14 Sup. Ct. Rep. 710, 38 L. ed. 656; *Mattingly v. Sutton*, 19 W. Va. 19.

We make no quotations from these authorities because in the case of *St. Louis Nat. Bank v. Gay*, 101 Cal. 290, 35 Pac. 876, the doctrine which they support is in principle sustained—that the existence at the time of the assignment of the liability to pay, upon the part of the surety, was sufficient to sustain his right to a setoff, notwithstanding the assignment, where payments were made subsequent thereto by virtue of that liability, and an unsatisfied demand for reimbursement existed in his favor when his right of setoff was sought to be enforced.

It is there decided that the maker of non-negotiable notes which had been assigned by the payee to a third party might

set off against them the note of the payee which he had purchased before the date of the assignment, and that it was of no moment that the note sought to be set off was not due when the assignment was taken, if it was due at the commencement of the action in which it was asserted as a setoff.

²²⁴ The proposition involved in that case, as in the case at bar, was whether the assignee took subject to a right of setoff, and it was there determined that he did, and that the fact relied on—that the indebtedness was not due when the assignment was made—was of no importance. In that case the thing itself which fixed the liability of the plaintiff therein—the note, a chose in action—was existing at the time of the assignment, and it was sufficient to entitle it to be enforced as a setoff against the assignee that it was due when the action in which it was asserted as a setoff was commenced, although not due at the date of the assignment.

In the case at bar the liability of Loewenthal upon his contract of suretyship for Coonan on the notes was existing at the time the assignment to appellant was made, and as he subsequently paid the notes under it, his claim against Coonan had fully accrued at the time he sought to have set off pro tanto the judgment in *Coonan v. Loewenthal* against the deficiency judgment which he had obtained against Coonan, and which represented Coonan's indebtedness to him under the liability existing at the date of the assignment.

We are satisfied that in principle the doctrine announced in the case referred to should be applied in the case at bar. But the natural equities in the present case also call for the application of that rule. The appellant took his assignment of the judgment with knowledge that Loewenthal was surety for her husband upon these notes. His liability as surety was an existing one when the assignment was taken by her, and the insolvency of her husband at that time and prior thereto made it as certain that Loewenthal, as surety, would have to pay the indebtedness represented by the notes, as it was certain therefrom that her husband could not do so.

By reason of the insolvency of Coonan his liability to his surety, Loewenthal, became as certain and definite as if payment of the notes had actually been made by the latter; and as Coonan at the time he obtained the judgment against Loewenthal was insolvent, the latter, by reason of the fact that he would have certainly to pay as surety the indebtedness of Coonan, was entitled to retain any money due from him

to Coonan, as indemnity against that liability, and he could not be deprived of that right by Coonan's assignment of the judgment, the enforcement of which by the assignee would ²²⁵ deprive him of the indemnity fund. This right of Loewenthal to retain, as an indemnity fund, the money due Coonan under his judgment, sprung from the fact of the insolvency of Coonan at the time of the rendition of the judgment in his favor, and at the time the assignment was made and existed by virtue of the liability of Loewenthal as surety for him, and not upon whether actual payment of the notes for which he was such surety had been made by Loewenthal or not.

And this right could not be affected by the assignment of appellant. If it could, then a surety, under such circumstances, would be entirely without remedy, when it is obvious that the plainest principles of justice are in his favor. Coonan himself, being insolvent, could not have enforced his judgment against Loewenthal in face of the liability of the latter as his surety on these notes, existing when such judgment was obtained, and appellant, as assignee, could stand in no better position than her assignor. In harmony with the rule as declared in the authorities we have cited, and with the principle announced in *St. Louis Nat. Bank v. Gay*, 101 Cal. 290, 35 Pac. 876, we are satisfied that the facts in the case at bar show that the right of setoff existed in favor of Loewenthal, under his contract of suretyship, when the assignment of the judgment in favor of Coonan was made by him to appellant; that if the simple fact of the existence of Loewenthal's liability as a surety, at the time of the judgment obtained by Coonan, had not secured that right to him notwithstanding he had not then paid the notes, still the existence of that liability, the relationship between the parties—principal and surety—the fact that Coonan was insolvent when the judgment was obtained by him and when assigned afforded sufficient ground to warrant the lower court in holding that an equitable right of setoff against the judgment obtained by Coonan existed at the time it was obtained, and was not affected by that assignment. This equitable right of setoff existing between the parties at the time of the rendition of the judgment in favor of Coonan clung to that judgment, and the assignee took it subject thereto.

Neither did the mortgages given by Coonan to indemnify Loewenthal affect this general right of equitable setoff.

The only effect of the mortgages was to make it uncertain ²²⁶ how much of a claim Loewenthal would have against Coonan, after the application of the securities toward canceling the indebtedness which would be represented through payment of these notes by Loewenthal under his general liability as surety. This could only be definitely ascertained after the security represented by the mortgages had been exhausted toward such payment. Loewenthal, having paid the notes upon which he was surety, foreclosed the mortgages and applied the proceeds to the liquidation of his claim against Coonan as far as they would go, leaving a deficiency judgment in his favor. At the time the motion to set off was made, and when it was granted, the mortgage security having been exhausted, the amount of setoff which Loewenthal was entitled to claim against the Coonan judgment had been determined by the deficiency judgment in his favor, and the only question before the court then was the right to set off judgment against judgment.

There is nothing in the case of *McKean v German-American Sav. Bank*, 118 Cal. 334, 50 Pac. 656, conflicting with these views. That case involved the right of the holder of a debt secured by mortgage to apply in reduction or cancellation of the debt a claim due by the holder to the debtor. It was held that this could not be done. But, in the case at bar, there was no attempt to set off a judgment against the mortgage indebtedness, but to set off a deficiency judgment after the mortgage had been foreclosed and the deficiency ascertained and docketed at the time the motion to set off was made. Nor did the existence of this security at the time of the assignment of the Coonan judgment to appellant deprive Loewenthal of the right to an equitable setoff by reason of his general liability as surety. The question of an equitable setoff was not involved in the case relied on by appellant. In fact, there was no reason in that case for the invocation of that doctrine. In the case at bar, however, there is. The doctrine of equitable setoff is what the respondent Loewenthal relies on, and the circumstances in this case entitle him to assert it. Here, at the time Coonan obtained his judgment, Loewenthal, was liable as his surety in a large amount; the relation of principal and surety existed between the parties; the mortgage was given as indemnity and was greatly inadequate and insufficient security for that purpose, and at the time of the ²²⁷ recovery of the judgment and its assignment Coonan was

insolvent. These facts, none of which appeared in the case relied on, differentiate it from this case, and furnish equitable reasons here for holding that at the time of the assignment of the judgment by Coonan, an equitable right to setoff existed in favor of Loewenthal by virtue of his liability as surety of Coonan at that time on the notes, and as the amount of his setoff against the Coonan judgment was certain and determined by the deficiency judgment in his favor at the time of his motion to set off the former pro tanto against the latter, the court properly ordered that it should be done.

The order appealed from is affirmed.

McFarland, J., and Henshaw, J., concurred.

OF THE SETTING OFF OF ONE JUDGMENT AGAINST ANOTHER.

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I. Of the Jurisdiction to Order.

a. Courts of Equity.—There can be no doubt of the jurisdiction of courts of equity, unless indeed on the ground that the remedy

at law is adequate, to compel the setoff of one judgment against another in every case where such setoff is equitable. In one case, at least, a court refused to proceed at law on the ground that the rights of the parties might be too complicated to admit of being adjusted except in equity: *Story v. Patten*, 3 Wend. 335. Doubtless this, where it exists, may be a sufficient reason for going into equity, but the facts disclosed in the case cited did not appear to warrant the timidity of the court. In truth the question, when it is proper for equity to interpose for the purpose of setting off one judgment against another, has not been adequately considered. It has been assumed in many cases that equitable interposition was proper because of the insolvency of one of the parties (*Goldsmith v. Stetson*, 39 Ala. 183; *Merrill v. Souther*, 6 Dana, 305), or because one of them had assigned his judgment, or because of some apparent, though not real, want of mutuality in the parties to the two judgments, or because the judgments were rendered in different courts, and for various other reasons, none of which, as we understand the law, would have prevented the granting of complete and adequate relief at law: *Russell v. Conway*, 11 Cal. 93; *Hobbs v. Duff*, 23 Cal. 596; *Webster v. McDaniel*, 2 Del. Ch. 297; *Mitchell v. Stewart*, 4 J. J. Marsh. 551; *Buckmaster v. Grundy*, 3 Gilm. (8 Ill.) 626; *Brown v. Warren*, 43 N. H. 430. It has also been intimated that the jurisdiction of courts of equity in this respect cannot be diminished by any statutory enactment whereby the remedy at law has been recognized and perhaps made more efficient: *Whitehead v. Jessup*, 7 Colo. App. 460, 43 Pac. 1042. Probably, in the face of these decisions, it is too late to say that equity will deny relief on the ground that the remedy at law is entirely adequate and free from embarrassment, but such we think is the purport of *Zinn v. Dawson*, 47 W. Va. 45, 81 Am. St. Rep. 772, 34 S. E. 784, and the reasoning of the court seems to us unanswerable, unless it be true, as several of the decisions assert, that the right to relief at law is a matter of favor which may be denied, leaving the applicant without any means of redress in courts of law. In an early case it was said: "The chancellor cannot set off one judgment against another unless there be a connection between the transactions on which the judgments were founded, or unless by nonresidence or insolvency the judgment prayed to be set off cannot be enforced by legal means": *Allnut v. Winn*, 3 J. J. Marsh. 304. What was meant by this laconic judicial utterance we may be pardoned for not clearly understanding. If it was intended to affirm that setoff would not be enforced unless there was something in the character of the causes of action on which the two judgments were founded that one of such causes might, before judgment, have been pleaded as a setoff to the other, such view of the law is not entertained at present; and if, on the other hand, it meant that insolvency alone was sufficient ground to support a resort to equity, it is at variance

with *Zinn v. Dawson*, 47 W. Va. 45, 81 Am. St. Rep. 772, 34 S. E. 784.

b. **Courts of Law.**—Perhaps a case may be imagined in which the facts may be so complicated and peculiar that relief may be had in equity only, but generally the relief at law is ample and extends to every ground of action on which relief could be sought with success in equity: *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786; *Simpson v. Houston*, 14 Tex. 476. Hence, it was held, after an application to a court of law by motion had been made and denied, that the decision of that court must be accepted as conclusive and that equity would not reinvestigate the matter: *Simpson v. Hart*, 1 Johns. Ch. 91. On appeal, however, this decision was reversed by a divided court, chiefly on the ground that a party proceeding by motion was not entitled to relief as a matter of right, but only by favor of the court, and that he hence retained, if unsuccessful at law, his remedy in equity, where his rights were unquestionably capable of vindication, even though for that purpose it was necessary to resort to some appellate tribunal: *Simson v. Hart*, 14 Johns. Ch. 63. Many statutes have been enacted purporting to confer upon courts of law the right to set off one judgment against another, but they must be regarded rather as a continuation of the common law upon the subject than new enactments, for it is beyond dispute that this jurisdiction upon the part of courts of law has always been recognized as inherent and not dependent on statutory creation or recognition: *Coonan v. Loewenthal*, 147 Cal. 218, ante, p. 128, 81 Pac. 527; *Collins v. Campbell*, 97 Me. 23, 53 Atl. 807; *Temple v. Scott*, 3 Minn. 419; *Chandler v. Drew*, 6 N. H. 469, 26 Am. Dec. 704; *Wright v. Cobleigh*, 23 N. H. 32; *Simpson v. Hart*, 1 Johns. Ch. 91; *Appeal of Coates*, 7 Watts & S. 99; *Duncan v. Bloomstock*, 2 McCord, 318, 13 Am. Dec. 728; *Simmons v. Reid*, 31 S. C. 389, 17 Am. St. Rep. 36, 9 S. E. 1058; *Simpson v. Huston*, 14 Tex. 476; *Dutton v. Mason*, 21 Tex. Civ. App. 392, 52 S. W. 651. Possibly these statutes may be regarded, however, as so far modifying the pre-existing law upon the subject as to give the applicant an absolute right to relief in the cases falling within them and thereby abrogating the rule sometimes maintained, that the action of a court of law was a mere matter of favor.

II. Form of the Proceedings.

Where the application for a setoff is to a court of equity, it is, of course, by bill filed in such court and such proceedings and decree thereunder as conform to the practice of the court and are applicable to the circumstances of the particular case and the relief desired. If the proceeding is at law, it is by motion made by the applicant in that court in which the judgment against him was rendered. The form of the motion or of the moving papers need not be here specially considered. It must necessarily conform to the practice of the court, and the papers must be served in the manner required by its rules or by statute, on all the parties whose

rights are sought to be affected. If both judgments were in the same court, no question could arise respecting the court in which the motion should be made nor of its power to act: *Palmateer v. Meredith*, 4 J. J. Marsh. 74; *Bartlett v. Pearson*, 29 Me. 9; *New Haven Copper Co. v. Brown*, 46 Me. 418. But where they are of different courts, it is essential that the proceedings be so conducted as to avoid any conflict of jurisdiction and at the same time secure the relief desired. For that purpose the applicant must move in the court against whose judgment he seeks relief, which court may direct that its judgment be satisfied to the extent of the judgment of the other court, and, as a condition of such relief, may require the moving party to satisfy his judgment in the other court either entirely or to the extent of the judgment against him in the court where his motion is made: *Porter v. Liscom*, 22 Cal. 430, 83 Am. Dec. 76; *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786; *Irvine v. Meers*, 6 Minn. 562; *Cooke v. Smith*, 7 Hill, 186; *Wright v. Cobleigh*, 23 N. H. 32; *Scholle v. Pinto*, 9 N. Mex. 393, 57 Pac. 335; *Taylor v. Williams*, 14 Wis. 155; *Welsher v. Libby*, 107 Wis. 47, 82 N. W. 693.

III. The Discretion of the Court.

The action of the court on the application to set off one judgment against another is spoken of in many of the cases as being discretionary. Here, as in many other instances of the use of this word, doubt arises as to what is meant, or, in other words, whether the discretion is an arbitrary one to be exercised by the court or judge according to his own notions of law or equity and free of all supervisory control, or is, on the other hand, a judicial discretion to be exercised in accordance with ascertained legal principles and subject to control or reversal by superior or appellate courts. Certainly, at one time it was thought that in equity only had a party the right to have one judgment set off against another, and though the jurisdiction of the court to act was conceded, it was said that, "Suitors may ask the interference of courts of law, in effecting a setoff, not *ex debito justitiae*, but *ex gratia curiae*." Hence, it was affirmed that the action of a court of law did not as *res judicata* control a subsequent application to a court of equity: *Simson v. Hart*, 14 Johns. Ch. 63; and finally, that the action of the court of law was discretionary in the sense that it would not be reviewed on appeal: *Scott v. Rivers*, 1 Stew. & P. 24, 21 Am. Dec. 645. It follows from these rules that, unless the right of setoff is given by statute, the court to which application is made on motion is at liberty to refuse it for any cause which to it may seem sufficient, and redress cannot be had by appeal: *Chipman v. Fowle*, 130 Mass. 352; *Burns v. Thornburgh*, 3 Watts, 78. What courts, however, usually intend by asserting that the power of courts of law in these matters of setoff is discretionary is that they are not bound to grant relief in every case in which an application is made, but that they exercise a jurisdiction of an equitable character, and may

consider all the circumstances and refuse relief in every instance wherein to grant it would be inequitable: *Herman v. Miller*, 17 Kan. 328; *Schuler v. Collins*, 63 Kan. 372, 65 Pac. 662; *Ex parte Wells*, 43 S. C. 477, 21 S. E. 334; *Simmons v. Reid*, 31 S. C. 389, 17 Am. St. Rep. 36, 9 S. E. 1058. Sometimes the action of courts of equity in this class of cases has also been spoken of as discretionary. "This does not mean that the authority to allow or deny the right is arbitrary, or the power to adjudge the setoff dependent upon the mere inclination of the court. The discretion to be exercised in such case is a sound legal discretion addressed to the conscience and judgment of the court, where the relationship of the reciprocal judgment creditors is such that upon equitable grounds the relief sought should be granted; and where an action is brought for that purpose, and the complaint sets forth sufficient facts to show equitable grounds which justify the relief asked, affirmative defensive matter of a legal character or addressed to the discretion of the court should be pleaded, and the cause determined after hearing upon the merits therein disclosed": *Martin County N. B. v. Bird*, 92 Minn. 110, 99 N. W. 780. Certainly in those states where the same tribunal exercises jurisdiction both at law and in equity, and where the distinction between forms of action has been abolished, one who by motion presents his claim to set off one judgment against another has the same absolute right to appropriate and adequate relief as if he had prosecuted an independent suit to accomplish his purpose: *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786.

IV. Judgments of Different Courts.

Where the right to set off one judgment against another is sought to be enforced by a suit in equity, the objection that the two judgments are of different courts can be entitled to no weight: *Robinson v. Kunkleman*, 117 Mich. 193, 75 N. W. 451. Nor do the authorities show that it constitutes any objection where the proceeding is by motion at law, provided that the jurisdiction there be exercised with substantial justice as between the parties. Of course, it must be so conducted, as we have suggested, as to avoid any real or apparent conflict between the two courts, but where the application is made to the court where the judgment against the applicant was rendered, that court, having jurisdiction over its judgment and process, can direct such entries to be made on its records as will prevent the further enforcement of its judgment or confine such judgment to what remains unpaid after crediting upon it the amount of the judgment in the other court in favor of the applicant, and he, as a condition of granting him relief, may be required to satisfy his judgment either in full or pro tanto, as the equities of the case require. He cannot, by proceeding in the court where the judgment in his favor is, procure any order controlling the other court or its officers (*Tenant's Heirs v. Marmaduke*, 5 B. Mon. 76), but if he pursues the course above suggested, relief may be granted him, if equitable, regardless of the

fact that the judgment in his favor is in another court (*Brooks v. Harris*, 41 Ind. 390; *Ewen v. Terry*, 8 Cow. 126; *Haff v. Spicer*, 3 Caines, 190; *Brown v. Hendrickson*, 39 N. J. L. 239; *Duncan v. Bloomstock*, 2 McCord, 318, 13 Am. Dec. 728; *Rix v. Nevins*, 26 Vt. 384; *Welsher v. Libby*, *McNeil & Libby*, 107 Wis. 47, 82 N. W. 693; *Bristow v. Needham*, 8 Scott (N. R.), 366, 7 Man. & G. 648; *Barger v. Braham*, 2 W. Black. 869, 3 Wils. 396; *Bridges v. Smith*, 8 Bing. 29, 1 Maule & S. 93, 1 D. P. C. 242, 1 L. J. C. P. 33), even though that court is of another state (*Phillips v. McKay*, 54 N. J. L. 319, 23 Atl. 941), or is in a court of the United States and the application is in a state court: *Schantz v. Kearney*, 47 N. J. L. 56.

V. Of the Character of the Causes of Action Out of Which the Judgments Arose.

If two persons have final valid judgments against each other which each is entitled to have paid, it would seem that no inquiry respecting the cause of action out of which the respective judgments arose should be permitted, unless, indeed, it be true, where the application is at law, that the court has a discretion, not subject to review, to withhold relief for any cause it may deem sufficient. Where such is the case, relief may be denied on the ground that the judgment in favor of the applicant is founded on a tort, and that against him on a contract, and the court, deeming the tort to be worthy of further punishment, may refuse to set off the judgment founded on the tort against the judgment based on contract: *Leitz v. Homan*, 207 Pa. St. 28., 99 Am. St. Rep. 791, 56 Atl. 868. In another case it was said that it was only when both judgments were entered in causes of action *ex contractu* that the court would by motion set off one against the other, but here the real question was whether a motion of this character could be granted, when granting it would deprive a party of the benefit of the law exempting his property from execution: *Duff v. Wells*, 7 Heisk. 17. Both upon principle and authority it must generally, if not universally, be immaterial whether the two judgments arose out of causes of action of the same or of a different character. It is sufficient that both are final, and that each judgment creditor is in law entitled to payment. It is no answer to the motion that the two causes of action could not have been set off against each other before judgment (*Levy v. Roos*, 32 La. Ann. 1029; *Temple v. Scott*, 3 Minn. 419), nor that the one was founded upon contract and the other upon tort (*Langston v. Robey*, 68 Ga. 406), nor that the one is for damages for breach of covenants of warranty in a conveyance of property and the other for a mortgage taken for part of the purchase price of such conveyance: *Harrington v. Bean*, 94 Me. 208, 47 Atl. 147.

VI. Of the Times When the Respective Judgments Were Rendered.

A suit or proceeding to enforce the setoff of one judgment against another may very properly be treated as an action on the judg-

ment sought to be set off, and required to be instituted within the time allowed by the statute of limitations for the commencement of actions on judgments: *Hobbs v. Duff*, 23 Cal. 596. If, however, both judgments remain enforceable, so that an action may be maintained thereon, or so that both are enforceable by execution, no further inquiry respecting the dates of their rendition is material: *Parker v. Rugg*, 9 Gray, 209. It may be that the one so far preceded the other that it might have been asserted as a counterclaim in the action in which the judgment was recovered, but as the defendant in that action was not obliged to there assert his counterclaim, the failure to assert it does not prevent his subsequent use of his judgment as a setoff: *Zinn v. Dawson*, 47 W. Va. 45, 81 Am. St. Rep. 772, 34 S. E. 784. If a judgment is dormant, the right to set it off against a judgment which is not dormant may be refused: *Camp v. Pace*, 40 Ga. 45. There may also be cases in which the failure to promptly assert a judgment or a right to setoff may give rise to equities in favor of third persons of so persuasive a character as to induce courts to refuse the right of setoff, particularly if the judgment creditor has in the meantime neglected to avail himself of additional securities with which he might have satisfied his judgment: *Schuler v. Collins*, 63 Kan. 372, 65 Pac. 662.

VII. The Parties for and Against Whom the Right of Setoff May be Enforced.

a. **The Real as Distinguished from the Nominal Parties.**—In considering the right to setoff, both at law and in equity, the real, rather than the nominal, parties to the judgment should be ascertained, and when it appears that a person, though not named as a party, is entitled to the proceeds of the judgment, he may, for the purposes of setoff, be treated as its owner (*Barrett v. Barrett*, 8 Pick. 342; *Wright v. Cobleigh*, 23 N. H. 32; *Andrews v. Varrell*, 46 N. H. 17), and, on the other hand, though the judgment is nominally in his favor, the right of setoff cannot be enforced by or against him if another is entitled to the proceeds of the judgment (*Harrell v. Petty*, 11 Rich. 373; *Meador v. Rhyne*, 11 Rich. 631), because the proceeding, whether by suit or motion, is controlled by equitable principles which forbid that which is in equity the property of one person from being employed as if it were the property of another. Hence, if an owner of mortgaged chattels transfers a cause of action for their conversion to the mortgagee, who obtains judgment thereon in the name of his assignor, the defendant in such action is not entitled to have set off against such judgment a judgment in his favor arising out of another transaction, for to concede him this right would enable him by his conversion of the mortgaged chattels to avoid the effect of the mortgage: *Ganche v. Milbracht*, 105 Wis. 355, 81 N. W. 487. The true inquiry is not whether the parties to the two judgments are nominally the same, but whether the setoff sought is equitable. If

so, it may be ordered: *Colquitt v. Bonner*, 2 Ga. 155; *Baker v. Hoag*, 6 How. Pr. 201.

b. **Where the Estate of a Decedent is the Real Beneficiary in the Judgment.**—if a judgment creditor dies and the judgment becomes assets in the hands of his administrator, this does not affect the right of the judgment debtor to set off against it judgments in his favor against the decedent: *Bristow v. Needham*, 8 Scott (N. R.), 366, 7 Man. & G. 648; *Barker v. Braham*, 2 W. Black. 869, 3 Wils. 396; *Bridges v. Smith*, 8 Bing. 29, 1 Maule & S. 93, 1 D. P. C. 242, 1 L. J. C. P. 33. This is but an application of the rule that the nominal ownership of the judgment is not controlling. So, if executors obtain a judgment in their representative capacity, they are entitled to have it set off against a judgment in favor of the judgment debtor and against the estate of the testator (*Carter v. Compton*, 79 Ind. 37; *Prior v. Richards' Admr.*, 4 Bibb, 356); and one against whom a judgment is obtained by an administrator on any cause of action which existed in favor of the intestate is entitled to have set off against such judgment a judgment by him recovered against the estate of the decedent (*Martin County Nat. Bank v. Bird*, 92 Minn. 110, 99 N. W. 780), though that estate is insolvent: *Quick v. Durham*, 115 Ind. 302, 16 N. E. 601. In cases of this class, as well as in all others where setoff is sought, the court may, in the exercise of its discretion, refuse to order the setoff where such refusal appears to be equitable: *Alexander v. Durkee*, 112 N. Y. 655, 19 N. E. 514.

c. **Judgments not Between the Same Parties.**

1. **Whether Resort Must be Had to Courts of Equity.**—There are certainly many dicta, and perhaps some decisions, to the effect that where the parties to a judgment are different, they cannot be set off at law, and that resort must therefore be had to courts of equity: *Hobbs v. Duff*, 23 Cal. 596; *Howe M. Co. v. Hickox*, 106 Ill. 461. It is doubtless true that setoff will not be allowed against any paramount equity, in favor of a person not a party to either judgment, but this is equally true whether the proceeding is at law or in equity, by motion or by action; but we do not think that any real ground exists for the broad assertion sometimes made, that it is necessary to resort to equity to obtain the benefit of a setoff where the parties to the two judgments differ and a setoff is nevertheless equitable.

2. **When Two Persons Represent the Same Interest or Liability.**—If a judgment is recovered against persons who occupy toward each other the nominal or equitable relation of principal and surety or otherwise under such circumstances that if one pays the judgment, he has a right to recover of the other the whole amount so paid, such judgment, for the purposes of setoff, may be treated both at law and in equity as if it were only against the principal or person primarily liable, and in all suits or motions to use it as a

setoff, or to have another judgment set off against it, the fact that the surety appears as a party to the judgment constitutes no objection to allowing the application: *Pierce v. Bent*, 69 Me. 381; *Bennett v. Hanley*, 91 Mich. 143, 51 N. W. 885; *Skinker v. Smith*, 48 Mo. App. 91; *Sweeney v. Bailey*, 7 S. Dak. 404, 64 N. W. 188.

3. **In Other Cases in Which the Setoff is Equitable.**—There are undoubtedly decisions denying the right to set off one judgment against another when the parties to the judgments are not the same, and the want of mutuality in the parties is such that the judgment sought to be asserted as a setoff could not be applied as a setoff in an action at law: *Richmond v. Block*, 38 Or. 317, 60 Pac. 388. We believe this to be a mistaken view, and that the true test should be, Does it appear that the party making application had the right to receive payment of the judgment which he offers as a setoff and apply the proceeds to his own use or to the satisfaction of the judgment of the court where the motion is made? It is not sufficient that he has a right to collect and receive payment of the judgment if it does not further appear that he has the right to appropriate the money when collected to the satisfaction of the judgment. Hence if A and B have recovered a judgment against C, and C has recovered a judgment against A, the latter is not entitled to enforce as a setoff against the latter judgment the judgment in favor of himself and B, because to allow such setoff would be to apply B's interest in the judgment to the payment of A's debt, when there is no showing that such application would be equitable: *Corwin v. Ward*, 35 Cal. 195, 95 Am. Dec. 93. If, on the other hand, the judgment is against A and B, and each is therefore answerable, and his property liable to execution for the whole debt the plaintiff may present this judgment as a setoff to any judgment recovered against him by either A or B: *Ballinger v. Tarbell*, 16 Iowa, 491, 85 Am. Dec. 527; *Hutchins v. Riddle*, 12 N. H. 464. Hence, we think that however different the parties may appear on the face of the judgment, setoff may be allowed on motion at law whenever it appears that he who seeks the setoff has the right to take out process on the judgment which he offers as a setoff, and thereby enforce it for his own benefit and to apply the moneys resulting from its enforcement to the satisfaction of the judgment in the court where the motion is made. Such being the case, the court will not put him to the trouble and circuitous action involved in the issuing and enforcing of process, but it will at once allow him the benefit of his judgment by directing its application to the judgment against him. In such a case it is not, we conceive, material that the judgment may be against others as well as the moving party, if he is liable for the whole thereof and the payment of the whole might be exacted of him in execution, and he is willing, as his motion shows, to meet his liability by applying upon it the demand belonging solely to himself: *Colquit v. Bonner*, 2 Ga. 155; *Ballinger*

v. Tarbell, 16 Iowa, 491, 85 Am. Dec. 527; Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614, 14 L. R. A. 512; Rutherford v. Crabb, 5 Yerg. 112.

VIII. Interest of Third Parties Which Will not be Prejudiced by Allowing a Setoff.

a. **As to Costs.**—The general statement has often been made that the right to set off one judgment against another will not be allowed as to taxable costs: *Ocean Ins. Co. v. Elder*, 22 Pick. 210.

We do not understand by this that there is any necessary difference between a judgment for costs alone, or partly for costs, and an ordinary judgment of which costs form no part. By the practice which formerly prevailed, and to some extent still prevails, a party recovering costs was sometimes not the party beneficially interested in them. Other persons, as, for instance, his attorney, might have a lien thereon, or the fees of some officer might be involved in the taxation, and, notwithstanding the judgment in favor of the party to the suit, might have a paramount right in so much of the judgment as represented his fees. Whenever any equity or lien exists for any reason in favor of a third person for costs, this equity or lien the court will not destroy by the order directing the setoff of the judgment. Subject to this exception, judgments for costs are available as a setoff against other judgments, and other judgments against them. In other words, as in other cases of the application for a setoff, the question first to be considered is who are the parties beneficially interested in the judgments involved: *Keifer v. Summers*, 137 Ind. 106, 35 N. E. 1103, 36 N. E. 894; *Harrington v. Bean*, 94 Me. 208, 47 Atl. 147; *Zerbe v. Missouri etc. Ry. Co.*, 80 Mo. App. 414; *Hurd v. Fogg*, 22 N. H. 98; *Ainsley v. Boynton*, 2 Barb. 258; *Gihon v. Fryatt*, 2 Sand. 638; *Henry v. Travelers' Ins. Co.*, 35 Fed. 15.

b. **As Against the Lien of Attorneys.**—The rule usually asserted as controlling the setoff of judgments would seem to require in all cases the recognition and protection of the liens of attorneys. Of course, this protection would not extend to their liens for services performed or expenses incurred in other suits or transactions: *Prince v. Fuller*, 34 Me. 122. There are, nevertheless, many cases in which courts have proceeded in utter disregard of the liens of attorneys (*Smith v. Evans*, 110 Ga. 536, 35 S. E. 633; *Langston v. Roby*, 68 Ga. 406; *Shirts v. Irons*, 54 Ind. 13), and perhaps the most that can be asserted to the contrary is, that as the court considering the motion has a discretion to exercise, it may so exercise that discretion as not to destroy or impair the liens of attorneys: *Leavenson v. Lafontaine*, 3 Kan. 523; *Barrett v. Barrett*, 8 Pick. 342; *Diehl v. Friester*, 37 Ohio St. 473. In many of the states the right to set off a judgment and the right to an attorney's lien are regarded as dormant until actively asserted, and hence if the proceedings for setting off a judgment are commenced prior to any notice or attempted enforcement of the attorney's lien, a pre-

cedence results in favor of the setting off of the judgment, in consequence of which the lien of the attorney may be disregarded: *Morton v. Urquhart*, 79 Minn. 390, 82 N. W. 653; *Sweeney v. Bailey*, 7 S. Dak. 404, 64 N. W. 188.

c. Assignees.

1 **Right of Setoff in Favor of.**—If one has the right to enforce the payment of a judgment for his own benefit, it ought not to be material what was the source of his title nor when it accrued. The right to assign a judgment is not, so far as we are aware, anywhere denied, though perhaps there may remain states in which the assignee is regarded as the owner in equity only, and hence is not entitled to bring an action or to take out process in his own name, but must proceed in the name of his assignor. The right of the assignee to set off the judgment assigned to him against a judgment existing against him has been denied on the ground that he could not sue thereon in his own name (*Bunnell v. Magee*, 9 Ala. 433), and perhaps on other manifestly untenable grounds. It is, of course, essential to the maintenance by the assignee of the right of setoff that he should have a full beneficial interest in the judgment: *Jones v. Chalfant*, 55 Cal. 505; *Sprigg v. Granneman*, 36 Ill. App. 102. It is perhaps fatal to his claim that it appears that the assignment was on condition that if he could not use the judgment as a setoff, the assignment should be void: *Gilman v. Van Slyke*, 7 Cow. 469. If, however, the assignment is unconditional, the right of the assignee to set off the judgment so assigned to him seems not less absolute than the right of the original judgment creditor: *Hill v. Brinkley*, 10 Ind. 102; *Frybarger v. Andre*, 106 Ind. 337, 7 N. E. 5; *Bush v. Monroe* (Ky.), 47 S. W. 215; *Pattison v. Edmonston*, 4 La. Ann. 157. Like the original judgment creditor, the rights of the assignee are subject to the general limitation that judgments cannot be set off against each other unless they are held by parties in the same capacity, or, in other words, unless each is equitably entitled to the proceeds of the judgment claimed by him. Therefore, if a judgment is recovered against an executor in his representative capacity, he cannot set off against it a judgment purchased by him in his personal or individual capacity: *Dudley v. Griswold*, 2 Brad. 24.

2 **As Against an Assignee.**—Much doubt has been entertained respecting the right to set off a judgment as against an assignee of the judgment against which the setoff is sought to be enforced. Many courts have been extremely guarded in their expressions, apparently limiting the right to cases of fraudulent assignments (*Hurst v. Sheets*, 14 Iowa, 322), or to assignments received with notice of the right of setoff (*Cooper v. Bigalow*, 1 Cow. 206; *Simmons v. Reid*, 31 S. C. 589, 17 Am. St. Rep. 36, 9 S. E. 1058; *Davidson v. Alfaro*, 16 Hun, 353), and of assignees whose equities were not prior in point of time to those of the party seeking the setoff: *Lockhart v. Wolf*, 82 Ill. 37; *Pheiffer v. Harris*, 11 Bush,

400; *Ledyard v. Phillips*, 58 Mich. 204, 24 N. W. 551; *Wyvell v. Barwise*, 43 Minn. 171, 45 N. W. 11; *Holly v. Cook*, 70 Miss. 590, 13 South. 228; *McAdams v. Randolph*, 42 N. J. L. 332. We think that the better opinion at the present time is that the assignment of a judgment is subject to any pre-existing right of setoff against the assignor based on a judgment against him. Sometimes this rule has been denied application as against attorneys who have taken assignments as security for their compensation or for disbursements made by them (*Benjamin v. Benjamin*, 17 Conn. 110; *Simmons v. Reid*, 31 S. C. 389, 17 Am. St. Rep. 36, 9 S. E. 1058); and in others it has been applied against them in equally doubtful cases: *Wright v. Treadwell*, 14 Tex. 255; *Fitzhugh v. McKinney*, 43 Fed. 461. Assignments of causes of action prior to judgment, and contracts or agreements entered into between the plaintiff in the action and a third person prior to its rendition may amount to a legal or equitable assignment thereof, and where such is the case, the assignment, contract, or agreement must be respected notwithstanding pre-existing judgments against the plaintiff: *Ely v. Cooke*, 20 N. Y. 365; *Roberts v. Carter*, 38 N. Y. 107; *Perry v. Chester*, 53 N. Y. 240; *Ex parte Wells*, 43 S. C. 477, 21 S. E. 334; *Anglo-American P. Co. v. Davies P. Co.*, 112 Fed. 574; *Bucki & Son L. Co. v. Atlantic L. Co.*, 63 C. C. A. 62, 128 Fed. 332. If, however, at the moment a judgment is rendered, a right exists in favor of the judgment debtor to set off against it a judgment held by him against the judgment creditor, this right is deemed to continue in a majority of the states, notwithstanding any subsequent assignment, no matter how good the consideration on which it was founded, or how free the assignee from notice of the pre-existing right of setoff. Every assignment of a judgment is subject to all rights of setoff then existing in favor of the assignor's judgment creditors whether the assignee had notice of such rights or not: *Skipper v. Stokes*, 42 Ala. 255, 94 Am. Dec. 646; *Hobbs v. Duff*, 23 Cal. 596; *McBride v. Fallon*, 65 Cal. 301; *Whitehead v. Jessup*, 7 Col. App. 460, 43 Pac. 1042; *Williams v. Taylor*, 69 Ind. 48; *Benson v. Haywood*, 86 Iowa, 107, 53 N. W. 85, 23 L. R. A. 335; *Gregory v. Cuppy* (Iowa), 82 N. W. 1016; *Jeffries v. Evans*, 6 B. Mon. 119, 43 Am. Dec. 158; *Hooper v. Brundage*, 22 Me. 460; *New Haven C. Co. v. Brown*, 46 Me. 418; *Peirce v. Bent*, 69 Me. 381; *Franks v. Edinberg*, 185 Mass. 49, 69 N. E. 1058; *Wabash R. Co. v. Bowring*, 103 Mo. App. 158, 77 S. W. 106; *Wells v. Clarkson*, 5 Mont. 336, 5 Pac. 894; *Hovey v. Morrill*, 61 N. H. 9, 60 Am. Rep. 315. At an early date in South Carolina it was held that the right of setoff would not be enforced against an assignee where the moving party had delayed to exercise his right to apply for such setoff until after the lapse of a term, and after the assignment had been made: *Williams v. Evans*, 2 McCord, 203. We think this decision belongs to a past epoch, when the setting off of one judgment against another was not recognized to be a matter of right.

and the discretion of the court was freely, and often unreasonably, exercised in opposition.

IX. The Necessity That the Judgment be Final and at the Time Capable of Enforcement.

a. The Judgment Must be Final in Form.—If a judgment is but *prima facie* evidence of a debt and something yet remains to make it conclusive and final as between the parties, it cannot be used as a setoff against another judgment: *People v. Judges*, 6 Cow. 598. One who seeks to employ a judgment as a setoff admits, or should admit, its finality and validity, and hence will not be allowed as a setoff the benefit of a judgment the finality and validity of which he still contests: *Zerbe v. Missouri etc. Ry. Co.*, 80 Mo. App. 414. Whether a judgment which remains subject to appeal is final, as that term is employed in the statutes, admits of doubt. Certainly, if rendered by consent, it is not appealable, and therefore may be asserted as a setoff, though the time for appeal has not expired: *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786. In *Sowles v. Witters*, 40 Fed. 413, it was held that an intent of the defendant to appeal from a judgment did not require the refusal of the right of the plaintiff to set it off against another judgment, and doubtless there should be no such refusal, whether a right of appeal exists or not, when at the time the moving party is entitled to enforce his judgment by execution.

b. Pendency of an Appeal.—When an appeal or writ of error has been accompanied by an undertaking sufficient in law to stay the execution of the judgment, its effect is for the time being suspended, and it cannot be employed as a setoff during the pendency of the appeal (*Yarborough v. Fitzpatrick* (Ky.), 51 S. W. 172; *Spencer v. Johnston*, 58 Neb. 44, 78 N. W. 482), nor afterward if the judgment is reversed: *Magarity v. Succop's Admr.*, 90 Va. 561, 19 S. E. 260. It has been said that the pendency of an appeal from a judgment requires the refusal of an application to set it off against another judgment: *Pierce v. Tuttle*, 51 How. Pr. 193; *In re Kloster*, 40 Hun, 374. But we apprehend that the better view is that the court to which the application is made will neither deny nor grant it during the pendency of an appeal or the continuance of the right to appeal, though no appeal has been taken, but will delay the proceeding until the judgment has become final and irrevocable, from the lapse of time for appealing, or, when an appeal has been taken, until the judgment is either affirmed or reversed: *Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786; *Irvine v. Meyers*, 6 Minn. 562 (Gil. 394); *Gemmell v. Huben*, 71 Mo. App. 291.

c. Where the Right to Enforce the Judgment is Suspended.—In addition to the suspension of the right to enforce a judgment by an appeal or supersedeas, other causes may arise disabling the plaintiff, either temporarily or permanently, from proceeding to coerce the payment of his judgment, and where such is the case we apprehend

that his right to use it as a setoff is also suspended. The issuing of an execution on the judgment does not impair the right to use it as a setoff (*Haskins v. Jordan*, 123 Cal. 157, 55 Pac. 786), at least, when nothing has occurred amounting to a permanent or temporary satisfaction. Generally, if the defendant's person was seized and he detained under execution, this amounted to a temporary satisfaction. Hence, ordinarily the right to setoff cannot be maintained while the defendant is charged in execution: *Cooper v. Bigalow*, 1 Cow. 56; *Taylor v. Waters*, 2 Chit. 303, 5 Maule & S. 103. But this is not an absolute extinguishment of the right of setoff and it may still be granted in exceptional cases: *Thompson v. Parrish*, 5 Com. B., N. S., 685, 28 L. J. C. P. 153, 5 Jur., N. S., 986, 7 Week. Rep. 210.

X. As Affected by the Exemption Laws.

In many of the states a judgment debtor is allowed an exemption from execution of personal property of a specified value. A judgment in his favor may therefore be exempt from execution as personal property, and where such is the case there cannot be set off against it in opposition to his claim of exemption another judgment in favor of his judgment debtor: *Atkinson v. Pittman*, 47 Ark. 464, 2 S. W. 114; *Draffin v. Smith*, 63 Ark. 83, 37 S. W. 307; *Cleveland v. McCanna*, 7 N. Dak. 455, 66 Am. St. Rep. 670, 75 N. W. 908, 41 L. R. A. 852. An officer of the law or other person may wrongfully seize and appropriate to his own use property which is exempt from execution, notwithstanding a claim of exemption interposed therefor. When this happens, the only remedy of the person injured is by an action to recover such property or its value. Any judgment for the property so taken, or its value, resulting from such an action must be regarded, so far as the exemption laws are concerned, as possessing the same characteristics as such exempt property and to be equally free from execution. Against such a judgment, therefore, the judgment debtor therein is not entitled to offset any judgment in his favor: *Beckman v. Manlove*, 18 Cal. 388; *Daniel v. Wall*, 80 Ga. 218, 4 S. E. 271; *Temple v. Scott*, 3 Minn. 419 (Gil. 306); *Ladd v. Ferguson*, 9 Or. 180.

PEOPLE v. WOODS.

[147 Cal. 265, 81 Pac. 652.]

CRIMINAL LAW—Other Crimes, Evidence of Conspiracy to Commit.—Where, on a trial for murder, there is evidence to show that the decedent, while acting as a policeman, but not wearing any uniform, was shot and killed by the defendant, evidence is properly admitted to the effect that the defendant and others were a party of burglars on their return from the scene of a proposed, but abandoned, burglary, having burglars' tools in their possession, because such evidence justifies the inference that the defendant did not act in self-defense against one who is not in uniform and did not announce himself as an officer, and that the officer in what he did, including the firing off of his own pistol, did nothing more than his duty under the circumstances. (p. 156.)

CRIMINAL LAW, Evidence of Other Attempted Crimes.—In a trial for murder in the shooting and killing of a policeman, evidence is properly admitted that just prior to such shooting the defendant and two others attempted to rob a third person, whose outcry and the consequent flight of the trio attracted the attention of the policeman and brought on the encounter resulting in his death. These facts, immediately preceding and leading up to the commission of the crime, are a part of the *res gestae*. (p. 156.)

MURDER in the First Degree, Evidence Sufficient to Sustain Conviction for.—Evidence showing that the defendant and others armed themselves and made preparations to kill in connection with a projected burglary, and while still together and having burglars' tools in their possession, but after the proposed burglary had been abandoned, on being approached by a policeman under circumstances indicating that he would arrest or search them, one of them shot and killed such officer, is sufficient to sustain a conviction, against such shooter, of murder in the first degree. (p. 157.)

CRIMINAL TRIAL—Alleged Misconduct of Prosecuting Attorney.—Where the defendant on trial for murder was designated in the indictment F. W. alias S. L. F., and his motion to strike the alias from the indictment being denied, the court instructed the clerk not to read the words "alias S. L. F." to the jury, the fact that the prosecuting attorney in his opening statement spoke of the defendant F. W. alias S. L. F., but on objection, asked pardon, does not constitute such misconduct as to entitle the defendant to a new trial. (p. 158.)

MURDER—Instructions.—It is not error to read to the jury the whole of a section of the Penal Code defining murder in the first degree, which includes, among other things, all murders committed in the perpetration, or attempt to perpetrate arson, rape, robbery, burglary or mayhem. Such reading is not objectionable as implying that under the evidence the jury would be warranted in finding that the decedent was killed by the defendant while the latter was attempting to commit one of those crimes. (p. 158.)

CRIMINAL LAW—Question of the Degree of Murder, When not Taken from the Jury.—Where the court correctly instructs the jury respecting the two degrees of murder, and that a conviction of murder in the first degree requires a sentence of death unless they by their verdict fix the penalty at life imprisonment, and states what the form of the verdict shall be as they desire the infliction

of the one penalty or the other, but omits to give a form of verdict of murder in the second degree, this is not an intimation that such verdict is out of the question, nor an interfering with the right of the jury to fix the degree of murder, if any. (pp. 158, 159.)

Albert P. Whelan, for the appellant.

U. S. Webb, attorney general, and J. C. Daly, deputy attorney general, for the respondent.

²⁶⁶ BEATTY, C. J. The appellant, jointly with five others, was indicted for the murder of Eugene C. Robinson, a police ²⁶⁷ officer of San Francisco. Upon a separate trial he was convicted of murder of the first degree and sentenced to death. His appeal is from the judgment and from an order denying his motion for a new trial.

The principal direct evidence against the appellant was the testimony of William Henderson, one of the six defendants charged with the murder, who stated that he, Goucher, Kauffman, Kennedy, Courtney, and the appellant had formed a plan to rob the safe at Cypress Lawn Cemetery; that they had provided themselves with burglars' tools, dynamite, etc., for the purpose of breaking into the safe, and on the night of the 20th of January, 1902, had gone to Cypress Lawn, where, finding the place occupied and guarded, they had abandoned the enterprise and started back to the city about midnight. All but one of the party were armed with pistols, that of appellant being of .44-caliber, the others smaller. Henderson, the witness, was carrying the tools and dynamite. In returning to the city they rode on electric cars to a point near the junction of Mission and Valencia streets, where the last car was put in the barn, and from there they started to walk down into the city. They divided themselves into two parties. Woods, Henderson, and Kauffman going in front, and Kennedy, Goucher, and Courtney following at some distance behind. While proceeding in this way, those in front were called back by those behind to consider a proposition to break into the office of a coal-yard and rob it. This enterprise was vetoed by Woods, Kauffman, and Henderson, and their tramp to the city was resumed in the same order as before. When the three who were in advance got to Seventeenth street, on Valencia, they heard a loud yell of alarm coming from the direction of Eighteenth and Valencia streets, and directly Goucher and Kennedy came running up. Kennedy turned and fired a shot from his pistol in the direction from which

they had come, jumped over a fence, and disappeared. Goucher joined those in front, remarking that he was not going to run. When the four had proceeded to a point between Sixteenth and Seventeenth streets on Valencia, the deceased, in plain clothes, ran up behind them and asked "Who has got that gun?" Henderson, the witness, started to get away, and had gone about twenty-five feet when two shots rang out, and were shortly followed by a whole fusilade. ²⁶⁸ Henderson continued his retreat, and only saw, or thought he saw, as he was leaving, that the appellant and Goucher were shooting the man who ran up—Officer Robinson. He also heard the command, "Throw up your hands," and thought it was the voice of appellant. He continued running along Valencia to Sixteenth street, down Sixteenth street to Julian avenue, and along Julian avenue to Fifteenth street. In his flight he was followed closely by Goucher and appellant, and he heard the latter say to Goucher as they ran, "He got me twice." At the corner of Julian avenue and Sixteenth street some one came up and commanded them to stop, but they continued to retreat, and some shooting occurred as they were passing along Julian avenue from Sixteenth to Fifteenth streets. One shot struck the witness as he was retreating, and he fired three shots in return. At Fifteenth street he was overtaken and arrested by Officer Taylor.

The testimony of this witness was supplemented by ample proof that Officer Robinson was shot and killed at the spot on Valencia street, between Sixteenth and Seventeenth, where the fusilade occurred, and it was corroborated in almost every detail by the testimony of other witnesses and by circumstantial evidence of a very persuasive character. Officer Taylor was at the corner of Mission and Fifteenth streets when he heard the shooting on Valencia. He ran to Sixteenth and up Sixteenth to the corner of Julian avenue in time to encounter Goucher and appellant, whom he ordered to halt, stating that he was an officer. They continued to run along Julian avenue, as related by Henderson, and some one fired at the officer. He drew his pistol and fired at them. One of his shots would account for the wound received by Henderson at this point. The appellant, when subsequently arrested, was found to be wounded in two places, but his wounds were probably inflicted by Officer Robinson, for Officer Taylor noticed that he was limping when he turned into Julian avenue, and he saw his companion (Goucher) take

him by the arm, saying at the same time, "Come on, you son of a bitch," and Henderson heard him say just before that, "He [meaning Officer Robinson] got me twice." Officer Taylor at the trial positively identified appellant as the larger of the two men he encountered at the corner of Julian avenue ²⁶⁹ and Sixteenth street, and the one who had the heavier sounding pistol. Two overcoats resembling those worn by appellant and Goucher previous to the shooting were found the next morning in a vacant lot near by, and one of them had bullet-holes corresponding to the wounds found on appellant's body when he was arrested some weeks after the murder at Portland, Oregon. The fatal wounds received by Officer Robinson were caused by 44-caliber bullets, and two witnesses testified that a few days before the murder a man resembling appellant and wearing an overcoat like that found with the bullet-holes in it had been inquiring at their shops for short 44-cartridges.

A number of other circumstances corroborative of Henderson's statement were proved. Appellant was identified as a visitor at the place where three of his codefendants lived. The conductors and gripmen on three or four different electric cars remembered the party of six men who went out to Cypress Lawn on the 20th of January and returned shortly after midnight to the carbarn near the junction of Mission and Valencia streets and started to walk from that point along Valencia street to the city. They did not positively identify appellant as one of the party, but, aside from the testimony of Officer Taylor as to his identity with the man he encountered at the corner of Julian avenue and Sixteenth street, the circumstances proved—especially the correspondence of the wounds on his body with the bullet-holes in the overcoat found near the spot where he eluded Officer Taylor—were sufficient to justify the jury in concluding that appellant was the man who was hit twice by Officer Robinson in the encounter on Valencia street. In short, there was evidence sufficient to warrant the jury in finding that the six defendants named in the indictment went to Cypress Lawn for the purpose of committing burglary—that before they started five of the six armed themselves with loaded pistols; that on their return to the city so armed, and with burglars' tools and dynamite in their possession, Goucher, Kennedy, and Courtney, who were following at some distance behind the others, attempted to hold up a Japanese near the corner of Eigh-

teenth and Valencia streets; that his loud outcry attracted the attention of a number of people and caused the trio to run; that Kennedy fired a shot as he ran to intimidate any ²⁷⁰ possible pursuer; that this attracted the attention of Officer Robinson, who ran up to the group composed of appellant, Goucher, Henderson, and Kauffman, and said or did something which made them apprehensive that he would arrest or search them, and that he would discover the burglars' tools and dynamite which Henderson was carrying; that this was one of the contingencies in view of which the defendants had armed themselves, and that in order to avoid detection they, or some of them, had immediately opened fire on the officer, and that he had returned the fire of the one who first fired upon him—the man with the 44-caliber pistol, the bullets of which caused his death. Clearly there was no failure of evidence to show that Officer Robinson was murdered, and the murder was the act of the appellant, and that it was willful, deliberate and premeditated in a legal sense. Counsel for appellant makes a general and sweeping charge of unfairness and violation of the well-known rules of criminal procedure in the conduct of the trial in the superior court, which we think is entirely unsupported by the record to which he appeals. It is true that very numerous objections interposed by him to the admission of evidence were overruled, but his objections were founded upon an erroneous view of the case, and the rulings of the court were correct. He assumes that the prosecution relied exclusively upon the theory that the killing was done in pursuance of the conspiracy to commit the burglary at Cypress Lawn, and that the appellant must therefore be convicted of murder, although he did not participate in the killing, if it was done by any one of the six persons engaged in the conspiracy. On this assumption he objected to all evidence of the conspiracy, and at the end of the trial moved to strike it all out upon the ground that the conspiracy ended with the abandonment of the attempt upon the cemetery safe and before the killing occurred. But the case for the prosecution did not rest upon the doctrine of the liability of one conspirator for the acts of the others. The proof showed that the appellant himself fired the fatal shot; and the evidence as to the preceding circumstances—the arming, the possession of burglars' tools, etc.—was material and relevant to the motives and probable line of conduct of the appellant at the time of the killing. It is a part of the argument of

counsel upon another point—at least, that seems to be his ²⁷¹ argument—that in the absence of any evidence except that of an accomplice (Henderson) as to what took place at the very time and place of the killing, the defendant may have used his pistol in self-defense against one who did not announce himself an officer and was not in uniform. It is true that whether we regard the testimony of Henderson or not, we are left to conjecture which of the two—appellant or deceased—first drew his pistol and commenced firing. Apart from all other evidence except that going to show that the parties met and fought and that one was wounded and the other killed, a jury might not be warranted in finding that the survivor was not acting in self-defense. But when they are informed that the slayer was one of a party of burglars returning from an unsuccessful attempt, in preparation for which they had armed themselves with loaded pistols and provided dynamite and burglars' tools, then in their possession, that the person killed was a police officer attracted to the spot by a loud outcry followed by the discharge of a pistol by one of the party, they would be warranted in concluding that the officer did nothing more than his duty under the circumstances, because he had no motive to do more, and that the parties who had armed themselves for just such a contingency, and who had the strong motive to prevent the discovery of the burglars' tools in their possession, that they, or some of them, would put their pistols to the use for which they were provided, and that they deliberately murdered the officer to escape detection. In this view all the evidence as to the conspiracy, the arms, and the burglars' tools was material and relevant, and all the incidents of the trip to the cemetery and return, so far as they may have been irrelevant, were entirely harmless: *People v. Pool*, 27 Cal. 572. This is especially true of the proposal to break into the coal-yard. The only evidence as to that was Henderson's, and he testified that the appellant refused to have anything to do with it. The evidence of Costello as to the attempt by Kennedy, Goucher and Courtney to rob the Japanese, his outcry, and the flight of the trio was of the *res gestae*; it was the occasion of the shot by Kennedy and of the interference by the officer which led to his death.

The court was not only justified in overruling the objections to the testimony regarding the conspiracy upon the ²⁷² ground above set forth, but upon the further ground that

upon the evidence—circumstantial and direct—the jury would have been justified in concluding that a part of the common design was to resist arrest by the use of the pistols with which the defendants armed themselves: *People v. Pool*, 27 Cal. 572. Pistols are not used for breaking into a safe; their purpose is to kill those who interfere to prevent a burglary or arrest the perpetrators.

There is some inconsistency in the contention of counsel that the conspiracy was at an end and that Henderson was an accomplice. If the conspiracy was at an end, Henderson, according to his own testimony, was entirely innocent of the murder. He had no part in it either in design or act, and if the jury believed him his testimony alone fastened the crime upon the appellant.

It is claimed that the evidence does not warrant a verdict of murder in the first degree. We think it was clearly sufficient. It shows that the appellant made preparations to kill in connection with the projected burglary, and that when an officer approached him under circumstances indicating the probability that he would arrest him or search him he killed the officer. This is sufficient evidence of a deliberate purpose to kill, and if such purpose existed the killing was murder in the first degree.

Appellant complains that he was prejudiced by misconduct of the prosecuting attorney during the impanelment of the jury. The alleged misconduct consisted in a statement made in the hearing of the panel from which the jury was selected. In the indictment the appellant was named Frank Woods, alias Saint Louis Frank. After his arraignment and plea he moved the court to strike out the alias from the indictment. The court denied this motion, but instructed the clerk not to read the words “alias Saint Louis Frank” to the jury. When the assistant district attorney commenced his statement of the case to the talesmen preliminary to their examination touching their qualifications to act he used this language: “The defendants at the bar, Frank Woods, alias Saint Louis Frank, William Henderson”—at this point he was interrupted by counsel for the appellant, who excepted to the reading of the alias from the indictment and assigned it as misconduct. The assistant district attorney and the district attorney himself, ²⁷³ who was present, begged the pardon of the court, and there the matter ended. We are not cited to any authority, and we know of none, for holding that the defendant in a crim-

inal case is entitled to have any portion of a valid indictment suppressed during the trial except the charge of a prior conviction. But conceding that a prosecuting officer might be guilty of misconduct in purposely and wantonly parading the fact that a defendant is named with an alias in the indictment, with intent to prejudice him before the jury, there is nothing in this case to indicate that the prosecuting attorney was actuated by any such motive, or that his using the words complained of was other than an inadvertence. Indeed, it does not appear that Mr. Alford, who made the statement, had any knowledge of the instruction which the court gave to the clerk to avoid reading the alias. We do not think the discretion of the court was abused in denying a new trial on this ground.

It is claimed that the court erred in reading to the jury as part of his charge section 189 of the Penal Code, which defines murder in the first degree, and includes, among other things, all murders committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem. The contention of counsel is, that this was misleading and confusing, because it seemed to imply that under the evidence the jury would be warranted in finding that officer Robinson was killed by appellant or some of his codefendants while they were attempting to commit a burglary. The charge of the court carries no such implication, and unless it can be said that it is error to give the full legal definition of murder in the first degree on the trial of an indictment for murder, the appellant has no cause of complaint as to this part of the charge, which, upon the whole, was a clear exposition of the difference between murder of the first and murder of the second degree.

Lastly, it is contended that the court committed a most flagrant and prejudicial error "in taking away from the jury the right to find the defendant guilty of murder in the second degree." Upon this point counsel cites a number of cases in each of which the trial court had erroneously instructed the jury to bring in a verdict of murder in the first degree in case they found certain facts. Nothing of the kind occurred in²⁷⁴ this case. The court correctly defined the two degrees of murder and informed the jury that a verdict of murder in the first degree would require the imposition of a sentence of death unless they should by their verdict fix the penalty at life imprisonment in the state's prison. In this connection the

court stated to them what the form of the verdict should be according as they desired the infliction of the one penalty or the other. The omission to give the form of verdict of murder in the second degree cannot be regarded as an intimation that such a verdict was out of the question. The jury could not have failed to understand from the elaborate discussion of the difference between the two degrees of murder contained in the charge of the court that they were to determine by their verdict of which degree the defendant was guilty, if guilty at all.

The defendant's counsel, as the jury were about to retire, requested the court to furnish them with written forms of verdicts of murder in the second degree and manslaughter. This request was refused, but there was no exception to the refusal, and we need not consider whether such refusal was erroneous.

The judgment and order appealed from are affirmed.

McFarland, J., Angelotti, J., Shaw, J., and Lorigan, J., concurred.

Rehearing denied.

Everyone Who Enters into a Conspiracy is deemed a party to every act connected therewith done by the others before that time, and a party to every act afterward done by any of the others in furtherance of such common design. And every act and declaration of each member of a conspiracy, in pursuance of the original concerted plan, and with reference to the common object is, in contemplation of law, the act and declaration of them all, and is original evidence against each of them without reference to the time that any of them entered the conspiracy: *Jenkins v. State*, 35 Fla. 737, 48 Am. St. Rep. 267; *McKenzie v. State*, 52 Tex. Cr. Rep. 568, 40 Am. St. Rep. 795; *Smith v. State*, 46 Tex. Cr. Rep. 267, 108 Am. St. Rep. 991; *State v. Stockford*, 77 Conn. 227, 107 Am. & Rep. 28.

IN RE BERRY.

[147 Cal. 523, 82 Pac. 44.]

MUNICIPAL ORDINANCES—Burden of Showing Unreasonableness of.—If a person seeks relief, on habeas corpus, from a judgment convicting and sentencing him for violating a municipal ordinance prohibiting the use of automobiles on public highways, in the night-time, on the ground that the ordinance is void, because unreasonable, he must assume the burden of proving its unreasonableness. (p. 160.)

AUTOMOBILES—Ordinances Prohibiting Use of at Night.—An ordinance of a board of supervisors prohibiting the running of an automobile on certain parts of the public highways of the county between the hours of sunset of any day and of sunrise on the day following is not, on its face, void for unreasonableness. (pp. 161, 162.)

Chickering & Gregory, for the petitioner.

Thomas P. Boyd, district attorney, for the respondent.

⁵²³ McFARLAND, J. There was an ordinance of the board of supervisors of the county of Marin, California, which, after prohibiting the use of automobiles on certain parts of some of the public roads of that county, and regulating their use in other respects, provides as follows: "Section 8. No person shall run an automobile on any of the said unprohibited highways of Marin county between the hours of sunset of any day and of sunrise on the day following"—and a violation of the section is made punishable by a fine or imprisonment. The above-named Thomas C. Berry was convicted of a violation of said section 8, and judgment was rendered against him sentencing him to imprisonment. He appealed to the superior court of said county, and the judgment was there affirmed. Thereupon this present application is made on his behalf for a writ of habeas corpus, and his discharge is asked upon the ground that said section 8 of the ordinance is invalid and void for certain assigned reasons.

There is nothing in any of the positions taken by petitioner which requires special notice, except the position that the provision of the ordinance here in question is void because ⁵²⁴ unreasonable; and in our opinion that position is not tenable.

When the validity of an ordinance is attacked on the ground that it is unreasonable, the burden of showing its unreasonableness is upon the person attacking it. In *Ex parte*

Haskell, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527, where an ordinance was attacked for reasons similar to those asserted in the case at bar, the court said: "A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power; and a contrary conclusion will never be reached upon light consideration." In the case at bar there is nothing in the record to show anything about the alleged unreasonableness of the ordinance except the ordinance itself; and the burden is on the petitioner to maintain that upon its face the ordinance is unreasonable. There is nothing in the record which shows with any particularity what an automobile is, and, of course, a court could not declare unreasonable a regulation about something of which it has no knowledge; therefore, in order to at all consider the question here involved, we must assume judicial knowledge of an automobile and its characteristics and the consequences of its use—under the statutory provision that courts take judicial notice "of the true significance of all English words and phrases": Code Civ. Proc., sec. 1875. We may assume, therefore, to have what is common and current knowledge about an automobile. Its use as a vehicle for traveling is comparatively recent. It makes an unusual noise. It can be and usually is made to go on common roads at great velocity—at a speed many times greater than that of ordinary vehicles hauled by animals; and beyond doubt it is highly dangerous when used on country roads, putting to great hazard the safety and lives of the mass of the people who travel on such roads in vehicles drawn by horses. Fearful accidents to persons driving animals which are frightened into unmanageable terror by automobiles are of common occurrence. And while there are usually laws regulating and limiting the speed at which they may be driven, it is matter of common knowledge that these laws are frequently violated, and that it is exceedingly difficult for officers, even in the daytime, to stop them when going at ~~525~~ forbidden speed and arrest the drivers. And it is apparent that this would be much more difficult to do in the night-time. Moreover, in the night-time even those drivers of automobiles who might be considerate of the safety of others would not be able to see an approaching team in time to take the proper precautions. Considering these matters, and many

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others which might be suggested, we see nothing unreasonable in the regulation—and it is only a regulation—which forbids the use of automobiles on country roads in the night-time.

Of course, if the use of automobiles gradually becomes more common, there may come a time when an ordinance like the one here in question would be unreasonable. As country horses are frequently driven into cities and towns, many of them will gradually become accustomed to the sight of automobiles, and the danger of their use on country roads will grow less. But the supervisors who passed this ordinance were dealing with present conditions in Marin county; and we are not prepared to say judicially that under present conditions the ordinance is so unreasonable as to be void.

We do not think it necessary to discuss the question further, because a general law has recently been passed by the state legislature which probably supersedes the ordinance here in question, and the decision of the case at bar will not be of much value as a precedent.

The person on whose behalf this writ was applied for is remanded to the custody of the sheriff, and the writ is discharged.

Shaw, J., Angelotti, J., Van Dyke, J., Lorigan, J., and Beatty, C. J., concurred.

The Law of the Automobile is the subject of a recent monographic note to *Christy v. Elliott*, 216 Ill. 31, 108 Am. St. Rep. 212-219.

PRYOR v. WINTER.

[147 Cal. 554, 82 Pac. 202.]

REMAINDERMEN, Prescriptive Title Against.—During the continuation of an estate for life no possession can be adverse as against remaindermen, as the statute of limitations cannot operate against them until the determination of the life estate gives them a right of possession. (p. 164.)

THE ESTATE OF A REMAINDERMAN is Distinct from that of the Tenant of the Preceding Particular Estate, and cannot be affected by any act of the particular tenant or of his grantee. (p. 165.)

CODE, Construction of.—All the statutory provisions on any subject are to be construed together, in view of the presumption that the legislators are acquainted with the well-settled principles of law and legislate with reference thereto. (p. 165.)

LIMITATIONS, Construction of Statute of.—The provision of the code that no action for the recovery of real property or the possession thereof can be maintained unless the plaintiff or his predecessor in interest was seised or possessed of the property within five years before the commencement of the action cannot be construed as making the statute of limitations run before a cause of action has accrued, and thereby cutting off the right of remaindermen by a possession held adversely to them during the continuance of the life estate. (pp. 166, 167.)

MORTGAGE, Foreclosure of does not Affect Title not Acquired Under the Mortgage.—If remaindermen are made parties defendant in an action to foreclose a mortgage executed by the tenant for life under an allegation that they claim some interest in the property which is subject to the mortgage, their title is not affected by the judgment of foreclosure and a sale and conveyance pursuant thereto. (p. 167.)

REMAINDERMEN, When not Prejudiced by a Judgment.—An administrator is not the trustee for remaindermen, and hence they are not estopped by a judgment against him, though he sued as administrator of one under and by whose will an estate in remainder was created and vested in such remaindermen. (p. 167.)

J. J. Wells and Earll H. Webb, for the appellants.

H. P. Andrews, for the respondent.

⁵⁵⁵ **McFARLAND, J.** The plaintiffs are the 'children of John E. Church, deceased, and they brought this action to quiet their title to undivided interests in certain lots of lands in the town of Red Bluff, in Tehama county, including the undivided half of a lot described as lot 22 in block 12. The court below, sitting without a jury, gave judgment to plaintiffs for the other property involved, but held that plaintiffs are not the owners of or entitled to the possession of any part of lot 22, and that defendant is the owner of all of said last-mentioned lot by adverse possession, and rendered judgment accordingly. From that part of the judgment which decrees that defendant is the sole owner of the whole of lot 22, and from an order denying their motion for a new trial plaintiffs appeal.

The said John E. Church, father of plaintiffs, died testate on January 13, 1886. At that time lot 22 was the community property of the deceased and his wife Elizabeth Church. By his will he devised all his real property to his surviving wife, Elizabeth, "for and during the term of her natural life," provided that she should not marry again, and it is provided by ⁵⁵⁶ the will that after her death the property should go to all of his children who should then be alive, share and share alike, as tenants in common, and in case of their death without issue then go to his brothers and sisters, and it was to go in the

same way upon her marriage. The wife was made executrix and acted as such until her death. She did not marry again, and at her death, which occurred on the twenty-second day of December, 1898, the children, plaintiffs herein, were both alive. Therefore, the references in the will to the contingencies of her marriage, and of the death of the children without issue, are of no consequence, except perhaps as touching upon the argument by counsel whether the remainder to plaintiffs was vested or contingent; and under our views of the case that question is immaterial. Therefore, the undivided half of lot 22 went to the widow in fee as survivor of the community; and under the will she took a life interest in the other half, with the remainder of that half to plaintiffs. The only question in the case, therefore, is whether the plaintiffs' right as remaindermen to the undivided half of the lot was barred by the statute of limitations.

Defendant's claim under the statute of limitations rests upon these facts: In March, 1894, the surviving wife, Elizabeth, in her individual capacity, executed two mortgages on property including lot 22—one to the defendant herein to secure a loan of two thousand five hundred dollars, and the other to the husband of defendant to secure a like amount. Afterward the defendant became the owner of both the mortgages, and brought an action to foreclose them. She made the plaintiffs herein defendants in the foreclosure suit upon the allegation that they claimed some interest in the property which was subject to the mortgages; and plaintiffs herein, defendants there, made default. Afterward she obtained a decree of foreclosure, and purchased the property at the foreclosure sale and obtained a commissioner's deed. On March 30, 1893, she dispossessed the executrix and entered upon the said lot 22, and since then has held possession of the same, claiming to have held it adversely to the whole world. When the present action was commenced the defendant has been thus in possession of the lot in contest for more than five years from the time of her first entry; but this action was brought within less than five years after the death of Elizabeth, the life tenant.

⁵⁵⁷ Under the above facts the action was not barred—for the cause of action did not accrue until after the death of the life tenant, and it was brought within the statutory period of limitation after it had thus accrued. Before that time the

plaintiffs had no right of possession of the lot, and had no cause of action touching such possession.

It has been universally held that the estate of a remainderman is distinct from that of a tenant of a preceding particular estate, and cannot be, in any way, affected by any act of the particular tenant or his grantee. The rule is stated by Chief Justice Kent in *Jackson v. Schoonmaker*, 4 Johns. 402, as follows: "Neither a descent cast, nor the statute of limitations will affect a right, if a particular estate existed at the time of the disseisin, or when the adverse possession began, because a right of entry in the remainderman cannot exist, during the existence of the particular estate; and the laches of a tenant for life will not affect the party entitled. An entry to avoid the statute must be an entry for the purpose of taking possession, and such an entry cannot be made during the existence of the life estate; citing cases." And in *Tiedeman on Real Property*, paragraph 400, it is said: "The tenant cannot do anything to defeat a vested remainder; a disseisin of the tenant affects the remainder in no manner. Nor can the possession of the tenant be deemed adverse to the remainderman, either for the purpose of preventing the latter from conveying his interest, or with a view to defeat it under the statute of limitations, unless the possession be continued after the termination of the particular estate. The statute of limitations does not begin to run until the remainder takes effect in possession." The citation of further authorities to the point is unnecessary; the principle is elementary, and we have been referred to no cases holding otherwise.

The conclusion of the lower court seems to have been arrived at by the process of looking only at section 318 of the Code of Civil Procedure, and considering nothing else. That section provides that no action for the recovery of real property or the possession thereof can be maintained unless the plaintiff or his predecessor was seised or possessed of the property in question within five years before the commencement of the action. But all the law on a wide subject like that of limitation of actions is not to be found in one section. All the statutory ⁵⁵⁸ provisions on the subject are to be considered, and they are to be construed in view of the presumption that the legislators are acquainted with well-settled principles of law, and legislate with reference thereto. For instance, in section 1452 of the Code of Civil Procedure it is provided that the

heirs or devisees may maintain an action for the recovery of the real estate against anyone except the administrator or executor; but surely that provision could not be considered as applicable to a remainderman, although he may have received his estate through a devise, and, therefore, is literally in the general category of "devisees"; it means only those heirs and devisees who have a present right of possession, and, therefore, a present cause of action as against everyone except the administrator. And so it cannot be held that the legislature intended by section 318 to abrogate or overlook the principle—declared in jurisdictions where statutes of limitations include provisions similar to that of section 318—that the statute does not commence to run against a cause of action before such cause of action shall have accrued, unless otherwise expressly provided. Our code itself expressly declares this rule in section 322 of the Code of Civil Procedure, where it is enacted that civil actions "can only be commenced within the period prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute"; and there is to our knowledge no statutory provision prescribing a different rule except section 359 of the Code of Civil Procedure, which refers solely to actions against directors or stockholders of corporations. The question here involved has not to our knowledge been directly decided by this court—probably because no one has heretofore contended that the statute of limitations would run against a remainderman during the life of the particular tenant. But in *Le Roy v. Rogers*, 30 Cal. 230, 89 Am. Dec. 88, Justice Rhodes, in delivering the opinion of the court, expressly declared the rule as above stated. In that case the purchaser at a foreclosure sale undertook to maintain that by his purchase he took a new title, and that the statute commenced to run against him only from the date of his purchase; but the court held against this contention, saying that "his estate in the land is the estate that the mortgagor had." And in the discussion of the question the learned justice, after referring to 559 other instances where a new title might start a new running of the statute, said: "And the remainderman, upon the expiration of the particular estate, does not come in under it, but claims through an independent source of title and he has his action, though the particular estate man may have been cut off from a recovery against the adverse possessor." And at the time of that decision the provision of said section 318 was

part of the law of this state, as it has always been since 1850: See 2 Hittell's General Laws of California, p. 633. It would be strange, indeed, if during the life of the particular tenant a remainderman could be compelled to lose his estate on account of another's possession which he would be utterly helpless to interrupt.

Plaintiffs' rights were not affected by the fact that they were made defendants in the foreclosure suit; their title was not subject to the mortgage, but was an independent paramount title, and not a subject of litigation in that suit.

It appears that one Webb was appointed administrator of the estate of John E. Church, deceased, as successor of the executrix, and commenced an action of ejectment against the present defendant Winter to recover possession of the property here in contest. The defendant in that action pleaded the statute of limitations; the trial court gave judgment for her; Webb appealed, and this court affirmed the judgment: See Webb v. Winter, 135 Cal. 455, 67 Pac. 691. But that judgment did not in any way bind the plaintiffs herein. An administrator is not a trustee for a remainderman, and the latter is not estopped by anything the former may do or suffer to be done. In that case the court said: "In this litigation the court is not concerned as to the individual legal status of the two adult children. If they have rights above and beyond that of the administrator, those rights are not in litigation here." Section 741 of the Civil Code expressly declares—what was always the law—that "No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or particular interest."

That part of the judgment appealed from and the order denying the new trial are reversed.

Lorigan, J., and Henshaw, J., concurred.

Hearing in Bank denied.

While We are not Inclined to Doubt the propriety of the decision in the principal case, the opinion does not meet the question presented by the facts before the court. The action was one to quiet title, and to its maintenance, under the statutes of California, it was not necessary that the plaintiffs should be entitled to the possession of the property at its commencement, or at all. Had the action been in ejectment, the assumption of the court that the plaintiffs had no cause of action until the death of their mother and the termination of her life estate would have been true, but an action

to quiet the plaintiff's title could have been commenced and maintained as soon as the foreclosure of the mortgage under which the defendant claimed had resulted in a sale and a conveyance purporting to transfer title pursuant thereto; from that moment the purchaser at such sale could have claimed, and probably did claim, an estate in the property adversely to the remaindermen, who, on their part, could at once have commenced a suit to have such adverse claim determined, and have obtained the relief sought in the present action, or so much, at least, of such relief as consisted in the determination that their title was not subordinate to that of the purchaser at the foreclosure sale. It was therefore not true, as a matter of fact, that the remaindermen were without a cause of action against the defendant prior to the termination of the life estate. The decision in the principal case does not consider, and therefore necessarily does not answer, the reasoning to be found in *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 13 Am. St. Rep. 73, 6 South. 197, and while we criticised that decision in our note thereto, we have not been able to discover that any court has fairly met the question necessarily involved, when the action by the remaindermen was one which they might have maintained as well before as after the determination of the estate for life.

The Possession of a Life Tenant is never deemed adverse to the remainderman, for the latter has no right of entry or action for possession during the life term: *Hanson v. Ingwaldson*, 77 Minn. 533, 77 Am. St. Rep. 692; *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387; *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239; note to *Allen v. De Grood*, 14 Am. St. Rep. 635.

COUTS v. CORNELL.

[147 Cal. 560, 82 Pac. 194.]

TAXATION.—*An Injunction Against the Assertion of a Tax or the Making of a Tax Deed* because of vital defects in the description of the property will not issue where the plaintiff has not offered to do equity by paying the amount for which the property was equitably taxable. (p. 170.)

TAXATION—*Moral Obligation to Pay Taxes.*—The fact that the assessment of real property is fatally imperfect as to description does not destroy the moral obligation to pay the taxes. The moral obligation to pay the amount justly chargeable is as great where the defect arises from an imperfect description as where it is the result of any other cause. (p. 171.)

Cassius Carter, district attorney, and W. R. Andrews, deputy, for the appellant.

Stearns & Sweet, for the respondent.

⁵⁰⁰ SHAW, J. The plaintiff had judgment on a demurrer to the complaint, and the defendant appealed.

The object of the action was to obtain a decree in equity ⁵⁰¹ declaring invalid certain assessments for taxes, and the sales and certificates made thereunder, enjoining the defendant from issuing any deed in pursuance thereof, and canceling the certificates so issued.

The complaint is in two counts, alleging that the plaintiff is the owner of certain land in San Diego county, consisting of parts of the Rancho Guajome, and that in pursuance of the assessments claimed to be invalid, the defendant as tax collector of the county is about to issue to the state of California deeds purporting to convey said land to the state, in pursuance of tax sales and certificates thereof made and issued for nonpayment of the taxes on one of said tracts of land for the years 1898 and 1899, respectively, and upon the other for the year 1895. The only defect or irregularity alleged, and the one which it is claimed makes the sales invalid is that the descriptions of the lands in the respective assessment-rolls are uncertain, and for that reason void. The appellant, for the purposes of the case, concedes that the descriptions are insufficient and uncertain, and that the sales were thereby rendered invalid, and we therefore refrain from expressing any opinion on the point.

In consideration of the case it must be assumed as true that the land was subject to taxation; that the tax levies were regularly made and the rates legally fixed by the proper authorities; that the plaintiff's land was fairly and legally valued at the sum stated in the assessment, and, consequently, that the plaintiff's property has been charged with no more than its fair and just proportion of the taxes levied; and further, that all the proceedings for the assessment, collection and sale were regular and valid, except that the description of the land in the assessment, though correct as to the number of acres assessed, was technically insufficient to identify the land as required by subdivision 2 of section 3650 of the Political Code. The plaintiff comes into a court of equity admitting that he should have paid on account of this property the exact sum originally charged against it; that this was no more than his fair share of the public burden which he, in common with all other taxpayers, must bear for the support of the government whose protection he enjoys.

We think the case thus presented is without equity, and that on the familiar principle that he who seeks equity must ⁵⁶² do equity, the plaintiff should be denied the equitable relief which he demands. The obligation to pay his just proportion of the taxes legally levied is one of the highest civic duties of the citizen to the state. The plaintiff admits that he has not been subjected to a greater proportional charge than other citizens have paid, and he practically asks exemption from any charge, on the technical ground that one of the public officers engaged in the duty of assessing the property has imperfectly described the property upon which his portion of the burden should be imposed. He claims that this just charge has become, because of an imperfect description, an injurious and oppressive cloud upon his title to the land which a court of equity should remove. The principle justly applicable to the case is thus tersely stated in *Esterbrook v. O'Brien*, 98 Cal. 674, 33 Pac. 765: "So long as the moral obligation to pay any portion of the tax exists, a court of equity will not lend its aid to prevent a cloud upon the title, but will leave the party to his remedy at law." Similar views have been expressed and enforced by this court in *Weber v. San Francisco*, 1 Cal. 457, *Hiberian Sav. etc. Soc. v. Ordway*, 38 Cal. 682, *San Jose Gas Co. v. January*, 57 Cal. 614, *County of Los Angeles v. Ballerino*, 99 Cal. 597, 32 Pac. 581, 34 Pac. 329, *Quint v. Hoffman*, 103 Cal. 508, 37 Pac. 514, *Pacific P. I. Co. v. Dalton*, 119 Cal. 606, 51 Pac. 1072, *Ellis v. Witmer*, 134 Cal. 253, 66 Pac. 301, and *Hellman v. Shoulters*, 114 Cal. 141, 44 Pac. 915, 45 Pac. 1057. If the description of the land had been sufficient, the plaintiff, in order to redeem his land from the tax sales, would be compelled to pay the original tax, and also interest, costs, and penalties amounting to more than the original sum: Pol. Code, sec. 3817. The original tax was not unjust, and if we concede that the defective descriptions were so material as to make the sales void, that consequently, under the provisions of section 3806 of the Political Code, the tax collector should not have offered the lands for sale, and hence that the penalties and costs are unjust, the plaintiff cannot ask to have the sales canceled nor the assessment set aside unless he shows that he has paid, or offers to pay, the amount which of right he ought to pay.

The application of this rule is not confined to cases where the relief demanded is confined to the enjoining of the collection of a tax, as distinguished from suits to obtain an ⁵⁶³ in-

junction against the issuance of a deed, or a decree removing a cloud, or some other equitable relief in regard to the proceedings taken to enforce collection. The rule is applied because of the broad principle that equity is peculiarly a forum of conscience, and it will not give relief which will enable a party to escape payment of all of a sum of money when it can perceive that in justice he should pay a part, unless he is ready to pay, and accompanies his demand with an offer to pay, the part which is just. The particular kind of equitable relief applied for is immaterial: *Weber v. San Francisco*, 1 Cal. 457; *Hibernia Sav. etc. Soc. v. Ordway*, 38 Cal. 682.

Nor can the rule be limited to cases where it appears that only a part of the original tax is just. If the entire tax or charge should justly be paid, the complainant would have no standing at all in equity, and he is allowed relief in any case solely because he offers to pay all that is just. Besides, this case does not present the question, for, by the forms of law, the plaintiff's lands are now chargeable by reason of the added penalties with more than twice the amount of the original tax, and it is strictly a case where part of the charge sought to be evaded is just and part unjust.

The fact that the assessment is imperfect as to the description does not, in view of the circumstances here appearing, destroy the moral obligation to pay the tax. The moral obligation to pay the amount justly chargeable as taxes is as great where the defect arises from an imperfect description of property as where it is caused by a valuation fraudulently made excessive, as in *Pacific P. I. C. Co. v. Dalton*, 119 Cal. 606, 51 Pac. 1072, and *County of Los Angeles v. Ballerino*, 99 Cal. 597, 32 Pac. 581, 34 Pac. 329, or by a higher levy than the board had power to make, as in *Quint v. Hoffman*, 103 Cal. 508, 37 Pac. 514, or by a levy improperly made, or a street assessment upon an illegally enhanced value, as in *Esterbrook v. O'Brien*, 98 Cal. 674, 33 Pac. 765, in each of which cases the rule here invoked was applied. Similar and much stronger applications of the rule are found in *German Nat. Bank v. Kimball*, 103 U. S. 733, 26 L. ed. 469, *Huntington v. Palmer*, 7 Saw. 358, 8 Fed. 449, *State R. R. Tax Cases*, 92 U. S. 616, 23 L. ed. 674, and *Hunt v. Easterday*, 10 Neb. 165, 4 N. W. 952.

Furthermore, in the case of a general annual tax such as ⁵⁶⁴ that here involved there is an obligation to pay, in a sense legal as well as moral, and also a lien therefor, each estab-

lished by law, irrespective of the regularity of the assessment. There can be no doubt that the legislature could authorize an amendment of the assessment so as to make it correctly describe the land, and if that were done the payment of the tax already levied could be enforced. An instance of the exercise of this power is shown by the act of March 23, 1893 (Stats. 1893, 290). In regard to such general taxes this court has said: 1893, p. 290). In regard to such general taxes this court has said: "The assessment does not create the lien. It is merely one justly leviable upon property attaches on the first Monday of March in each year, and the obligation to pay necessarily accrues at the same time, if not earlier": *County of San Diego v. County of Riverside*, 125 Cal. 500, 58 Pac. 81. The payment, it is said, is not due until a legal assessment is made, but when that is done there is no new obligation created, but a mere step is taken toward the enforcement of the original one: *County of San Diego v. County of Riverside*, 125 Cal. 500, 58 Pac. 81. It follows that there is a valid existing obligation upon the plaintiff to pay the tax, and one capable of enforcement at law. Therefore, the argument that the rule of equity here invoked by defendant cannot be applied unless there is an enforceable obligation on the plaintiff to pay falls to the ground.

There are some expressions in the opinion of Commissioner Smith in the recent case of *Palomares Land Co. v. County of Los Angeles*, 146 Cal. 530, 80 Pac. 931, which, if considered apart from the context and the question there involved, seem to state positively that until a valid assessment is made there exists no obligation, legal or moral, to pay the tax levied. But the court is there speaking of the right of the state to impose on the taxpayer an additional penalty for a failure to pay the tax when due, and the word "obligation" is obviously used in reference to a perfected and matured obligation, one of which immediate payment is due. What is meant is, that until an assessment is made there is no such obligation of immediate payment as would justify punishment for a failure to perform within the time prescribed. The doctrine of that case is not inconsistent with the views here expressed.

The respondent has not made any argument. The appellant calls our attention to the case of *Grant v. Cornell*, 147 Cal. 565, post, p. 173, ⁵⁶⁵ 82 Pac. 193, now pending in department one, involving the questions here discussed, in which the respondent has filed a brief in answer to the points made by the

appellant in this case, and upon the consideration of this case we have availed ourselves of the argument of the respondent in that case, so far as applicable.

For the reasons here given the demurrer to the complaint should have been sustained.

The judgment is reversed.

Angellotti, J., Van Dyke, J., Henshaw, J., Beatty, C. J., and Lorigan, J., concurred.

The Decision in the Principal Case is followed by the supreme court of California in the subsequent case of Grant v. Cornell, 147 Cal. 565, post, p. 173.

GRANT v. CORNELL.

[147 Cal. 565, 82 Pac. 193.]

AN INJUNCTION WILL NOT ISSUE to Prevent the Execution of a Deed for taxes on the ground of defects in the description of the property in the assessment. (p. 174.)

AN INJUNCTION WILL NOT ISSUE to Prevent the Execution of a Tax Deed on the ground that some parts of the tax for which the property was assessed are invalid, unless the complainant has paid, or offered to pay, the part which was valid. (p. 174.)

TAX SALE, Constructive Notice of.—A certificate showing the sale of property for delinquent taxes and giving a correct description of such property operates as constructive notice, and charges subsequent purchasers with the fact that a tax lien exists and is not satisfied by payment. (p. 175.)

AN INJUNCTION Against the Execution of a Tax Deed Will not Issue, in favor of a purchaser of the property subsequent to the tax sale, on account of defects in the assessment, where the original owner could not have maintained suit for such relief. (p. 175.)

Cassius Carter, district attorney, and W. R. Andrews, deputy, for the appellant.

Nutt Shaw, A. E. Nutt and George H. P. Shaw, for the respondents.

see SHAW, J. This is an appeal by the defendant from a judgment in favor of the plaintiffs, and is taken upon the judgment-roll alone.

The complaint attempts to set forth a cause of action in equity to enjoin the defendant from executing to the state of California a deed of certain lands belonging to the plaintiff

Fannie C. Grant, in pursuance of a certain sale thereof for taxes of the year 1891. The basis of the complaint upon which it is claimed that the deed should not be executed is, that the assessment of the taxes for the year in question was informal and irregular, particularly with respect to the description of the property, and that the levy was in part illegal. The property consisted of a block in Horton's addition to the city of San Diego. The description in the assessment did not mention the name of the city. This is the principal defect alleged. The other irregularities, aside from the alleged illegal levy relate to certain defective proceedings for the sale of the property. There is no allegation or showing that the plaintiffs, or either of them, at any time paid or tendered any part of the taxes for the year in question. The case in this particular is in all respects similar to the case of *Couts v. Cornell*, 147 Cal. 560, ante, p. 163, 82 Pac. 194, decided by the court in Bank, and it must be decided upon the same principles. It is there held that in a case where it is not claimed that the property is not liable for taxation, or that the proportion of taxes for which it is justly chargeable has ever been paid, it is necessary, in order to maintain a bill in equity against the officers of the state to prevent the execution of a deed in pursuance of a tax sale, that the plaintiff should show that he has paid or tendered the amount of the tax justly chargeable against the land, according to the levy legally made for the year in question. It is claimed that the levy for the year 1891 was invalid as to the road tax and bond and interest tax, composing part of the levy. It is admitted, however, that as to the remaining portion of the levy it was in all respects valid. In such cases it is necessary that the party should pay or tender the valid portion of the tax in order to enable him to enter a court of equity to ask relief concerning the portion claimed to be illegal or invalid.

⁵⁶⁷ The respondents make the additional point in this case that the plaintiff, Fannie C Grant, became the owner of the property in October, 1899, long after the proceedings for the sale took place, and that she was an innocent purchaser for value, and the court finds the facts in accordance with this claim so far as actual notice is concerned, but finds further that she had constructive notice of the sale by reason of the record of the certificate in the recorder's office. It is claimed by the respondents that this certificate did not constitute constructive notice, because the assessment upon which it is based

was void. The authorities cited, however, go no further than to state that a deed or other instrument which upon its face is void, or which is a forgery, does not constitute constructive notice: *Oglesby v. Hollister*, 76 Cal. 140, 9 Am. St. Rep. 177, 18 Pac. 146; *Hearst v. Egglestone*, 55 Cal. 367; *Hager v. Spect*, 52 Cal. 584. This certificate in question gave a correct description of the property, showing the name of the town, and was not subject to the defects which, it is claimed, make the assessment invalid. We doubt if the purchaser of property can claim the benefit of the doctrine protecting innocent purchasers, for the purpose of evading any duty or burden resting upon the property for the payment of taxes to the state, in cases where the party is seeking to restrain the officers of the state from proceeding in the manner prescribed by law to enforce payment of the taxes. The lien of the tax exists by statute, and can be discharged only by payment (Pol. Code, secs. 3716, 3717), and all persons are required to take notice of that fact. But however this may be, the certificate, being genuine and valid on its face, imparted constructive notice, and charged plaintiffs with knowledge of the fact that the tax lien existed and that the taxes had not been paid. It was said in *Couts v. Cornell*, 147 Cal. 560, ante, p. 168, 82 Pac. 194, that, notwithstanding the defective and irregular proceedings for the enforcement of the lien and the collection, the legislature could authorize a reassessment of the property and subsequent proceedings for the enforcement thereof: And see *County of San Diego v. County of Riverside*, 125 Cal. 500, 58 Pac. 81. The tax is a charge upon the property from the first Monday in March of the year for which it accrued, and the plaintiffs, under the circumstances of this case, occupy no position different from that of the original owner with respect to the ⁵⁶⁸ requirement that they must do equity before they can be allowed to receive relief at the hands of a court of equity. The demurrer to the complaint should have been sustained, and the judgment was therefore erroneous.

The judgment is reversed and the cause remanded.

Angellotti, J., and Van Dyke, J., concurred.

Hearing in Bank denied.

Principal Case affirms the decision in *Couts v. Cornell*, 147 Cal. 560, ante, p. 168.

NAVAJO MINING AND DEVELOPMENT COMPANY v.
CURRY.

[147 Cal. 581, 82 Pac. 247.]

CORPORATION, Increase of Capital Stock of—Notice Required by the Constitution and Statute cannot be Waived.—If the constitution and statutes of a state provide that the capital stock of a corporation cannot be increased without the consent of the persons holding the larger amount in value of the stock at a meeting called for that purpose, giving sixty days' public notice as may be provided by law, a meeting without such notice at which all the stockholders and the subscribers for stock are present and sign a written consent to such increase is entirely inadequate. (p. 177.)

Charles H. Brainard, for the petitioner.

U. S. Webb, attorney general, and George D. Sturtevant, deputy attorney general for the respondent.

⁵⁸¹ BEATTY, C. J. This is an original proceeding in which a California corporation seeks to compel the respondent to file and issue certificates of increase of its capital stock. An alternative writ of mandate was issued upon the filing of the petition, and the respondent submits the controversy upon his general demurrer thereto, for want of facts to justify the issuance of the writ.

The facts are, that the petitioner, having been originally organized with a capital stock of only seventy-five thousand dollars, became desirous of increasing the amount to one million dollars. To carry out this object a meeting of the stockholders was convened at the offices of the company in pursuance of a resolution of the directors for the purpose of ⁵⁸² considering the expediency of the proposed increase, and at said meeting the holders of all the issued stock were present in person or by proxy, as well as all subscribers for stock. And they all signed a written consent to the proposed increase on the record of the meeting. In short, the proceedings required for effecting an increase of the stock of a corporation were regularly pursued in every respect as prescribed by section 359 of the Civil Code, except that the public notice therein specified was not given. A certificate in proper form of what was done was delivered to the respondent, and the fees for filing were duly tendered, but he refused to file the certificate upon the ground that it appeared therefrom that the whole proceeding was invalid for want of the statutory

notice by publication in a newspaper of the call for the stockholders' meeting.

The contention of the petitioner is, that the actual attendance and consent of all the holders of, and subscribers for, its stock, rendered the failure to publish notice of the meeting immaterial; that the statutory and constitutional requirement of published notice in such cases is wholly for the benefit and protection of the stockholders; and that when the sole object of the notice has been accomplished by the voluntary attendance of all interested parties the statutory provision for published notice should be held directory and not imperative. There is both reason and authority to sustain this contention as applied to a statute, but in this state we have not only a statute to construe, but a constitutional provision which in express terms prohibits any increase of the capital stock of a corporation, "without the consent of the persons holding the larger amount of value of the stock, at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law": Const., art. 12, sec. 11.

A provision of the constitution of Missouri substantially identical was held by the supreme court of that state to be directory: *Riesterer v. Horton Land etc. Co.*, 160 Mo. 141, 61 S. W. 238. But we could not place the same construction upon the above-quoted provision of our constitution without disregarding not only its expressly prohibitory terms, but also the rule prescribed by the constitution itself for the effect to be given to its provisions: Const., art. 1, sec. 22.

⁵⁸³ If it be conceded that the requirement is unduly rigorous, we are nevertheless not at liberty to hold it directory merely. As a part of the constitution prohibitory in terms, it is necessarily prohibitory in effect, and the failure of petitioner to observe its requirements rendered the attempted increase of its capital stock absolutely void. It would, therefore, have been a vain act to file the certificate; and since mandate will not issue to compel the performance of a vain act, the writ must be denied and the proceeding dismissed. It is accordingly so ordered.

Henshaw, J., McFarland J., Van Dyke, J., Shaw, J., Angellotti, J., and Lorigan, J., concurred.

Corporations, Waiver of Notice of Increase of Capital Stock.—Perhaps the only other cases involving the question considered in the principal case are cited therein, to wit, *Riesterer v. Horton Land*
Am. St. Rep., Vol. 109—12

etc. Co., 160 Mo. 141, 61 S. W. 238, and Norvell-Shapleigh H. Co. v. Cook, 178 Mo. 189, 77 S. W. 559, the decisions in which are opposed to that in the principal case. We should, indeed, be surprised at any decision in harmony with it. It is true that the provisions of the constitution of California are not directory, but mandatory. This, however, does not, in our judgment, prevent a party entitled to the protection of the constitution from waiving it, at least in so far as property rights and civil obligations are concerned; nor preclude one entitled to notice in a prescribed manner from voluntarily appearing or proceeding, or submitting himself to liability, in the absence of such notice.

The Doctrine of Riesterer v. Horton Land etc. Co., 160 Mo. 142, 61 S. W. 238, is affirmed in the subsequent case of *State v. Cook*, 178 Mo. 189, 77 S. W. 559, where Chief Justice Robinson said: "Corporations in this state have by the unanimous concurrence of all the stockholders thereof, in meeting assembled, the right to increase their capital stock or bonded indebtedness, without the necessity of going through the form of giving the sixty days' public notice of the time and place of such meeting, as the constitution and statute designate, when all the stockholders express a waiver of such requirement. Such notice could have served no useful purpose whatever, under the facts as they appear in this particular, where all stockholders of relator company were present and participated in the meeting called. It is our opinion that the sixty days' notice does not apply to conditions like the present, and that the construction of a constitutional or statutory provision should never be adopted which results in the requirement of useless and absurd acts, except where its terms are positive and unavoidable."

IN RE KELSO.

[147 Cal. 609, 82 Pac. 241.]

ON HABEAS CORPUS to Obtain Release from Imprisonment under a conviction for violating a municipal ordinance, evidence given at the trial cannot be considered for the purpose of determining whether it justified the conviction. (p. 179.)

MUNICIPAL ORDINANCE, Construction of.—An ordinance declaring that no person shall maintain or operate any rock or stone quarry within designated limits cannot reasonably be construed as prohibiting the owner of land containing stone or rock from making thereon such proper and useful excavations for the purposes of construction as may be necessary. (p. 179.)

CONSTITUTIONAL LAW—Limitation of the Right to the Use of One's Real Property.—While the use to which a man may put his property may be restricted or regulated by the state in the exercise of its police power so far as may be necessary to protect others from injury from such use, the enjoyment of one's property by him cannot be interfered with or limited arbitrarily. The next thing to depriving him of his property is to circumscribe him in its use. (pp. 180, 181.)

MUNICIPAL ORDINANCE Forbidding Quarrying, Validity of. An ordinance declaring that no person shall maintain or operate any rock or stone quarry within a designated part of a city is unreasonable and void as an attempt to deprive the owner of the use of his property, though such use may not be detrimental or dangerous to the public. (p. 182.)

J. C. Bates, for the petitioner.

Lewis F. Byington and James M. Hanley, for the respondent.

¶¹⁰ ANGELLOTTI, J. Petitioner seeks his discharge from the custody of the sheriff of the city and county of San Francisco, by whom he is held under a commitment issued upon a judgment pronounced against him upon conviction of a violation of an ordinance of said city and county.

The prohibitory portion of said ordinance is as follows, viz.: "No person, company or association shall maintain or operate any rock or stone quarry within that portion of the city and county of San Francisco bounded as follows." Then follows a description of a large portion of said city.

The complaint filed against petitioner simply charged him in the language of the ordinance with willfully and unlawfully maintaining and operating a certain stone and rock quarry within the limits designated, and undoubtedly alleged a public offense if the ordinance is valid. In this proceeding, we cannot of course consider the evidence given upon the trial of petitioner, or determine whether or not that evidence showed that he committed the acts charged against him. The adjudication of the trial court, and the affirmance of the judgment by the superior court, are conclusive upon that question here.

The only question presented for our determination is as to the validity of the ordinance.

We do not think that the ordinance can reasonably be construed as prohibiting an owner of land containing stone or rock from making thereon such "proper and usual excavations for purposes of construction," as may be necessary. What is prohibited is the maintenance or operation of a "rock or stone quarry." The term "quarry" is not properly applicable to the comparatively slight excavations in land made primarily for purposes of construction thereon, and not primarily for the purpose of disposing of the rock, or stone, or other material taken out. As defined by the lexicographers, it is similar to a mine, in the sense that the material removed, be it mere rock or stone or valuable marble, is removed because of its value for some other purposes, and in the sense that it is not removed for the purpose of improving ¶¹¹ the property from which it is taken. It is distinguished from a mine in the fact that it is usually open at the top and

front (see Century and Standard Dictionaries); and, in the ordinary acceptation of the term, in the character of the material extracted, but these distinctions are not material here. Webster defines a quarry as "a place, cavern or pit where stone is taken from the rock or ledge, or dug from the earth, for building or other purposes; a stone pit," and in March's Dictionary we find it defined as "a stone mine." In its proper significance, this is what it really is. It is a place, generally open at the top and front, from which rock or stone is extracted solely because of its value for use elsewhere, just as gold or other precious metals are removed from a mine, and "proper and usual excavations" made for construction purposes on the land to be improved do not fall within the term "quarry." There is therefore nothing in the contention that the ordinance is in conflict with the provisions of section 832 of the Civil Code, confirming the right of the owner of land "to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations," and subject to which right the coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land.

The case, however, presents a much more serious question. The effect of the ordinance absolutely prohibiting the maintenance or operation of a rock or stone quarry within certain designated limits of the city and county of San Francisco is to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership—viz., the right to extract therefrom such rock and stone as they may find it to their advantage to dispose of. While the use to which a man may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as may be necessary to protect others from injury from such use, it is of course elementary that the enjoyment of one's property cannot be interfered with or limited arbitrarily. As is said in Tiedeman's Limitations of Police Power, the next thing to depriving a man of his property is ⁶¹² to circumscribe him in its use. A limitation of the use pro tanto deprives him of the enjoyment thereof, and any arbitrary action in this regard is a taking of private property without due process of law: Secs. 122, 122a. While in the

exercise of its police power the state may limit or regulate the use, any such limitation or regulation must find its justification in the necessity for the protection of the legal rights of others. If it does not, it is an unwarrantable invasion of property rights, against which the courts will protect. Whether or not a certain limitation or regulation is essential is largely a question for the legislative department, to be determined with reference to all the existing circumstances, and the courts will not ordinarily interfere where it can be seen that the regulation has some proper relation to an object within the domain of the police power of the state, which, as stated by Mr. Cooley, includes all regulations having reference to "the comfort, safety or welfare of society." But regulations which transcend these objects cannot be upheld by the courts as legitimate police regulations: See *Ex parte Dickey*, 144 Cal. 234, 236, 103 Am. St. Rep. 82, 77 Pac. 924, 66 L. R. A. 928.

Applying these well-recognized principles to the ordinance before us, we are unable to perceive any ground upon which it may be sustained as a legitimate exercise of the police power. It is in no sense a mere regulation as to the manner in which rock or stone may be removed from the land by the owner thereof, but is an absolute prohibition of any such removal. However valuable the rock or stone may be if removed, and however valueless if not removed, the owner must allow it to remain in its place of deposit. Such a prohibition might be justified, if the removal could not be effected without improperly invading the rights of others, but it cannot be doubted that rock and stone may under some circumstances be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize. So far as such use of one's property may be had without injury to others it is a lawful use which cannot be absolutely prohibited by the legislative department under the guise of the exercise of the police power.

It may freely be conceded that rock or stone quarrying may be done in such a way and under such circumstances as to occasion injury to others or to make it a public nuisance (see *Queen v. Mutter*, 10 Cox C. C. 6), and that the state has the power to impose such limitations as are necessary to prevent this.

For instance, an ordinary method of loosening rock or stone is blasting with powder, dynamite, etc., and respondent urges

this as one of the reasons why the operation of a quarry is dangerous to the public safety. This objection goes, however, only to the way in which the work is done, and not to the work itself. Rock or stone may be extracted without blasting—not so easily, perhaps, and therefore not so profitably, but still blasting is not absolutely essential to the extraction of the rock. It has been properly recognized that the matter of blasting in a densely populated community is one for police regulation, and the circumstances may be such that blasting may be absolutely prohibited. It was so held by the supreme court of Massachusetts in *Commonwealth v. Parks*, 155 Mass. 531, 30 N. E. 174, where an ordinance prohibiting the blasting of rock and stone with gunpowder, etc., without written consent from the board of aldermen, was upheld. Doubtless, the city and county of San Francisco may enact all needful regulations as to blasting, and such other regulations as to the manner in which and extent to which quarrying work may be done, as may be necessary to the protection of those rights which may be guarded by the state by the exercise of its police power. It may also be suggested that in so far as any work of the character here attempted to be prohibited, by reason of the place or manner in which it is being done, or the extent to which excavations are being made, constitutes an unauthorized invasion of the property rights of adjoining owners, such adjoining owners have their remedy by civil action.

We can see no valid objection to the work of removing from one's own land valuable deposits of rock or stone that may not be entirely met by regulations as to the manner in which such work shall be done, and this being so, we are satisfied that an absolute prohibition of such removal under all circumstances cannot be upheld.

It may be that such regulations of the work as will be upheld as a proper exercise of the police power will entail such costs as will in many cases make it unprofitable to remove⁶¹⁴ the rock or stone, or the rock or stone may be so situated as to make it impossible to extract it at all without violating the regulations; but if this be the effect of proper regulations the property owner cannot complain, for he holds his property subject to the proper exercise of the police power of this state.

It is unnecessary to discuss other objections made to said ordinance.

The ordinance being invalid, the petitioner must be discharged from custody, and it is so ordered.

Henshaw, J., Lorigan, J., McFarland, J., Beatty, C. J., Van Dyke, J., and Shaw, J., concurred.

All Property is Held under the implied obligation that the owner's use of it shall not be injurious to the public, and to this end such use may be regulated by the exercise of the police power of the state: *Bland v. People*, 32 Colo. 319, 105 Am. St. Rep. 80. But under the guise of the police power, property rights cannot unjustly or arbitrarily, without good cause, be infringed or invaded: *Iler v. Ross*, 64 Neb. 710, 97 Am. St. Rep. 676; *Block v. Schwartz*, 27 Utah, 587, 101 Am. St. Rep. 1.

The Liability of Persons Who Explode Blasts on their own premises is discussed in *Sullivan v. Dunham*, 161 N. Y. 290, 76 Am. St. Rep. 274; *Booth v. Rome etc. R. Co.*, 140 N. Y. 267, 37 Am. St. Rep. 552; *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 18 Am. St. Rep. 248. That blasting operations carried on in a city may constitute a nuisance, see *Longtin v. Persell*, 30 Mont. 306, 104 Am. St. Rep. 723.

EX PARTE HAYDEN.

[147 Cal. 649, 82 Pac. 315.]

CONSTITUTIONAL LAW.—The Liberty and Pursuit of Happiness in Which an Individual is Protected by the constitution of the United States and of the state applies as fully to his right to contract, and his right to follow a legitimate vocation, untrammelled by unnecessary regulations, as it does to the freedom from arrest or restraint of his person. (p. 184.)

CONSTITUTIONAL LAW—Police Power, Limitation Upon.—The legislature, under the guise of police regulation, cannot enact laws which do not pertain to the public health, welfare, or morals, and which impose onerous and unnecessary burdens upon business and property. (p. 184.)

CONSTITUTIONAL LAW—Police Power, Duty of the Courts to Determine What is a Valid Exercise of.—When, in an assumed exercise of the police power, attempts are made to regulate a business or occupation which is in itself recognized as innocent and useful to the community, it is always a judicial question whether such regulation is a valid exercise of the police power. (p. 185.)

CONSTITUTIONAL LAW.—A statute providing that all fruit, green and dried, contained in boxes, barrels, or packages, which shall be shipped or offered for shipment in the state, shall have stamped, branded, stenciled, or labeled in a conspicuous place on the outside thereof, in clear, legible letters, a statement truly designating the county and immediate locality in which the fruit was grown, is not an exercise of the police power, and is void as an unconstitutional invasion of liberty. (p. 187.)

Wright & Wright, for the petitioner.

Benjamin K. Knight, district attorney, for the respondent.

649 HENSHAW, J. Petitioner was convicted and sentenced to punishment for violation of the provisions of a state statute, which provides as follows: "All fruit, green and dried, contained in boxes, barrels or packages, which shall hereafter be shipped or offered for shipment in this state by any person, firm or corporation, shall have stamped, branded, stenciled or labeled in a conspicuous place on the outside of every such box, barrel or package, in clearly legible letters, at least one-quarter ⁶⁵⁰ of an inch in height, a statement truly and correctly designating the county and immediate locality in which such fruit was grown": Stats. 1903, p. 338. For a violation of this act he was sentenced to pay a fine of three hundred dollars, with the alternative of imprisonment, and sued for and obtained a writ of habeas corpus. He contends that the penal statute in question is violative of section 1 of the fourteenth amendment of the constitution of the United States and of section 1 of article 1 of the constitution of this state, and that the statute in question works an unwarranted invasion of his liberty.

It has come to be well recognized that the liberty and the pursuit of happiness in which the individual is protected by the constitution of the United States and of the state applies as fully to his right of contract, his right to follow a legitimate vocation, untrammelled by unnecessary regulations, as it does to the freedom from arrest or restraint of his person. This subject has received recent consideration by this court, and it is unnecessary to do more than refer to *Ex parte Dickey*, 144 Cal. 234, 103 Am. St. Rep. 82, 77 Pac. 924, 66 L. R. A. 928.

Putting out of contemplation, therefore, the fundamental right of the government to subject private property to taxation and to take such property in time of public calamity and peril, the right of the state to impose burdens upon such property where the business is legitimate and innocuous—in other words, to regulate harmless vocations—is found in the police power alone: *Young v. Commonwealth*, 101 Va. 853, 45 S. E. 327; *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. Rep. 383, 42 L. ed. 780. The police power, deriving its existence from the rule that the safety of the people is the supreme law, justifies legislation upon matters pertaining to the public wel-

fare, the public health, or the public morals: Cooley's Constitutional Limitations, 7th ed., p. 837; *Ruhstrat v People*, 185 Ill. 133, 76 Am. St. Rep. 30, 47 N. E. 41, 49 L. R. A. 181. But the legislature, under the guise of police regulations, cannot enact laws which do not pertain to one or the other of these objects, and which impose onerous and unnecessary burdens upon business and property. By this court it has been said (*Ex parte Whitwell*, 98 Cal. 73, 35 Am. St. Rep. 152, 32 Pac. 870, 19 L. R. A. 727): "But it is not true that when this power is exerted for the purpose of regulating a business or occupation which in itself is recognized ^{as} as innocent and useful to the community, the legislature is the exclusive judge as to what is a reasonable and just restraint upon the constitutional right of the citizen to pursue such business or profession. As the right of a citizen to engage in such a business or follow such a profession is protected by the constitution, it is always a judicial question whether any particular regulation of such right is valid exercise of legislative power. . . . This principle is stated very forcibly in the case of *Mugler v. Kansas*, 123 U. S. 661, 8 Sup. Ct. Rep. 273, 31 L. ed. 205, in the following language: 'The courts are not bound by mere forms, nor are they to be misled by mere pretense. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the court to so adjudge, and thereby give effect to the constitution.' "

The propositions here enunciated have received the sanction of all the courts and may not be gainsaid. Indeed respondent upon this appeal does not dispute them but undertakes to show that the act in question is a legitimate exercise of the police power, in that its object and purpose are to preserve and promote public health and public welfare. His reasoning in this regard is, that from time to time the legislature has passed and this court has approved statutes providing for the quarantining of infected fruit, for the destruction of diseased fruit and fruit trees and for the compulsory care and preservation against disease of orchards, and it quotes this court's statement in *County of Los Angeles v. Spencer*, 126

Cal. 673, 77 Am. St. Rep. 217, 59 Pac. 203, to the following effect: "It is known that the existence of the fruit industry in this state depends upon the suppression and destruction of the pests mentioned in the statute. The act in question is, therefore, a proper exercise of the police power which the legislature has under section 1 of article 19 of the constitution, to subject property to such reasonable restraints and burdens as will secure and maintain the general welfare and prosperity of the state." From this respondent argues that ⁶⁵² the effect of the act is (e. g.), that when apples are shipped to the markets of this state, properly labeled "Apples grown in Santa Cruz county," because of their known cleanliness and freedom from disease, such apples are permitted to pass local boards of commissioners, while at the same time, if apples are shipped from San Mateo county into Santa Cruz county bearing the label, the county of Santa Cruz can protect itself against the diseased fruit from the neighboring county. Still further, it is argued that the act would prevent the false labeling of fruit, and that the prevention of a general fraud is legitimately within the scope of the police power. But the difficulty with this argument is that the act clearly is not designed to accomplish any of these purposes, and is wholly inadequate to their accomplishment. The scope, the meaning and intent of an act must be gathered from its title and from its body. There is nothing in either the title or the body of this act which deals or pretends to deal with any of the difficulties which respondent mentions. If it is a question, as respondent contends, of the shipping of diseased apples, it would be simple enough for the legislature, and quite within its powers, to regulate or prohibit the transportation of such diseased fruit. If it were a question merely of deception in the label, the direct and efficacious method would be for the legislature to prohibit false labeling. None of these things, as we have said, does this act do or pretend to do. It requires merely that every shipment of every package of fruit, whether it be from the small farmer with few trees or vines or whether it be from the large producer, must in every instance bear a label naming the county and immediate locality in which the fruit was grown. It is a matter of common knowledge that this requirement would work the absolute destruction of certain important branches of industry. Dried fruit, such as prunes, peaches, and apricots, are gathered in establishments in enormous quantities from the state over.

These fruits when dried are assorted by grade and quality, and thus assorted and packed are shipped to the uttermost parts of the earth. It would absolutely prohibit this industry if these fruit-driers were compelled to label each package with the name of the localities from which the fruit came, and if it did not absolutely prohibit it, it would render their business so onerous, complicated, and expensive as seriously to imperil ~~its~~ its existence. It is plain, therefore, that the act was not designed to prevent either false labeling or the shipping of diseased fruit, and, if so designed, it is both meaningless for this purpose and burdensome for all others. It seems quite apparent that the true purpose of the act was to obtain for the fruit-raisers of some well-advertised and favored localities, an advantage in the disposition of their own fruit. But this, for reasons well and elaborately set forth in *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736, 51 N. E. 257, 42 L. R. A. 490, forms no part of the police power, and is wholly beyond the prerogative of the legislature.

It follows, therefore, that the act in question works an unconstitutional invasion of the prisoner's liberty and it is ordered that he be discharged.

McFarland, J., Lorigan, J., Angellotti, J., Van Dyke, J., and Shaw, J., concurred.

A Statute Requiring all articles made by prison labor to be branded or marked so as to show that fact, before being sold, is held unconstitutional in *People v. Hawkins*, 157 N. Y. 1, 68 Am. St. Rep. 736. But a statute requiring manufacturers and sellers of baking powder to affix a label to every can showing the residence of the manufacturer and the ingredients of the contents, is held constitutional in *State v. Sherod*, 80 Minn. 446, 81 Am. St. Rep. 268. See, too, the note to *Booth v. People*, 78 Am. St. Rep. 261.

NORRIS v. LILLY.

[147 Cal. 754, 82 Pac. 425.]

CONTRACTS.—The Mere Fact that a Contract is not Specifically Enforceable does not render it either void or voidable. (p. 189.)

FRAUDS, STATUTE OF.—If a Conveyance is Executed in Consideration of the Oral Promise of the Grantee to Support, and do other acts for the benefit of, the grantor, the performance of the contract by the former is a sufficient execution to take it out of the statute of frauds. (p. 190.)

A CONVEYANCE, the Consideration of Which is the Promise of the Grantee to Support the Grantor, though such promise cannot be specifically enforced, is valid and cannot be rescinded at the instance of the former if the latter has performed, or is in good faith engaged in the performance of the promise. (p. 190.) [Overruling *Grimmer v. Carlton*, 93 Cal. 189, 27 Am. St. Rep. 171, 28 Pac. 1043.]

A JUDGMENT on the Pleading is not proper when there is an issue joined upon any proposition. (pp. 190, 191.)

Warren Sexton and R. H. Latimer, for the appellants.

J. M. McGee, for the respondent.

755 HENSHAW, J. Plaintiff sued for a cancellation of a deed to real property which he had made to defendants, and for the recovery of the value of certain personal property, farming utensils, and the like, which were upon the land at the time of the conveyance. His complaint alleged that he was an old man seventy-four years of age, and that, induced by the promises of the defendants that they would provide support and maintenance for him during every alternate two months of his natural life, and would pay all his existing debts and obligations, he executed to them a deed of all his realty. He alleged that the promises and representations were made in bad faith with intent to deceive and defraud him of his property; that the promises were made without any intent on the part of defendants to perform them, and that in fact they had wholly failed and neglected to provide him with support and maintenance, nor had they paid any of his debts. The answer denied the bad faith and fraud. It agreed with the complaint upon the question of the moving consideration for the deed, and averred complete performance upon the part of defendants—the payment of his debts and his maintenance and support—until plaintiff refused further to accept such support and maintenance. The performance of defendants' contract is

alleged to have continued from the winter of 1896 until October, 1902. They specifically aver a payment of doctor's bills, funeral expenses, etc., on behalf of the plaintiff in excess of the sum of one hundred and thirty-five dollars, and, ⁷³⁶ finally, they allege that they never have refused to comply with any of the terms of the contract, and stand ready and willing to perform them all.

Such, in brief, are the pleadings in the case, and upon them the court rendered its judgment that the deed of plaintiff to defendants be canceled, that the defendants execute a deed of conveyance of the property to plaintiff, and that plaintiff have his costs of suit. From the judgment so rendered on the pleadings the defendants appeal.

From the argument of the respondent upon this appeal it appears that the trial court based its decision and judgment upon the case of *Grimmer v. Carlton*, 93 Cal. 189, 27 Am. St. Rep. 171, 28 Pac. 1043, and in effect held that putting out of consideration the issue raised upon the question of fraud, the contract itself, being one that could not be specifically enforced against the defendants, made the deed void, or at least voidable, and subject to cancellation at the instance of the grantor without any further evidence upon the matter. It is but just to the learned judge of the trial court to say that his ruling in this regard draws support from the case to which we have adverted. That case itself, however, is at variance with other adjudications of this court as well as with the whole current of authority upon the subject, and cannot longer be considered as an authoritative expression of the law. The mere fact that a contract is not specifically enforceable does not render it either void or voidable. An agreement to do any act or series of acts which the promisor but for his agreement was under no obligation to perform, has always been deemed an ample consideration of any contract, transfer or conveyance, whether the doing of such act or acts should be specifically enforced or not. If in such a case as this, the promisor had refused to execute the contract, an action for rescission would lie, but this rescission would involve a cancellation of the deed only upon terms meet in equity. In the very case here pleaded, if the defendants, after the payment of this money, and after years of personal service, had refused to proceed further with the contract, plaintiff unquestionably would have been entitled to rescind, but in rescinding the court in equity would take cognizance

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Such, in brief, are the pleadings in the case, and upon them the court rendered its judgment that the deed of plaintiff to defendants be canceled, that the defendants execute a deed of conveyance of the property to plaintiff, and that plaintiff have his costs of suit. From the judgment so rendered on the pleadings the defendants appeal.

From the argument of the respondent upon this appeal it appears that the trial court based its decision and judgment upon the case of *Grimmer v. Carlton*, 93 Cal. 189, 27 Am. St. Rep. 171, 28 Pac. 1043. and in effect held that putting out of consideration the issue raised upon the question of fraud, the contract itself, being one that could not be specifically enforced against the defendants, made the deed void, or at least voidable, and subject to cancellation at the instance of the grantor without any further evidence upon the matter. It is but just to the learned judge of the trial court to say that his ruling in this regard draws support from the case to which we have adverted. That case itself, however, is at variance with other adjudications of this court as well as with the whole current of authority upon the subject, and cannot longer be considered as an authoritative expression of the law. The mere fact that a contract is not specifically enforceable does not render it either void or voidable. An agreement to do any act or series of acts which the promisor but for his agreement was under no obligation to perform, has always been deemed an ample consideration of any contract, transfer or conveyance, whether the doing of such act or acts should be specifically enforced or not. If in such a case as this, the promisor had refused to execute the contract, an action for rescission would lie, but this rescission would involve a cancellation of the deed only upon terms meet in equity. In the very case here pleaded, if the defendants, after the payment of this money, and after years of personal service, had refused to proceed further with the contract, plaintiff unquestionably would have been entitled to rescind, but in rescinding the court in equity would take cognizance

of the value of the services rendered and the moneys paid, the value of the occupation of the land by the promisors, and ⁷⁵⁷ reach its conclusion under the evidence as to the terms upon which a cancellation of the deed should be decreed. Under the case, however, presented by these pleadings, issue was squarely joined upon the question of the breach of the contract, and if it be that defendants have performed the obligations imposed upon them and stand ready for a continued performance of them, plaintiff has no cause of action whatever. This contract was executed by the plaintiff by his deed. The consideration of the defendants was oral, but such oral consideration is not in dispute between the parties, and is sufficient to support the contract: *Hays v. Montgomery*, 118 Ind. 91, 20 N. E. 646; *Nichols v. Burch*, 128 Ind. 324, 27 N. E. 737. And if any doubt could exist upon this point the continued performance of the contract by the promisors, as alleged, is sufficient execution to take the case out of the statute of frauds. Such, indeed, was held to be the case in *Manning v. Franklin*, 81 Cal. 205, 22 Pac. 550, where the whole contract, involving the erection of a dwelling-house upon the one hand for a life estate to be granted upon the other, was held to be taken out of the statute of frauds by a part performance in the erection of the building and the rendering of the personal services.

Grimmer v. Carlton, 93 Cal. 189, 27 Am. St. Rep. 171, 28 Pac. 1043, as we have said, seems to have entertained the mistaken notion that a contract such as this was void because not specifically enforceable, whereas, in truth, such a contract, in the absence of fraud, is absolutely valid and is no more voidable because not capable of specific performance than would be any other of the myriad forms of like contracts which are daily entered into and daily performed, and for the breach of which upon the part of the promisor the promisee has his action for rescission or for damages, as the circumstances may justify and warrant. It is only necessary upon this proposition to cite the footnote to the case of *Grimmer v. Carlton*, as reported in 27 Am. St. Rep., at page 171, and also the footnote in *Devlin on Deeds*, paragraph 807, where the same case comes under review.

That case having been decided upon the mistaken proposition of law that the contract was void, it is perhaps superfluous to point out that issues in this action are joined upon all the vital matters, and that where issue is joined upon any

⁷⁵⁸ single material proposition a judgment on the pleadings is improper: *Widmer v. Martin*, 87 Cal. 88, 25 Pac. 264; *Ghirardelli v. McDermott*, 22 Cal. 539; *Botto v. Vandament*, 67 Cal. 332, 7 Pac. 753.

For the foregoing reasons the judgment is reversed and the cause remanded.

McFarland, J., and Lorigan, J., concurred.

Authorities in Support of the Principal Case will be found in the note to *Grimmer v. Carlton*, 27 Am. St. Rep. 174. See, too, the recent cases of *Teske v. Dittberner*, 65 Neb. 167, 101 Am. St. Rep. 614; *Cooper v. Colson*, 66 N. J. Eq. 328, 105 Am. St. Rep. 660; *Stebbins v. Petty*, 209 Ill. 291, 101 Am. St. Rep. 243; *Culy v. Upham*, 135 Mich. 131, 106 Am. St. Rep. 388.

CASES
IN THE
SUPREME COURT
OF
IDAHO.

**FORD v. WASHINGTON NATIONAL BUILDING AND
LOAN INVESTMENT ASSOCIATION.**

[10 Idaho, 30, 76 Pac. 1010.]

USURY—Building and Loan Associations.—Where a contract of a building and loan association provides for the payment of a fixed monthly sum as interest, and a further monthly sum as principal, so that while the principal debt is decreasing the interest payments remain the same, and, though at first legal, become, through the reduction of the principal, usurious before the maturity of the loan, the transaction is not relieved from the operation of the usury statute by a grant of a right to pay the entire debt at any time. (p. 194.)

USURY.—In Determining the Question of usury in the case of a transaction by a building and loan association the subject of inquiry is whether or not a contract has been made whereby, either directly or indirectly, a greater rate of interest may be charged than that authorized by law. (p. 194.)

USURY.—The Defense of Usury may be Pleaded by anyone claiming under and in privity with the borrower. (p. 195.)

USURY.—The Doctrine of Estoppel cannot be invoked to defeat the defense of usury. (p. 198.)

Forney & Moore, for the appellant.

No appearance on behalf of the respondent.

32 AILSHIE, J. This action was commenced by the plaintiff for the cancellation of a mortgage appearing of record against certain of her real estate in the city of Moscow. The defendant answered denying, among other things, the payment of the mortgage debt, and set forth the mortgage and alleged a balance due thereon praying judgment of foreclosure. The case was tried before the judge without a jury and

judgment was entered in favor of the plaintiff. The defendant settled a statement and bill of exceptions and thereupon appealed from the judgment.

The questions presented by this appeal for our consideration are set forth in the following assignments of error: "1. The trial court erred in adjudging the contract usurious—the principle announced by this court in *Anderson v. Oregon Mtg. Co.*, 8 Idaho, 418, 69 Pac. 130, being applicable; 2. The contract herein differs from those in the cases of *Fidelity Sav. Assn. v. Shea*, 6 Idaho, 405, 55 Pac. 1022, *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 86, 49 Pac. 314, 37 L. R. A. 509, in that the debt could be paid at any time by the borrower, with interest at twelve per cent per annum and no more; 3. The evidence proved an estoppel upon the plaintiff's claim of usury upon appellant's second defense; 4. On no theory appellant received back his principal."

As suggested by the second assignment, the only material or essential difference between the facts upon which this case rests and those in *Fidelity Sav. Assn. v. Shea*, 6 Idaho, 405, 55 Pac. 1022, and *Stevens v. Home Savings etc. Assn.*, 5 Idaho, 741, 51 Pac. 779, is that in this case the borrower might at any time "or on before" seven years from the date of the contract pay off the entire debt by paying the annual interest of six per cent and annual premium of six per cent.

On the eighteenth day of May, 1893, Honorable W. C. Piper then judge of the second judicial district of this state, made a written application to the Washington National Building and Loan Investment Association (a corporation), appellant herein, for a loan of \$1,300, offering as security therefor a first mortgage on his residence property in the city of Moscow. At the time of making this application, Judge Piper was not a member of the association, and under the by laws of the corporation it seems that loans could not be made to anyone but members who had their dues paid up on their stock for at least six months. After going through with the regular routine, usually required by such companies, the mortgage was executed of date October 16, 1893, and was acknowledged on the eighteenth day of the same month. November 3, 1893, the association issued a check for \$1,195 to "the Wash. Nat. Bank, account William C. Piper," which it had been agreed should be used to pay off a pre-existing mortgage indebtedness upon the same property on which the subsequent mortgage was given.

Another check for the balance of \$105 was issued to "William C. Piper or bearer," but was never delivered to the mortgagor, but was turned into the association for the ostensible purpose of paying the following items to the company: Membership fee, \$16; attorney fee, \$10; application, \$13; cancellation fee, \$7.50, and \$58.50 for six installments on the stock, covering the six months' installments immediately preceding the loan as required by the by-laws. The actual sum, then, received on this loan was \$1,195. By the terms of the contract Piper was to pay a fixed sum of \$13 per month as interest and a monthly installment of \$9.75 on the principal or stock, as it was termed by the contract. While the principal would be constantly diminishing, the interest payments would still remain fixed, and although starting out at a rate of about 12.56 per cent, by the end of seven years would exceed thirty-six per cent. It is true that if the debtor had paid the debt at such a time prior to the reduction of the principal that the monthly interest paid would not have raised the rate above eighteen per cent per annum, as allowed by law at the time of execution of the contract (Rev. Stats., sec. 1264), then no usury would ever have been collected or payable. But this was not done. This contract did not mature in full within that period of time, but only to the extent of the monthly principal and interest installments. It cannot be presumed that the contract was executed with any view to payment in any other manner or at any different time than that stipulated therein. The contract shows on its face the intent of the parties thereto. That intent was to charge ³⁴ and collect under devious and specious pretexts what amounted to a higher rate of interest than that allowed by law. A contract of this kind granting an option to pay before maturity and where the interest grows into a usurious rate before such maturity is a usurious contract, and does not fall within the rule announced by the courts permitting a higher rate by way of a penalty after maturity where the debt is not paid at maturity. The test of usury, fixed by our statute (section 1266), is not what might have happened under possible contingencies, but rather, that if "a rate of interest has been contracted for greater than is authorized" by law it is usurious and must be so treated by the courts. The subject of inquiry in such cases is whether or not a contract has been made whereby, either directly or indirectly, a greater rate may be charged than that authorized by law: Vermont Loan etc. Co. v. Hoff-

man, 5 Idaho, 376, 95 Am. St. Rep. 186, 49 Pac. 314, 37 L. R. A. 509; *Stevens v. Home Saving etc. Assn.*, 5 Idaho, 741, 51 Pac. 779; *Fidelity Savings Assn. v. Shea*, 6 Idaho, 405, 55 Pac. 1022.

Does this fall within the rule announced in *Anderson v. Oregon Mtg. Co.*, 8 Idaho, 418, 69 Pac. 130? I would answer this in the negative. There may be expressions in that opinion which would look to the conclusion reached by the appellant here, but as I read that case, the only question material to its determination was whether or not the purchaser of the mortgaged premises who retained sufficient out of the purchase price of the land to cover the debt and agreed to pay the mortgage could be heard to say that the debt he thus agreed to pay was usurious. A majority of this court said he could not. That seems to me the utmost extent to which that case goes.

The last installment paid under this contract was in April, 1898, and on July 6, 1899, the mortgagor conveyed the mortgaged premises to Adele T. Piper, his wife. This deed contained full covenants of warranty, and among its covenants is the following: "That the same are free and clear of all former or other grants, bargains, sales, liens, taxes, assessments and encumbrances of whatever kind or nature soever, except taxes for year 1899; and that the above bargained premises in the quiet and peaceable possession of the said party of the second ³⁵ part, her heirs and assigns, against all and every person or persons lawfully claiming or to claim the whole or any part thereof, the said party of the first part shall and will warrant and forever defend."

On the fifth day of October, 1899, Adele T. Piper, by deed containing like covenants and warranty, conveyed the premises to the plaintiff, Adele T. Ford. It is not contended by the appellant that either the purchaser, Adele T. Piper, or the plaintiff ever assumed or promised or agreed to pay the mortgage debt.

In this case the respondent is the purchaser of the entire legal and equitable estate of the mortgagor in and to the mortgaged premises, and is privy in estate with the original grantor. She has neither assumed nor agreed to pay the mortgage debt, neither does it appear that any sum whatever was retained by her from the purchase price of the land for the benefit of the mortgagee or for application upon the mortgage debt. The principal sum borrowed by her grantor having been repaid by him prior to conveyance, it would be reason-

able and fair to assume that she took this property with notice of the usurious character of the contract and with knowledge that under the usury statute the debt was paid and liquidated, and that there was no further obligation thereunder chargeable against the estate. It seems to me that the defense of usury may be pleaded by anyone claiming under and in privity with the borrower. This view seems to have been taken by some very respectable authorities: Thompson on Building and Loan Associations, p. 522; Brolasky v. Miller, 9 N. J. Eq. 807; Lyon v. Welsh, 20 Iowa, 579; Tyler on Usury, p. 406.

We next come to the contention of appellant that the respondent and her grantors were estopped from raising the issue of usury in this case. The substance of appellant's contention under this assignment is that, since the loan association was so organized as to permit of the subscribers for stock paying up at any time they might desire to withdraw from the association, and at the same time receive a share of the net profits earned, numerous members might withdraw and receive their share of usurious interest collected under these contracts, ³⁶ and thereafter this defense be interposed by other members and thereby diminish the proceeds to be received by the remaining members, and work an inequitable and unjust discrimination between the withdrawing members and those who remain in the association. Our answer to this position is that the members of the association are presumed to know the law, and thus knowing that all such contracts as the one entered into in this case, executed to be enforced against real estate in Idaho, are usurious, and that if they so divide their unlawfully gotten profits as to enable one member to obtain an advantage over another, they cannot resort to a court of equity to give them relief. When declaring dividends out of such usurious receipts, they must have known that every such contract for the enforcement of which they might be compelled to resort to the courts would be open to attack for its illegal provisions. To allow the purposes and objects of the usury statutes to be thwarted and the law evaded by a corporate plan so unique would be an acknowledgment of the inability of the courts to look through a veneer of words and find the real object and purpose sought. It seems to me that the doctrine of estoppel which prevents a party to a contract coming into court and seeking to have the court place a different construction upon his contract from that

which he has placed upon it by his continuous actions and conduct, and thereby prejudice the rights of the other contracting party, should not be applied to prevent the enforcement of the usury statute. The state has an interest in the enforcement of this statute, in that it receives the benefits of the penalty, and the statute therefore becomes more than a law protecting the necessitous borrower.

Respondent has aptly expressed this view of section 1266 of the Revised Statutes as follows: "Section 1266 of the Revised Statutes provides that the court shall impose the penalty prescribed for usury 'if it is ascertained in any suit, brought on that contract,' that a rate of interest greater than that authorized by the statute is contracted for, 'directly or indirectly.' Under this statute usury is not a defense which a party may, or may not, invoke by pleading it. The duty of enforcing the prohibition is imposed upon the court regardless of the plea by the ⁸⁷ party; and the statute is a solemn declaration of the public policy of the state. A party cannot, therefore, estop himself from asserting this defense."

This position is substantially sustained by *Stevens v. Home Bldg. etc. Assn.*, 5 Idaho, 741, 51 Pac. 779; *Fidelity Bldg. Assn. v. Shea*, 6 Idaho, 405, 55 Pac. 1022; *Vermont Loan etc. Co. v. Hoffman*, 5 Idaho, 376, 95 Am. St. Rep. 86, 49 Pac. 314, 37 L. R. A. 509. On estoppel, see *Cade v. Larned*, 109 Ga. 292, 34 S. E. 566; *Buquo v. Bank of Erin* (Tenn. Ch. App.), 52 S. W. 775; *Miles v. Kelly* (Tex. Civ. App.), 25 S. W. 724; *Red v. Johnson*, 27 Wash. 56, 67 Pac. 381, 57 L. R. A. 404.

Appellant urges that the judgment should be reversed, for the reason that the court erred in finding that the principal sum received by Piper had been fully paid. According to the figures presented by the appellant's brief, there is a balance of \$46.80 due the association, and according to respondent's figures there would be a balance of \$23.30 which respondent practically admits would still be due. This misunderstanding on the part of the court has evidently arisen from the variance between the allegations of defendant's answer and his proofs. In paragraph 7 of the defendant's "further, separate and second defense," it is alleged "that during this period the payments made on account of the Piper loan have been the sum of \$689, and no more, and the payments on said stock, together with the dividends, aggregating the sum of \$590.50, and no more." The same allegation as to payment of \$689

interest and premium is found in paragraph 4 of defendant's "further, separate and third defense."

Mr. Vials, who was the association's manager during the period covered by this transaction, testified upon the trial concerning the amount paid as follows: "The total amount of installments paid on this building and stock loan amounted to \$565.50. The total amount paid in, interest and premium on the loan, \$687.70, making the total amount paid in, \$1,253.20." The confusion evidently arose by reason of the defendant figuring all the while that the loan was \$1,300, and the first \$58.50 deducted for six installments was a payment on the loan, while the plaintiff proceeded on the theory that the loan was only \$1,240.50, and that the \$58.50 was never received by the borrower. ^{ss} It seems that this confusion is more the fault of appellant than of respondent, and if the apparent discrepancy had been seasonably brought to the attention of the trial court it would undoubtedly have been corrected.

We cannot reverse the judgment on this account alone. We shall, however, decline to award respondent any costs, and that will fully compensate the appellant for all it would have been entitled to recover upon any basis of figuring which has been presented to us.

Judgment affirmed. No costs awarded.

Sullivan, C. J., and Stockslager, J., concur.

What Transactions are Usurious is the subject of a monographic note to *Bank of Newport v. Cook*, 46 Am. St. Rep. 178-202. A contract is usurious when it is the purpose of the lender to get more than the lawful rate of interest, and there is any contingency by which he may do so: *Miller v. Life Insurance Co.*, 118 N. C. 612, 54 Am. St. Rep. 741. Compare *Truby v. Mosgrove*, 118 Pa. St. 89, 4 Am. St. Rep. 575, and see *McDonnell v. De Soto etc Bldg. Assn.*, 175 Mo. 250, 97 Am. St. Rep. 592. On the question of estoppel to urge the defense of usury, see *Faison v. Grandy*, 128 N. C. 438, 83 Am. St. Rep. 693; *McDonnell v. De Soto etc. Bldg. Assn.*, 175 Mo. 250, 97 Am. St. Rep. 592.

COEY v. CLEGHORN.

[10 Idaho, 166, 76 Pac. 72.]

EXEMPTIONS—Person on Indian Reservation.—The creditors of a person who resides on an Indian reservation cannot seize his exempt property on the theory that he is not a resident of the state. (p. 202.)

EXEMPTIONS—Waiver by Disclaimer of Ownership.—Where a debtor disclaims ownership in exempt property seized in attachment, and the attachment is dissolved, he may nevertheless claim his exemptions when a second writ is levied on the property. (p. 203.)

Edwin McBee, for the appellant.

Charles L. Heitman, for the respondent.

¹⁶⁷ **STOCKSLAGER, J.** This case was before this court at the March term, 1904, at Lewiston, on motion to dismiss the appeal. For a full statement of the facts, see 10 Idaho, 162, 77 Pac. 331. The case is now here for review on appeal from a certain order refusing to release certain personal property from attachment. The order appealed from is as follows:

“This cause came on to be heard in open court on the fourth day of November, A. D. 1903, on the motion of defendant to have certain property levied upon herein released as exempt property Edwin McBee, Esq., appeared for the defendant and in support of said motion, and Chas. L. Heitman appeared for the plaintiff and in opposition thereto. The court, being fully advised in the premises, ordered that said motion be, and same hereby is, overruled and denied. To which ruling the defendant, by his counsel, then and there duly excepted. It was further ordered that the stay of execution herein heretofore granted be, and the same is hereby, vacated and set aside as to the wheat and oats covered by the writs of attachment and writ of execution herein, and that the same be sold by the sheriff of Kootenai county without delay as perishable property.

“It is further ordered that the stay of execution as to the cattle, horses and farm implements heretofore levied upon be extended for the term of fifteen days from this date.

“It is further ordered that the defendant herein have ten days ¹⁶⁸ from this date in which to prepare, file and serve his bill of exceptions herein as to the refusal of the court to release said property as exempt property.”

The motion referred to in the above order follows:

“To Chas. P. Coey, the Above-named Plaintiff, and to Chas. L. Heitman, His Attorney.

“You and each of you will please take notice that the above-named defendant will on Tuesday, October 27, 1903, at Rathdrum, Kootenai county, Idaho, request the above-named court at the hour of 10 o'clock A. M., or as soon thereafter as counsel can be heard, for an order releasing from attachment certain property attached in the above-entitled action which defendant claims as exempt under the provisions of the statutes of the state of Idaho governing exemptions from attachment, said property being the property described in the affidavit annexed hereto and made a part of this motion. This motion will be made and based on the record and files in this action and upon the affidavit hereto attached. The affidavit referred to is that of George F. Cleghorn, the defendant in the lower court, appellant here. It describes certain horses, cattle, grain, consisting of oats and wheat, one wagon, a McCormick harvester, harness, etc., and says that he is a married man, the head of a family and has resided in Kootenai county, this state, since March, 1902; that his occupation is farming; that on the twenty-first day of October, 1903, a writ of attachment was issued and levied upon his property. That he has not any farming implements exceeding in value the sum of \$300, including those attached and those not attached. No other horses or cows other than those attached, etc., and claims all the property attached under and by virtue of the exemption laws of the state of Idaho.”

Ada Cleghorn testifies that she is the wife of appellant, and that she has read the affidavit of defendant and that the same is true of her own knowledge.

Appellant's counsel say in their brief that only two questions are presented by this appeal: 1. “Can appellant claim benefit of the exemption laws of Idaho while residing upon the Coeur d'Alene Indian Reservation within the limits of said county?” 2. “Should a claim for the statutory exemption be allowed to the ^{1st} defendant under the levy of the second writ of attachment after his failure to make such a claim as against the levy of the first writ of attachment, and after his disclaimer at the time of the first levy of ownership in the property attached?”

Taking up these questions in the order named, we find that counsel for appellant insists that appellant was a resident of

Kootenai county and had been for two years residing on the Indian reservation in that county, and that such residence was a legal one. There is no dispute as to the fact that appellant is a married man and the head of a family.

Counsel for respondent does not contradict the fact that appellant was living upon the Indian reservation, but denies that he had or could acquire a legal residence in Kootenai county by residing upon the reservation. It seems to be conceded that prior to appellant's removal to the reservation he was a resident of Spokane county, Washington. If the appellant had a legal residence on the Indian reservation he is entitled to the exemption given him by the statute of this state.

In the case of *Francis v. Green & Green*, 7 Idaho, 367, 65 Pac. 362, decided by this court in 1901, all the parties to the suit being residents of the Fort Hall Indian Reservation, the question involved the settlement of the right of William and Sarah Francis to use the waters of a certain creek in the reservation and on reservation land. We quote from the opinion: "From the record it appears that the defendants entered into a contract with William M. and Sarah M. Francis, by which they agreed to pay the attorney's fee and costs in a certain case to be commenced in the district court between said William M. and Sarah M. Francis as plaintiffs, and one Good-enough as defendant, which action was for the purpose of settling the rights between said William M. and Sarah M. Francis to the use of the waters for irrigation and domestic purposes of Little Cottonwood creek. That said action was commenced and tried in the district court of Bannock county and the waters of said stream decreed to said parties."

Appellants contend that the property in controversy in this action being upon an Indian reservation, all the parties are trespassers and the courts have no jurisdiction to determine their respective rights.

¹⁷⁰ While it does not appear that any of the parties have acquired permission from the Secretary of the Interior, or from any other source, to reside upon or occupy their lands, it does appear they are all there, and that their rights to occupy such land has never been questioned by the government authorities or the Indians themselves, and the parties are subject to the same rules as though they lived upon the public domain.

It may be, and doubtless is, true that appellant was a trespasser upon the Indian reservation, but so long as the Indians

themselves or the government does not complain, his creditors cannot seize his property exempt by law from attachment on the theory that he is not a citizen of this state whilst residing on the reservation. He is not then in violation of any statute of this state. He could not plead his residence on the Indian reservation in bar of any action that might be commenced against him, either civil or criminal, in the courts of Kootenai county. He is a resident of Kootenai county and entitled to his exemption provided by the statute of this state: *Utah etc. Ry. Co. v. Fisher*, 116 U. S. 28, 6 Sup. Ct. Rep. 246, 29 L. ed. 542; *Truscott v. Hurlburt Land Co.*, 73 Fed. 62, 19 C. C. A. 374.

The question is, Could and did appellant waive this exemption by his statements to the officer at the time of the first levy of the attachment? He stated to the officers that none of the property levied upon was his. His counsel explains this statement by saying that defendant has made these transfers to secure indebtedness owing to other parties, and at the time of the first levy actually thought the transfers were valid, but after investigation and the advice of counsel found that they had not been delivered and there was no continued change of possession, and that said transfers were therefore of no effect as against attaching creditors. It is next insisted that even though he did make such statements at the time of the levy of the first attachment, and it would have been a bar to his claim of such property under the exemption laws, when that attachment was dissolved by order of the court it left the property and the parties to the action in the same condition as though no attachment had been issued and served; that when the second ¹⁷¹ attachment was levied there was no disclaimer of ownership of the property attached, etc. The existence of these facts does not seem to be disputed by the affidavits or counsel for respondent. Counsel for respondent with equal earnestness and zeal insists that after appellant had once disclaimed ownership of the property he could not afterward be heard to claim under the exemption laws. In support of this contention, he cites *Sebright v. Moore*, 33 Mich. 91. The syllabus says: "Estoppel, attachment; disclaimer, advising proceedings. One who disclaimed ownership and advised an attachment of chattels as the property of another and consented to the levy is estopped from afterward setting up a claim of title as against such proceedings." He also cites *Butt v. Green*, 29 Ohio St. 667. The syllabus in this case follows: "Where an officer levied upon a horse belonging to

an exemption debtor who thereupon demanded the exemptions allowed by law, and they then mutually agreed upon a proper time and place for the debtor to select and the officer to cause to be appraised the property of the debtor exempt from levy and sale, and the debtor purposely failed to be present and make selections at the time and place agreed upon. Held, that the debtor by such failure waived his right to select and hold as exempt the horse so levied upon."

These two authorities do not sustain the contention of learned counsel for respondent. It does not appear that appellant ever advised the levy upon this property, consented to such levy, or agreed to anything with the officer making the levy. He told the officer that the property belonged to other parties. It cannot be said that this misled the officer or the respondent in this action, as the second attachment was levied upon most of the same property. We have examined the other authorities cited by respondent and do not think this case comes within the rule laid down in any of them unless it be the cases from Pennsylvania.

Mr. Freeman in his excellent work on Executions, in discussing the cases from that state, has this to say: "This rule does not seem to have its foundation in any provision of the statutes of that state. It results from the belief of the judges¹⁷² that the statutes were designed for the benefit of honest debtors, for those only who would not seek to avoid the operation of the writs directed against them. If, however, we conclude that the dishonest are not worthy of the benefits of the exemption laws, it still seems that we should not as judges enforce our peculiar ideas until they had met the expressed approval of the legislature. Judges ought not to pronounce sentence where the law has provided no penalty. Besides it must be remembered that one of the chief objects of these laws is to protect and provide for the debtor's family and that this object would be partially subverted by making the benefit of the law depend upon the character of the debtor." It is not disputed that if the appellant was a resident of the state of Idaho he was entitled to the exemption now claimed were it not that he had disclaimed ownership of the property in dispute at the time of the first levy.

All these facts being considered, and viewing the contested questions in the light we do, this judgment must be reversed, with costs to appellant.

Sullivan, C. J., and Ailshie, J., concur.

The Waiver of the Benefit of the Exemption Statutes by a disclaimer of ownership of the property levied upon is discussed in Strouse v. Becker, 38 Pa. St. 190, 80 Am. Dec. 474; Emerson v. Smith, 51 Pa. St. 90, 88 Am. Dec. 566. A debtor who induces his creditors to sue on their claim and garnish his personal earnings is estopped from thereafter setting up the exemption of such earnings: Dowling v. Wood, 125 Iowa, 244, 106 Am. St. Rep. 301.

FIRST NATIONAL BANK OF HAILEY v. GLENN.

[10 Idaho, 224, 77 Pac. 623.]

ACKNOWLEDGMENT—Impeachment by Notary.—A notary who has taken an acknowledgment to a mortgage cannot give testimony upon the foreclosure thereof impeaching his certificate. (p. 207.)

ACKNOWLEDGMENT—Married Woman.—Where a notary states to a married woman that an instrument bearing her signature is a mortgage, and explains to her its nature and contents and the property encumbered, whereupon she replies that it is all right with her if it is with her husband, and that whatever he says or does is all right with her, she thereby makes a sufficient acknowledgment of the instrument, and the notary is justified in attaching his certificate. (p. 208.)

ACKNOWLEDGMENT.—An Officer Taking an Acknowledgment is not Required to see the person sign the instrument, nor to witness it; but he is required to ascertain whether the party acknowledges the instrument as his obligation and as having been executed by him. (p. 209.)

ACKNOWLEDGMENT—Signature by Mark.—Witness.—A notary's certificate of acknowledgment to a mortgage is a sufficient witnessing to the signature by mark to the instrument. (p. 210.)

USURY—Stipulation for Payment of Taxes.—A mortgage which draws the highest legal rate of interest is not rendered usurious by a stipulation that the debtor shall pay the taxes on the debt or mortgage, if the statutes declare such a stipulation void. (p. 210.)

MORTGAGE FORECLOSURE—Presentment of Claim to Executor.—A statute which provides that no holder of a claim against the estate of a decedent shall maintain an action thereon, unless it is first presented to the executor or administrator, except that an action may be brought by the holder of a mortgage to enforce it against the encumbered property, where all recourse to any other property of the estate is waived in the complaint, does not bar the foreclosure of a mortgage, although the claim secured thereby has been presented to the administrator for allowance. (p. 212.)

R. F. Buller, for the appellant.

W. C. Howie, for the respondent.

229 AILSHIE, J. The First National Bank of Hailey commenced this action on the twenty-fourth day of July, 1895, for the foreclosure of a real estate mortgage executed by Oliver S.

Glenn and Emma Glenn, his wife, and G. P. Glenn and Jennie Glenn, husband and wife. The mortgage was executed on the twenty-seventh day of July, 1887, to secure the payment of three promissory notes aggregating the sum of eight thousand seven hundred and thirty-three dollars, and bearing interest from August 1, 1888, at the rate of one and one-half per cent per month in favor of H. E. Miller. Miller sold and transferred the notes and mortgage to appellant, prior to the commencement of this action. At the time of the execution of the notes and mortgage, G. P. Glenn and wife were residing upon that portion of the land upon which the foreclosure was sought in this action, and the same was at that time the community property of the husband and wife. In 1889, G. P. Glenn died intestate, leaving his widow, Jennie, and six children surviving him. Payments had been made on the mortgage indebtedness from time to time, and after the death of G. P. Glenn, the mortgagee, Miller duly and regularly presented his claim for the amount due in principal, interest and taxes to the administrator of the estate, and the same was thereupon allowed by the administrator and also by the probate court of Elmore county. After the allowance of the claim the administrator paid something over two thousand dollars thereon. Under the statute as it existed at the time of the execution of this mortgage it was lawful to charge and collect interest at the rate of one and one-half per cent per month. It was also the law at that time that all mortgages were taxable; and under section 1425 of the Revised Statutes ²³⁰ then in force it was provided that: "Every contract by which a debtor agrees to pay any tax or assessment on money loaned, or any mortgage, deed of trust, or other lien, shall as to such tax or assessment, be null and void." By the terms of the notes and mortgage given in this case the debtors contracted to pay the highest legal rate of interest permissible under the laws of the then territory; and, in addition thereto, it was provided that the debtors should pay all taxes that might be assessed against the mortgaged property and also all taxes that might be assessed against the mortgage itself, or the debt secured thereby. Personal service was made upon all the defendants, and also upon the guardian for the six minor children of the deceased, G. P. Glenn. The action was dismissed as to Oliver S. Glenn and Emma Glenn, owing to their having no interest in the land, and the default of Jennie Glenn was duly and regularly entered. The minors, however, all appeared through

their guardian and answered, and contested the action at every step of the proceedings and are the respondents in this action. The answer denies the execution of the mortgage by the defendant Jennie Glenn. It also alleges that she never acknowledged that instrument in any manner or form. It also sets up the defense of usury and charges that the contract was a usurious contract. It was further alleged as a separate defense that the claim had been presented to the administrator of the estate of G. P. Glenn, deceased, and that part payments had been made thereon, and that the mortgagee was thereby barred from maintaining his action upon the contract and to foreclose the mortgage.

The case was tried before the judge of the fourth judicial district sitting in Elmore county; but before it was finally submitted upon that trial, the judge, Justice Stockslager, now of this court, who heard the testimony, was succeeded by Judge Perky, and the case was therefore retried and judgment was entered November 14, 1902. Soon thereafter one of the plaintiff's attorneys died and the case had slow progress in getting into this court. The trial judge found that the mortgage was never executed by the defendant Jennie Glenn, and that the execution thereof was never acknowledged by Jennie Glenn. He also found that the contract was usurious and that the principal of the loan had been fully paid and judgment was thereupon entered ²³¹ dismissing the action and for costs against the plaintiff. Since the court found that the mortgage was never executed nor acknowledged by the defendant, Jennie Glenn, we will consider both of these questions together. The mortgage which was introduced in evidence appeared to have been executed in due form and by all the parties, except by the defendant Jennie Glenn. Her name was affixed to the

her
mortgage as follows: "Jennie X Glenn," but this sig-
mark

nature by mark was not witnessed by any person writing his name as a witness thereto. Her acknowledgment, however, as shown by the certificate of the notary who took the same, seems to have been duly and regularly made and taken. At the trial she appeared and testified as a witness on behalf of the minor children who were defending, and testified that she never signed her name to the mortgage and that she never made her mark, and that she never saw the mortgage. She also denied acknowledging the same, but did admit that the notary came to see her about the

matter, and claims that she did not understand anything about it. It should be observed that she is an Indian woman, and while she speaks the English language fairly well and appears to understand it reasonably well, as disclosed by her answers given on the witness-stand, still, like most of her people, she did not fully grasp all that was said to her, and especially business methods and ordinary legal proceedings. Other witnesses who were about the house at the time the notary came to take this acknowledgment testify to his being there and having the mortgage with him, and going over and sitting down by the table or desk where she was seated and explaining to her the contents and nature of the mortgage, and that she replied in substance that whatever her husband would do she would do, saying: "But Gus Glenn, he good man, and what Gus say and do I say and do all right." The defendants at the trial called the notary who took the acknowledgment and examined him with a view to contradicting his certificate and showing that no real acknowledgment had ever been taken from this woman. The plaintiffs objected to the notary testifying to any fact that would in any manner tend to impeach his certificate, but the court overruled the objection²³² and permitted the testimony. We think the objection by the plaintiff was well taken. No notary should be allowed to come into court upon the foreclosure of a mortgage and give testimony impeaching his certificate to the mortgage which is being foreclosed. In the first place, the certificate is made at the time of the acknowledgment and is the solemn declaration of the officer in his official capacity, under his hand and seal, as to the truth and accuracy of the statements it contains, and it is much more likely to be true and correct than the memory of the person in years afterward. This case is a practical illustration of the danger of allowing an official to come in and contradict his own certificate at a period in this case of more than fourteen years after it was made. After persons have relied upon the faith and correctness of his official statement and invested their money and rights have grown up thereunder, the person who acted as such official and made such certificate should not be heard in a court of justice disputing its correctness: *Shapleigh v. Hull*, 21 Colo. 419, 41 Pac. 1108; *Northwestern etc. Bank v. Rauch*, 5 Idaho, 752, 51 Pac. 764; *Hockman v. McClanahan*, 87 Va. 39, 12 S. E. 230; *Hawkins v. Forsyth*, 11 Leigh, 301; *Central Bank of Frederick v. Copeland*, 18 Md. 305, 81 Am. Dec. 597; *Johnson v. Wallace*, 53

Miss. 331, 24 Am. Rep. 699. In this case, however, the evidence of the notary was as much in support of the certificate as in contradiction thereof. He testified to explaining to the witness the contents of the instrument and its purpose and effect, and that, while she did not appear to understand it very well, she told him it was all right with her if it was with her husband, and that whatever he did or said was all right with her. He also testifies that after going over the matter, making as full explanation as he could, and conversing with her about it, he considered she had made a sufficient acknowledgment of the execution of the instrument and that she was satisfied therewith, and that he felt justified in attaching the certificate of acknowledgment thereto. We think his conclusion was correct, and that he was justified in so certifying: *Banning v. Banning*, 80 Cal. 273, 13 Am. St. Rep. 156, 22 Pac. 210; *De Arnaz v. Escandon*, 59 Cal. 489. The record here shows that the wife reposed perfect confidence in her husband and was entirely satisfied with whatever ²³³ he said and did in business matters. We think an acknowledgment to this effect is a compliance with the statute: *Northwestern etc. Bank v. Rauch*, *supra*; *Gray v. Law*, 6 Idaho, 559, 96 Am. St. Rep. 280, 57 Pac. 435. More especially should this be true where, as in this case, it is admitted that the husband and the family of which he was the head received the full consideration for which the mortgage was executed, and there is no pretense or contention that any fraud or deception was practiced upon either the wife or husband. It further appears in this case that the money for which this mortgage was executed was received and used by Glenn and his wife in redeeming this identical tract of land from a sheriff's sale on foreclosure of a previous mortgage, and that the time for redemption was just about expiring. The money, therefore, sought to be recovered in this action is, practically speaking, the purchase price for the tract of land. This brings us to the question of the signature to the mortgage by the defendant, Jennie Glenn.

Section 16 of the Revised Statutes which is devoted to definitions of various words and phrases used in the statutes defines a signature as follows: "Signature or subscription includes mark, when the person cannot write, his name being written near it, and witnessed by a person who writes his own name as a witness." It is argued by respondent that under this statute Jennie Glenn's "signature" does not appear to the mortgage, since it is shown on its face to have been made by

mark and there is no witness thereto. We think this contention would be correct if the signature were found in this condition to an unacknowledged instrument, or one that is not required by law to be acknowledged. But by the provisions of section 2921 of the Revised Statutes, it is provided that the community property occupied as a residence cannot be encumbered "unless both husband and wife join in the execution of the instrument by which it is so encumbered, and it be acknowledged by the wife, as provided in chapter 3 of this title." Section 2960 as found in chapter 3 referred to in section 2921, *supra*, provides the form of acknowledgment to be made by a married woman to an instrument affecting title to real property in which she has any interest. An examination of the acknowledgment will disclose that an officer is required to certify that "the person whose ²³⁴ name is subscribed to the within instrument, described as a married woman," personally appeared before him, and that, "upon examination without the hearing of her husband, I made her acquainted with the contents of the instrument, and thereupon she acknowledged to me that she executed the same and that she does not wish to retract such execution." It is clear that an officer would not be justified in taking and certifying an acknowledgment of any person to an instrument whose name is not affixed to the instrument and does not appear thereon; and it is equally clear in order to make a good acknowledgment the person executing the instrument must adopt the name appearing thereon and the execution thereof as his or her own. The officer taking the acknowledgment is not required to see the person sign the instrument, nor is he required to witness the instrument; but he is required to ascertain whether or not the party acknowledges the instrument as his or her obligation or contract and as having been executed by him or her. All these things appear from the certificate in this case to have been done regularly. The name of Jennie Glenn appeared subscribed to the instrument; whether by her, her husband, or some other person, she approved of it, adopted it and acknowledged it as her own: See *Bartlett v. Drake*, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; *Clough v. Clough*, 73 Me. 487, 40 Am. Rep. 386; *Harris v. Harris*, 59 Cal. 620; *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634. To "execute" an instrument, it is true, includes signing it; but the admission by a party, whose name is appended to an instrument that he executed it is as binding upon the party contracting as if the

person to whom the admission is made had seen him affix his name thereto. Such admission becomes legal evidence of the fact. We therefore conclude that the notary's certificate, that the party whose name is affixed acknowledged the execution of the instrument, is as good a witness to the signature by mark as if he had written his name at the foot of the document "as a witness to her signature by mark." In a case like this where there is no charge of deception or fraud, and where it is not denied that the contracting parties received and enjoyed all the fruits of their contract and the full consideration therefor, it would be an injustice to allow a recovery to be defeated in a court of equity by reason of such ²³⁵ a slight deviation from the forms usually recognized and followed.

We next come to appellant's contention that the court erred in finding that the contract was usurious. This finding was predicated upon the clause found in the mortgage providing that the debtors should pay taxes on the mortgage and the debt secured thereby. The defendants maintained that, since the mortgage was drawn for the highest legal rate of interest permissible, a stipulation for the payment of taxes on the mortgage in any sum whatever had the legal effect of raising the rate above that allowed by law, and therefore brought the contract within the provisions of section 1266 of the Revised Statutes, and made it usurious. In support of this proposition respondent has cited *Mortimer v. Prichard*, 1 Bail. Eq. (S. C.) 505, and *Meem v. Dulaney*, 88 Va. 674, 14 S. E. 363. In *Mortimer v. Prichard*, the South Carolina court held that where a contract provided for the highest rate of interest and also provided for the debtor paying the state and city taxes, upon its face it would appear usurious, but that where, as in that case, it appeared that the parties acted in good faith and had taken the advice of counsel as to the legality of such a contract, there was no corrupt intent, and the court held the contract legal. In *Meem v. Dulaney*, the Virginia court of appeals held a contract very similar to the one at bar usurious.

In *Banks v. McClelland*, 24 Md. 62, 87 Am. Dec. 594, the supreme court of Maryland in the syllabus to that case say: "An agreement by the mortgagor to pay the taxes on the mortgage debt is not usurious," and the question of usury in such a case is there held to depend upon the particular circumstances of the case. We find that in none of the cases cited by respondent on this question has there been a statute similar to ours declaring such stipulations void.

Since section 1425, as it stood when this contract was entered into, provided that every contract whereby the debtor agreed to pay the taxes on the money loaned or the mortgage was null and void, the stipulation, therefore, found in this mortgage was never such as could be enforced. If "null and void," it could never have had any life or vitality in it. If void from the beginning, it is difficult to see how it ever obtained the energy ²³⁶ or ability to taint an otherwise legal contract with usury. This statute carried within itself its own penalty for its violation, namely, that the contract should "be null and void." To allow a stipulation which the statute says should be void from the beginning, to have the effect of corrupting the whole contract in which it is found and subject it to the penalties for usury, would be attaching a double penalty to a statute which carries its own penalty with it. It is also worthy of observation that the usury statute of this state does not declare the usurious contract void, but rather imposes a penalty upon both the debtor and creditor. If the contract under consideration were usurious, it would have been the duty of the trial court, not only to declare the penalty against the lender, but also the borrower; and we are not prepared to say that the borrower, by inserting a stipulation in his mortgage which the statute says is void, thereby subjects himself to the penalty of a usury statute. On the other hand, the mortgagee in this case testifies that he never knew such a stipulation was in the mortgage until long after its execution, and that he never at any time collected such a tax from the mortgagors, nor did he ever charge them therewith.

In *Re Press Fuller*, 1 Saw. 243, Fed. Cas. No. 5148, a judgment had been entered by confession and provided for a greater rate of interest than allowed by law. It was contended that this made the judgment usurious and subjected it to the penalties of the usury statute. Judge Deady disposes of the usury phase of the question as follows: "There can be no doubt but this provision shows that it was intended that this judgment should draw more than the legal rate of interest. But I do not think a judgment or decree can become usurious by any such means. The code provides the rate of interest a judgment shall bear, and the parties cannot change it by stipulations or terms inserted therein. Such stipulations are simply void—as, for instance, that the interest accruing on a judgment shall be paid annually, and, if not, shall bear interest as principal."

We now come to the last contention made by appellant in this case. It is embodied in the following conclusion of law made by the trial court: "Plaintiff's predecessor, having presented his claim against the estate of G. P. Glaln, deceased, ²³⁷ and having received payment thereon, cannot now maintain this action." Respondent claims that this conclusion of law is justified by section 5470 of the Revised Statutes of 1887. The provisions of that section are as follows: "No holder of any claim against an estate shall maintain any action thereon unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint." Respondent argues that if the plaintiff could not, in the first instance, maintain his action to foreclose his mortgage without expressly waiving "all recourse against any other property of the estate," then he cannot be allowed to present his claim against the estate, and, after obtaining all he can from the estate, be permitted to foreclose his mortgage, and then waive recourse against any other property of the estate. We have been cited to no authority sustaining this construction of the foregoing statute, and we have been unable to find any to that effect. In California they seem to have changed their statute on this subject from time to time, but at no time do they appear to have had a statute in the exact language of our provision. Still the courts of that state have frequently considered the right of a mortgagee to foreclose both with and without having presented his claim to the administrator, and have inferentially touched upon this question in the following cases: *Fallon v. Butler*, 21 Cal. 24, 81 Am. Dec. 140; *Willis v. Farley*, 24 Cal. 500; *Moran v. Gardemeyer*, 82 Cal. 96, 23 Pac. 6; *McGahey v. Forrest*, 109 Cal. 63, 41 Pac. 817; *Hibernia Savings etc. Assn. v. Thornton*, 109 Cal. 427, 50 Am. St. Rep. 52, 42 Pac. 447; *Bull v. Coe*, 77 Cal. 50, 11 Am. St. Rep. 235, 18 Pac. 808. We do not understand the statute to be a bar to the foreclosure of a mortgage simply because the mortgagee presented his claim in due form to the administrator, but when he seeks to maintain his action to foreclose the mortgage, then under the terms of the statute he must waive all recourse against other property. It appears to be conceded by the argument of respondent, and at any rate exists as a fact, that section 5470 does not in

express terms forbid the mortgagee ²³⁸ foreclosing the mortgage where he has previously presented his claim to the administrator. If that section means what respondents contend it does, it is only by implication and not by express terms. We cannot, however, by mere implication give to a statute like this a meaning or interpretation which will preclude or tend to preclude the creditor pursuing his remedy in a court of equity for the foreclosure of his mortgage: Idaho Const., art. 5, sec. 20; Fallon v. Butler, 21 Cal. 24, 81 Am. Dec. 140; Pechand v. Riquet, 21 Cal. 76; Willis v. Farley, 24 Cal. 500; Corbett v. Rice, 2 Nev. 331; Verdier v. Bigne, 16 Or. 208, 19 Pac. 64.

The respondent makes the point that the plaintiff after having received a large sum of money from the estate on the allowance of his claim gains an advantage if he can afterward be allowed to foreclose his mortgage. This is a matter with which the administrator and probate judge have ample authority to deal. If the estate is solvent over and above the family allowances, and such homestead as may be set off by the probate judge, in that case it can make no difference to the estate or any creditor thereof for the reason that the claim should be fully paid, and there would be no occasion for a foreclosure. If, on the other hand, the estate is insolvent, the administrator should not pay and the probate court should not allow paid any secured claim except as the money therefor is made out of the encumbered property. The order of payments and preferences to be made out of an estate is directed by sections 5606 and 5607 of the Revised Statutes. Provision is also made for the sale of the encumbered property by the probate court where the mortgagee or lienholder has presented his claim under sections 5536 and 5537 of the Revised Statutes. Under these statutory provisions governing the administration of the estates of deceased persons, a mortgagee can acquire no advantage or preference by being allowed to present his claim and thereafter foreclose his mortgage. Of course he cannot foreclose his mortgage after having presented his claim, if the encumbered property is sold by order of the probate court and the proceeds thereof are applied to the payment of the mortgage debt. In such a case he would have exhausted his security and could not pursue it any further.

We therefore conclude that the plaintiff was entitled to a ²³⁹ decree foreclosing its mortgage, and the judgment of the lower court will be reversed. The cause is remanded with directions to the trial court to compute the amount due to the

plaintiff on its mortgage, and to make findings of fact and conclusions of law in accordance with the facts proven upon the former trial and in harmony with the legal conclusions herein announced, and to enter judgment and decree in accordance therewith.

Costs awarded to appellant.

Sullivan, C. J., concurs.

Stockslager, J., having heard the case at the first trial, took no part in the foregoing decision.

The Sufficiency of Acknowledgments to conveyances is discussed in the recent extended note to *Trerise v. Bottego*, 107 Am. St. Rep. 376-414. The duties of notaries in taking acknowledgments is discussed in the monographic note to *Joost v. Craig*, 82 Am. St. Rep. 382. And the conclusiveness of certificates of acknowledgments is discussed in the monographic note to *American Freehold etc. Assn. v. Thornton*, 54 Am. St. Rep. 150-159. See, too, the recent case of *Gray v. Law*, 6 Idaho, 559, 96 Am. St. Rep. 280.

GRICE v. WOODWORTH.

[10 Idaho, 459, 80 Pac. 912.]

HOMESTEAD—Conveyance—Statutory Regulation.—Sections 3040 and 3041 of the Revised Statutes of Idaho, prescribing the manner of conveying homesteads by married persons, are in the nature of rules of evidence, and conveyances thereunder are subject to the same legal principles as are conveyances falling under the statute of frauds and the rules of equitable estoppel and waiver. (p. 217.)

HOMESTEAD—Conveyance—Statutory Regulation.—Statutes prescribing the manner of conveying homesteads by married persons are intended to protect their rights, especially those of the wife, and not to relieve them against fraudulent transactions. (p. 219.)

HOMESTEAD—Conveyance—Estoppel Against Wife.—Where a husband and wife orally agree to sell their homestead, and the vendee pays the purchase price, enters into possession, and makes improvements, with the knowledge and consent of the wife, she cannot successfully defend his suit for specific performance. (p. 219.)

R. V. Cozier and Stewart S. Denning, for the appellant.

Forney & Moore, for the respondents.

463 SULLIVAN, C. J. This is an action to compel specific performance of a contract for the conveyance of real estate

situated in Moscow, Latah county. It appears from the record that the respondents are husband and wife, and that on the seventh day of January, 1895, the husband purchased the east one-half of lots 4, 5 and 6, in block 2, Fry's addition to the town of Moscow, Latah county, and the consideration paid therefor was money acquired by the respondent, Jay Woodworth, subsequent to the marriage of the respondents; that on the twentieth day of March, 1895, while respondents were residing on said premises and occupying the same as a homestead the respondent, Lillie I., filed her declaration of homestead upon said premises; that sometime prior to the thirtieth day of August, 1901, the respondents had removed from Moscow, in the county of Latah, to Wallace, in the county of Shoshone, and that respondent Woodworth had listed said property for sale with real estate agents residing and doing business in said town of Moscow, at the price of \$1,500; and on said last-mentioned date the appellant paid to said agents for the respondent \$25 for a thirty-day option to purchase said premises, and thereafter, on the twentieth day of September, the appellant took up said option and orally promised the said agents to purchase said premises and to pay the sum of \$1,500 therefor as follows, to wit: To assume a mortgage upon said premises executed by the respondents to the Vermont Loan and Trust Company, to secure the payment of \$950, together with interest thereon and \$550 in ⁴⁸⁴ cash, and thereupon, with the consent of said agents, the appellant entered into the possession of said premises and moved his family into the residence situated upon said premises, and has ever since occupied the whole of said premises as a residence, all of which was known to the respondents; that instead of paying said \$550 as agreed, the same was paid in payments as follows: November 1, 1901, \$100; December 1, 1901, \$175; January 4, 1902, \$100; July 6, 1902, 100; September 16, 1902, \$100—aggregating in all the total sum of \$525. Said sums were paid over by the agents to the respondent, Jay Woodworth; that after said payments were made, the appellant personally demanded of Jay Woodworth a deed to said premises and offered to pay him then and there the \$25 still due on the purchase price, with interest on all deferred payments, and the said Woodworth promised to execute a conveyance to said premises as soon as he conveniently could; that after the appellant had entered into possession of said premises, he made improvements thereon of the value of \$250; that after appellant had so entered into

the possession, the respondent, Lillie I., was informed of the improvements made thereon and knew that said improvements had been made and possession taken by the appellant under the belief that he was the owner of said premises, and to all of which said Lillie I. made no objection and consented thereto; thereafter, in the month of March, 1903, the appellant again tendered the respondents the sum of \$25 as the balance still due on the purchase price, and demanded of them that they execute to him a good and sufficient deed of conveyance to said premises, which demand the respondent then and there refused, and the respondent, Jay Woodworth, when asked his reason for refusing to execute the deed, informed the appellant that he had consulted with attorneys and they had advised him that he could not be compelled to make the deed; that the payments made by appellant, including the \$525 referred to, together with interest on said mortgage, taxes and the improvements made by appellant make a total of \$1,181.57.

Upon the foregoing facts, judgment was rendered in favor of the respondents decreeing to them the possession of said premises and granting to the appellant judgment of \$844.72,⁴⁶⁵ that being the balance after deducting the rental, at the rate of \$12.50 per month, with interest thereon, from the sum of \$1,191.57 above mentioned. The case was decided upon the theory that a specific performance of the contract of sale could not be enforced because of the provisions of our statute in regard to the conveyance of real estate by married women.

The question presented for decision is whether the respondents should be compelled to convey said property to the appellant under the facts of this case, it having been at one time occupied as a homestead. The sections of our statute in regard to the conveyance or encumbrance of a homestead by a married person and the manner in which a homestead may be abandoned, are as follows:

“Sec. 2921. No estate in the homestead of a married person, or any part of the community property occupied as a residence by a married person can be conveyed or encumbered by act of the party, unless both husband and wife join in the execution of the instrument by which it is so conveyed or encumbered, and it be acknowledged by the wife as provided in chapter 3 of this title.

“Sec. 2922. No estate in the real property of a married woman passes by any grant or conveyance purporting to be executed or acknowledged by her, unless the grant or instru-

ment is acknowledged by her in the manner prescribed in chapter 3 of this title, and her husband, if a resident of the territory, joins with her in the execution of such grant or conveyance."

"Sec. 3040. The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife

"Sec. 3041. A homestead can be abandoned only by a declaration of abandonment, or a grant or conveyance thereof, executed and acknowledged: 1. By the husband and wife, if the claimant is married; 2. By the claimant, if unmarried."

Prior to the adoption of section 3041 above quoted, creditors of the homesteader often attached the premises homesteaded and attempted to subject the same to the payment of the debt ⁴⁰⁸ on the ground of abandonment, and in order to make the homestead more secure, a rule of evidence was established by the adoption of said section, and any litigant, attempting to subject the homestead to the payment of his debt must show that the same was abandoned by a written declaration of abandonment properly executed and acknowledged. The provisions of that section are not applicable to the case at bar.

The case of *Mellen v. McMannis*, 9 Idaho, 418, 75 Pac. 98, decided by this court, is not in point. In that case it was not shown that the purchaser ever went into the possession of the premises, or put any improvements thereon, or that Clark ever accepted the purchase price thereof, or that his wife ever knew anything about the sale, or ever consented thereto.

Sections 3040 and 3041 are in the nature of rules of evidence, and are subject to the same legal principles as are conveyances falling under the statute of frauds, and the rules of equitable estoppel and waiver. We are aware that there is much conflict among the decisions on the question of how far the doctrine of equitable estoppel applies to married women. One of the leading decisions of the Pacific Coast states is that of *Morrison v. Wilson*, 15 Cal. 495: See, also, cases cited in 1 *Notes on California Reports*, pp. 604, 605. In section 814, 2 *Pomeroy's Equity Jurisprudence*, it is stated as follows: "Upon the question how far the doctrine of equitable estoppel by conduct applies to married women, there is some conflict among the decisions. The tendency of modern authority, however, is strongly toward the enforcement of the estoppel against married women as against persons sui juris, with little or no

limitation on account of their disability. This is plainly so in states where the legislation has freed their property from all interest or control of their husbands, and has clothed them with partial or complete capacity to deal with it as though they were single. Even independently of this legislation there is a decided preponderance of authority sustaining the estoppel against her, either when she is attempting to enforce an alleged right, or to maintain a defense." The author cites modern English cases, as well as American, to sustain the text.

In the case of *Galbraith v. Lunsford*, 87 Tenn. 89, 9 S. W. 365, 1 L. R. A. 522, in referring to *Morrison v. Wilson*, the Tennessee court says that the ⁴⁶⁷ case of *Morrison v. Wilson*, "relied on so confidently by counsel for complainant, seems to not only deny the application of an estoppel in pais to a married woman, but goes so far as to hold that affirmative fraud on her part will not effect that result. It is sufficient to say of this case, that it not only loses sight of the distinction referred to as to defective execution of a contract, but is directly opposed to our own adjudged cases so far as the element of fraud is concerned."

In *Pilcher v. Smith*, 2 Head (Tenn.), 208, it is said: "The legal disability of coverture carries with it no license or privilege to practice fraud or deception on other persons."

The provisions of our statutes above quoted must not be so construed as to permit the respondent, Lillie I., to reap the benefits of a fraud perpetrated on the appellant. It must be borne in mind that there is no conflict in the evidence in this case whatever.

The legal disability of married women in this state has been almost entirely removed. They have been given elective franchise; they may hold office, and under the second section of an act approved March 9, 1903 (Sess. Laws 1903, p. 345), the wife is given the management, control and absolute power of disposition of her separate property, with like effect as a married man may in relation to his real and personal property. It is true that said act was passed subsequent to the contract involved in this suit, but this only tends to show and support the doctrine laid down in 2 Pomeroy's Equity Jurisprudence above cited.

As to the statute of frauds, section 6007 of the Revised Statutes provides that no estate or interest in real property, other than for leases having a term not exceeding one year, nor any trust or power over or concerning it, or in any manner relat-

ing thereto, can be created, granted, assigned, surrendered, or declared, otherwise than by operation of law, or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized in writing. It is conceded that no instrument in writing has been executed in this case. Section 6008 of the Revised Statutes provides that the section above ⁴⁶⁸ cited must not be construed to affect the power of a testator in the disposition of his real property by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law, nor to abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof. In the case at bar it is shown that the contract sued on is an executed contract so far as appellant is concerned. Hence, so far as the statute of frauds is concerned, the trial court should have compelled the respondents to convey the property in controversy by good and sufficient deed to the appellant. Courts of equity will not permit the statute of frauds, or the statute in regard to conveyances of married women, to be a shield to protect fraud, and those statutes were not enacted to encourage frauds and cheats. The appellant had paid the price agreed to be paid for the property, had taken possession thereof and expended \$250 in improving the same, all of which was assented to by respondent, Lillie I., and under the well-established rules of law applicable to the case, the appellant is the owner of the equitable title thereto. Because of the facts of this case the principle that governs is more in the nature of an estoppel or waiver on the part of respondent, Lillie I., and not the broad principle of abandonment as suggested by the provisions of section 3041 of the Revised Statutes, above quoted. While the provisions of the sections above quoted were made for the protection of married women, they were not intended to operate as a shield to relieve them against a fraudulent transaction such as the one under consideration, and she is estopped by her own acts from interposing the provision of said sections as a valid defense to this action. The verbal agreement for the transfer of the homestead in question was assented to by both husband and wife, and was followed by change of possession and permanent improvement placed thereon by the purchaser and a payment of the purchase price. Those acts operated to transfer the equitable title to the appellant. That being true, a court

of equity will compel the respondents to convey the legal title to the appellant.

⁴⁶⁹ The judgment is reversed and the cause remanded for further proceedings in conformity with the views herein expressed. Costs are awarded to appellant.

Stockslager, C. J., concurs.

AILSHIE, J., Dissenting. If it should be conceded, which I am not now prepared to do, that the doctrine of estoppel in pais can be applied to a married woman in this state, still I do not think the conduct of the wife as shown in this case is sufficient to establish an estoppel against her. It is clear from the record that the appellant did not contract with the husband or part with his money upon any representation or action of the wife, and she cannot therefore be charged with any acts of fraud. It is equally clear, without citation of authority, that the wife should not be held for the fraudulent acts of her husband in which she has not participated. For this reason the judgment should be affirmed.

ON REHEARING.

STOCKSLAGER, C. J. Counsel for petitioner filed a lengthy petition setting up many reasons why a rehearing should be granted. The earnestness of the petition and well-known ability of counsel representing her prompted the court to hear further argument, and a rehearing was granted. Briefs were filed and arguments heard at the March term at Lewiston. The questions discussed are, first, as to the estoppel of Mrs. Woodworth; secondly, that of fraud on her part. These questions were discussed on the hearing and were considered by the court from every standpoint before the opinion was finally agreed upon. We agree that the legislature of this state has uniformly dealt kindly, and we think fairly, in protecting married women in their property rights. In this legislation for her protection it was not intended to shield her in any wrongful act. Under the facts in this case, which are fully stated in the opinion by Mr. Chief Justice Sullivan, I do not think she can escape the doctrine of equitable estoppel. Counsel for petitioner call our attention to a number of authorities, among them being section ⁴⁷⁰ 813 of Pomeroy's Equity Jurisprudence, volume 2. We quote the section from their brief: "The measure of the operation of an estoppel is the extent of the representations made by one party and acted

upon by the other. The estoppel is commensurate with the thing represented and operates to put the party entitled to its benefit in the same position as if the thing represented were true.

“With respect to the persons who are bound by or who may claim the benefit of the estoppel, it operates between the immediate parties and their privies, whether by blood, by estate or by contract. A stranger who is not a party or a privy can neither be bound nor aided. Since the whole doctrine is a creation of equity and governed by equitable principles, it necessarily follows that the party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted in good faith and reasonable diligence, otherwise no equity will arise in his favor.” Apply this rule to the party claiming exemption from the doctrine of estoppel, and what is her standing in a court of equity? She knew the defendants—appellants—entered into the possession of the property, put valuable improvements thereon, and paid all but \$25 of the agreed purchase price, and then when he demands a deed comes into a court of equity and asks for relief under a plea that she had filed a homestead declaration on the property, he offering to allow plaintiff to take judgment for amount found due the plaintiff after deducting rental for the property for the time it was occupied by plaintiff, and she asking to be dismissed with her costs.

Under the rule laid down by Mr. Pomeroy, above quoted, it is immaterial whether there was an allegation or proof of fraud on the part of the defendants or not. He says: “The party who claims the benefit of an estoppel must not only have been free from fraud in the transaction, but must have acted in good faith and reasonable diligence, otherwise no equity will arise in his favor.” Now, what was the duty of Mrs. Woodworth when she visited the premises in dispute and found them occupied by appellant and his family, making valuable and lasting improvements upon the house in good faith, believing ⁴⁷¹ they were the owners thereof? Mrs. Grice, wife of appellant, testifies: “I am the wife of plaintiff; was his wife at the time he moved into and took possession of the Woodworth property. Am acquainted with Mrs. Woodworth, one of the defendants in this action; have known her for eight or nine years at Moscow. She was living either at Wallace or Wardner at the time we took possession of the property. I

knew of her coming back to Moscow two years ago—the spring of 1902. I was down at the hospital one afternoon and met Mr. Woodworth in the hall; he was going downstairs and he said, ‘Lillie is upstairs; you had better go upstairs and see her.’ Miss Baker was with me at the time. We went upstairs: Mrs. Woodworth was in the parlor and we sat down and talked; in our conversation she asked me how I liked our new home. I said ‘Real well’; that it was fine and such a pretty location and remarked that it was rather large. She said that was the objection she always had to the place. That was the substance of the conversation. I had another conversation with her, I imagine in June, sometime in 1902; I know it was quite warm. She and her mother called at the house one afternoon. They came in, sat down and talked to me; we had the house painted at the time. She remarked how pretty the house looked since it was painted. She says: ‘It is just the color we intended to have it painted if we hadn’t sold the place’; she says, ‘You have the sitting-room painted too; it is very pretty.’ ”

Leeta D. Baker testified she had lived in Moscow about sixteen years; knew all the parties to the case and has known Mrs. Woodworth ever since she has lived in Moscow; heard the two conversations related by Mrs. Grice and practically re-related them in the same language.

Mrs. A. J. McDonald testifies to a conversation with Mrs. Woodworth in March, 1903. She says, “She asked Mrs. Woodworth if they weren’t sorry that they had sold their home,” and she said, “I guess we are.” I said, “Why did you sell?” She said that Mr. Woodworth said they were going away and they might never come back to Moscow again, and they thought they might just as well sell while they had a chance. If Mrs. Woodworth desired to deal fairly with the Grices when she returned ⁴⁷² from Moscow, and found them in possession of her property, upon which she had filed a homestead declaration (if she did not know they were occupying the property under a claim of purchase prior to that time), she should have then said to them, “You are improving property upon which I have filed my homestead declaration. I have never consented to the sale of it and still desire to claim it as my home.” This would have been good faith and reasonable diligence. Equity does not permit her to remain silent as to her claims and by her conversation encourage appellants to continue their payments and improvements on the prop-

erty, then when they demand a deed answer by saying, "You can take a judgment against my husband for the amount you have paid on the purchase price and for the improvements made, less the reasonable rental during the time you have occupied the premises, but the property has increased in value and I am informed I can hold it under my homestead declaration; you may enforce your judgment against my husband if you can, but I will hold the property, which has about doubled in valuation." Courts of equity should not, and will not, encourage such transactions as are shown to exist in this case, and exempt them from compliance with the contract.

After carefully reconsidering this case, we are still of the view that the opinion heretofore filed correctly states the law of this case.

Sullivan, J., concurs.

AILSHIE, J., Dissenting. The application of the doctrine adopted in this case to the facts it discloses works an effectual rape of the statute in the name of that facile and beguiling progeny of equity called estoppel. I shall not enter upon any discussion as to whether or not the homestead of a married woman may be alienated or transferred in any other manner than that pointed out by statute. I am convinced, however, that if the doctrine of estoppel adopted by my brothers is applicable to a married woman and not forbidden by express statute, that, notwithstanding such a rule, the facts of this case are entirely barren of the elements of estoppel. In 16 Cyclopaedia, 726, Professor Bigelow defines the essential elements of ⁴⁷³ estoppel in pais as follows: "In order to constitute an equitable estoppel there must exist a false representation or concealment of material facts; it must have been made with knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge or the means of knowledge of the real facts; it must have been made with the intention that it should be acted upon; and the party to whom it was made must have relied on or acted upon it to his prejudice." Applying this test to the facts disclosed in the record, not a single element of estoppel as against Mrs. Woodworth can be gleaned from this case. All the acts, declarations and conduct of the wife in this case which are held to constitute an estoppel are narrated in the opinions of my associates, and it is therefore unnecessary for me to repeat them here. The acts and declarations of the wife in

this case by which she is estopped to set up the plea of her homestead right were made to third parties, and that in the course of casual conversation which took place long after the purchaser, Grice, had paid the entire purchase price with the exception of a very trivial sum. And, indeed, there is no evidence in the record anywhere showing, or tending to show, that the substance of these conversations and declarations, or any part thereof, was ever at any time communicated to Grice prior to the commencement of this action. It is not even shown when the wife came into knowledge of the fact that her husband had sold or contracted to sell this homestead, and so far as the record is concerned, that information may have been gathered by her long after her husband had received the entire purchase price, with the exception of \$25 unpaid at the time the action was commenced. It is said by the chief justice in his opinion that "if Mrs. Woodworth desired to deal fairly with the Grices when she returned to Moscow and found them in possession of her property she should have said to them, 'You are improving property upon which I have filed my homestead declaration. I have never consented to the sale of it and still desire to claim it as my home.' " One would infer from this statement that Grice had no information as to the filing of the homestead; but that would be a wrong impression. As a matter of fact, the homestead declaration was ⁴⁷⁴ of record long before Grice entered into the contract with Woodworth or took possession of the property, and he was chargeable with notice of such fact as well as with notice of the provisions of the statute to the effect that the wife cannot be divested of her homestead right except by an instrument in writing duly acknowledged by her. The laches and neglect shown in this case are to my mind entirely chargeable to appellant rather than to the respondent, Mrs. Woodworth. It is true, as said by counsel for respondent in their brief, "that a certain degree of negligence is a luxury that all mankind are licensed to enjoy and for which every man must make an allowance in his dealings with other men." This is said upon the theory, I presume, that all men—and women too—are human, and may not live up to all the moral obligations their neighbors may think the code imposes; but for every such dereliction a court of equity cannot interpose with an adequate and speedy remedy. It is difficult to understand upon what theory either the actions, declarations or conduct of this married woman are to be construed into an estoppel

against defending her homestead rights where the record contains not a word showing that the party who purchased from her husband parted with a single dollar or made the slightest improvement upon the property upon any statement, act or representation made by her.

In speaking of an estoppel by actions and conduct, Justice Field, in *Henshaw v. Vissell*, 18 Wall. 271, 21 L. ed. 841, says: "For its application there must be some intended deception in the conduct or gross declaration of the party to be estopped or such gross negligence on his part as to amount to constructive fraud." Such is not the case here. The wife is apparently estopped in this case because she did not, as soon as she learned of this sale by her husband, rush out upon the streets and to her neighbors and recount her troubles to everyone with whom she met; and, of course, necessarily berate the conduct of her husband and brand him as one who was obtaining money under false pretenses.

After reading the majority opinion in this case the *femes covert* of this commonwealth, in order to hereafter avoid the plea of estoppel, will find it necessary, where their speculative husbands ⁴⁷⁵ have parted with the old homestead without their consent, to then turn *Xantippes* and rail their grievances as well from the housetops and market places as from the forum. And, indeed, in order that they may not be estopped, they should, on their "days at home," apprise all their gentle callers that, while their impecunious spouses lured them away from the old homestead bound with cords of affection, that still they are as deeply attached to that declaration of homestead as they were on the day when a considerate husband first suggested its execution. Or when she returns the call made by the "innocent purchaser's" wife, she might save herself from the bar of estoppel by reciting to that good dame how their husbands both were ignorant of the statute as well as unmindful of her individual property rights and learned in the arts of fraud. Or when the "innocent purchaser," ignorant of the statute, calls to pay her avaricious husband his monthly installment, she might eject him from the premises and deliver him a personal discourse, and thereby in a modest but *Portian* way save herself from this oft salutary, ever convenient, but sometimes dangerous, plea of estoppel.

The majority have told the good wives of this state that they must talk or be estopped—I am chagrined to hear it. It is enough if they keep still; indeed, the law hath required no

more, and, moreover, equity taketh no delight in a parade of grievances and multiplicity of troubles where peace and quietude might reign. I am persuaded that it hath never before been written that our good wives should be estopped by the courtesies and pleasantries they exchange when "making calls" or at the "tea party."

I think the judgment should be affirmed.

Incident to the Enlarged Power of Married Women to deal with others is the capacity to be bound and estopped by their conduct when the enforcement of the principles of estoppel are necessary for the protection of those with whom they deal: See Dobbin v. Cordiner, 41 Minn. 165, 16 Am. St. Rep. 683; Baillarge v. Clark, 145 Cal. 589, 104 Am. St. Rep. 75. There is very strong reluctance on the part of some authorities, however, to apply the doctrine of equitable estoppel to married women, especially in the matter of their title to real estate: See Waldron v. Harvey, 54 W. Va. 608, 102 Am. St. Rep. 959; Lewis v. Apperson, 103 Va. 624, 106 Am. St. Rep. 903. The subject of estoppel against married women is discussed at length in the note to Trimble v. State, 57 Am. St. Rep. 169-185.

STATE v. NELSON.

[10 Idaho, 522, 79 Pac. 79.]

CONSTITUTIONAL LAW—**Forbidding Women to Enter Saloons.**—While a city may forbid females to enter, for immoral purposes, places where intoxicating liquors are sold, it may not forbid any person keeping such a place to permit females to enter therein regardless of their motive or purpose. (p. 232.)

C. C. Cavanah, for the appellant.

C. F. Neal and B. F. Kinyon, for the respondent.

524 STOCKSLAGER, C. J. This action was commenced before the police magistrate of Boise, and charged defendant with permitting a female, one Rena Morrow, to enter and remain in a saloon maintained by defendant, in violation of an ordinance of the said city. A trial was had and defendant was convicted in that court, and an appeal taken to the district court. A trial was had in that court at the February, 1904, term, and defendant was convicted and sentenced to pay a fine of twenty-five dollars and costs. The appeal is from this judgment.

This prosecution is based on the following section of the ordinance of the city of Boise: "Section 858. It shall be un-

lawful for any person maintaining any saloon, barroom or drinking-shop, or any apartment thereto attached, to permit females to enter their said place of business or maintain any sign, or offer any inducement or any invitation to females to enter any such saloon, barroom or drinking-shop kept within the city of Boise. Approved September 24, 1903."

This section was introduced in evidence and was the state's exhibit "A." State's exhibit "B" follows: "Any person violating any of the provisions of sections 855, 856, 857 or 858, shall, upon conviction before the police magistrate be punished by a fine not less than twenty-five dollars, nor more than two hundred dollars, or by imprisonment in the city jail for not less than ten days nor more than sixty days." Section 872 provides: "In all cases where a fine shall be imposed upon a person for a violation of any of the ordinances of said Boise City, such fine may be collected under the ordinances of said city and laws of Idaho, or by imprisonment at hard labor in the city prison, or by working any person sentenced to such imprisonment upon the streets, parks, public squares, workhouse or house of correction, during the term thereof, until such fine and costs be paid, at the rate of one day for every two dollars of said fine and costs, provided the total time of imprisonment shall not exceed sixty days."

It is first urged by counsel for appellant that "this objection to the introduction in evidence of sections 858, 859 [plaintiff's exhibits 'A' and 'B'], should have been sustained, for the reason that such sections of the revised ordinances of Boise City are invalid, void, unreasonable and an interference with ⁵²⁵ individual liberty granted to the citizens of Idaho by the constitutional laws of Idaho, and in its operation imposes an unjust and illegal punishment upon the owners of places where liquors are sold, whenever a female enters said places, although she may enter there upon lawful business, and creates an unequal, unjust and illegal discrimination against women who enter such places upon lawful business."

This seems from the record to be the sole question presented for our consideration in this appeal. If the section of the ordinance, state's exhibit "A," is valid, we do not think the penalty provided by state's exhibit "B" too severe. The evident intent of both sections above referred to is in the interest of morals and for the general good of the people of the city. All good citizens should join in an effort to protect the people from immoral influences, and especially the young people of

the community. With this object in view, we will examine the provisions of the ordinance in controversy. In support of his contention that the provision of the ordinance under discussion is invalid, void, unreasonable and an interference with individual liberty, counsel for appellant cites *Gasteanu v. Commonwealth*, 108 Ky. 473, 94 Am. St. Rep. 386, 56 S. W. 705, 49 L. R. A. 111. The ordinance in that case is dissimilar in some particulars to the one under consideration, but the reasons for declaring the ordinance unconstitutional seem to be applicable to the case at bar. The language of the ordinance is as follows: "Be it ordained by the board of council of the city of Middlesboro, Bell county, Ky.: (1) That it shall be unlawful for any woman to go in and out of any building where a saloon is kept offering for sale any spirituous, vinous, and malt liquors, or to frequent, loaf, or stand around said building within fifty feet thereof. (2) That it shall be unlawful for any saloon-keeper, or his clerk or employés to allow or permit any woman or women to come in or out of his building where spirituous, vinous, and malt liquors are sold or offered for sale, and it shall be the duty of said saloon-keeper, clerk or employés to immediately notify the officers that the first section of this ordinance has been violated, giving the name and color of the offender." These two sections are followed by section 3, ⁵²⁶ which provides for the punishment of the proprietor if he violates section 2, and for the offender if she violates section 1. The Kentucky court, speaking through Mr. Justice Gaffy, disposes of the case in the following concise and forcible language: "It is contended for appellee that the sole object of the ordinance is to regulate and control the sale of liquors by reason of the fact that very disreputable, low and vile women congregate in and about saloons and places where liquor is sold, thereby causing affrays, fights, murder and other crimes. . . . It seems to us that the ordinance in question is unreasonable and an unnecessary interference with individual liberty, and tends to subject the vender of liquors as well as citizens to unreasonable prosecutions. If the ordinance only included the persons mentioned in appellee's brief, we are not prepared to say that it would be invalid. But it might be that very good women would, for proper and legal purposes, find it necessary to go into a building where liquors are sold, . . . and besides, we know of no rule which prohibits a well-behaved woman, for a lawful purpose, and in a lawful manner, from going into or near a

saloon. It may be taken for granted that it is not often that such would be the case, but the ordinance in question makes no exceptions. If the citizens of Middlesboro choose to have saloons established where liquor is sold, it follows that all orderly and well-behaved persons have a right in an orderly manner, and for a lawful purpose, to visit such saloons." The judgment was reversed and the lower court directed to adjudge the ordinance in question invalid and unconstitutional. For the reason that this case is particularly applicable to the case at bar, we have quoted almost the entire opinion.

Counsel for respondent urges that the ordinance under consideration in the case above cited, after making it a misdemeanor for "a woman to go into a building where liquor was sold," went further, and provided that it was a misdemeanor also for a woman to "stand within fifty feet of such building." Counsel for respondent further say: "The last clause of this ordinance is an obviously unnecessary interference with personal liberty which finds no parallel in the ordinance in question in the case at bar." It is true that the ordinance in the ⁵²⁷ Kentucky case does add the last clause as suggested by counsel, and that no such provision is contained in the ordinance under consideration, but it will be observed that the court in passing upon the provisions of the ordinance devoted nearly the entire opinion to a discussion of the clause that prohibited women from entering a building where intoxicating liquors were sold.

In *Re Ah Jow*, 29 Fed. 181, it is shown that the city of Modesto passed an ordinance, one section of which provided that "Every person who, in the city of Modesto, keeps or maintains any room or other place where opium, or any of its preparations is sold or given away, and every person who resorts to, frequents or visits such room or place is guilty of a misdemeanor; provided, that this section shall not apply to the sale or gift of any of the preparations of opium by any druggist for any ailment not caused by the use of opium or any of its preparations." The opinion, which is by Mr. Justice Sawyer, on this particular feature of the ordinance, says: "This language is extremely comprehensive and embraces every possible case of visiting such room or place, no matter whether for a proper and lawful or improper and unlawful purpose; whether the party has knowledge or is ignorant of the character of the room or place; whether he visits it innocently or otherwise; neither knowledge nor purpose of the visit

is made an element of the offense. The mere fact of going there without any other element is made an offense.”

In *Hechinger v. City of Maysville*, another Kentucky case by Mr. Justice Gaffy, reported in 22 Ky. Law Rep. 486, 57 S. W. 619, 49 L. R. A. 114, the ordinance provided: “That it shall be unlawful for any person or persons other than the husband, father, or brother or other male relative, to associate, escort, converse or loiter with any female known as a common prostitute, either by day or by night, upon any of the streets or alleys of the city of Maysville, and any person or persons other than the said husband, father, brother or other male relative, so offending shall, upon conviction thereof, before the police court in said city be fined.” It is said in the opinion: “Manifestly, the ordinance was intended to accomplish a proper and ⁵²⁸ laudable object, but it seems to us it is not properly guarded. . . . Any person should be allowed to converse with such female long enough to transact any necessary and legitimate business.”

Mr. Dillon, in his work on *Municipal Corporations*, volume 1, fourth edition, section 322, in discussing the powers of municipal corporations to enact laws or ordinances for the punishment of crime, says: “As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal and if done by another not so, ordinances which have this effect cannot be sustained. Special and unwarranted discrimination or unjust or oppressive interference in particular cases is not to be allowed. The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances general in their nature and impartial in their operation”: See 1 *Dillon on Municipal Corporations*, 4th ed., sec. 325.

In volume 21 of the *American and English Encyclopedia of Law*, 990, under the head of “Construction of Common Rights,” this subject is discussed and the authorities of a large number of the states bearing on this question cited. Mr. McClain, in his work on *Criminal Law*, volume 1, section 65, in discussing the subject of reasonableness of ordinances, says: “An ordinance which the city passes in the exercise of the powers given it must be reasonable and the courts have authority to inquire into that question to a greater extent than they have with reference to state statutes,” citing a number of authorities to support the text.

On the same subject we find the following language in volume 21 of the American and English Encyclopedia of Law, 985: "It is well established as a general rule that ordinances in order to be valid and binding must be reasonable and not arbitrary or oppressive, and ordinances which do not conform to this requirement will be declared void." Numerous cases are cited from many of the American states in support of this rule. In *Commonwealth v. Worcester*, 3 Pick. 462, it is said: "Whether a by-law be reasonable or not is for the court to determine."

For a very able and interesting discussion of the powers and duties of city authorities, as well as the courts in passing upon ⁵²⁹ questions similar to the one before us, see *Helena v. Dwyer*, 64 Ark. 424, 62 Am. St. Rep. 206, 42 S. W. 1071, 39 L. R. A. 266.

In support of the contention that this ordinance should be sustained, counsel for respondent rely upon *Adams v. Cronin*, reported in 29 Colo. 488, 69 Pac. 590, 63 L. R. A. 61. We have read this case with much interest and care and are in full accord with every principle of law enunciated. A careful examination of this case, however, discloses that a very different ordinance was before the Colorado court for determination to the one we are called upon to construe. Section 745 of the Denver ordinance provided: "Each and every liquor saloon, dramshop or tippling-house keeper . . . who shall have or keep in connection with or as part of such liquor saloon, dramshop or tippling-house, any wine-room or other place either with or without door or doors, curtain or curtains, or screen of any kind, into which any female person shall be permitted to enter from the outside, or from such liquor saloon, dramshop or tippling-house, and there be supplied with any kind of liquor whatsoever, shall upon conviction be fined as hereinafter provided." Section 746 provides: "No person having charge or control of any liquor saloon . . . shall suffer or permit any female person to be or remain in such liquor saloon, dramshop, tippling-house or other place where intoxicating or malt liquors are sold or given away, for the purpose of there being supplied with any kind of liquor whatsoever . . . nor shall any female person be or remain in any dramshop, tippling-house, liquor saloon or place adjacent thereto or connected therewith and wait or attend on any person or solicit drinks in any such place." This ordinance was declared

valid—and why not? No provision in the ordinance that an orderly, well-behaved woman might not enter any saloon in the city of Denver for the transaction of legitimate business and as often as she felt so disposed, so long as she did not visit such place for the purpose of being supplied with liquors or other immoral purposes. This ordinance falls strictly within the rule laid down in *Gastenu v. Commonwealth*, and indeed all the cases to which our attention has been called and heretofore referred to in this opinion. It is aimed at the very class of women who are usually termed the unfortunates⁵³⁰ of the human family, and was designed to discourage and prevent their presence in and around saloons, tippling-houses and wherever intoxicating liquors are sold. There is no attempt to prohibit a woman in the ordinary course of business to enter such places in the discharge of her business or for any legitimate reasons. The distinction between that ordinance and the one under consideration is easily drawn. The Denver ordinance prescribed a punishment for an offense that the proprietor must commit himself, whilst the Boise City ordinance provides a punishment for the proprietor if any woman enters his place unbeknown to him, without his consent and against his will, no matter what her motive or intent may be. There is no exception; the mere matter of entrance is the essence of the crime. There is no question about the power, and we may say the duty, of the city authorities to enact such ordinances as will promote morals and regulate the sale of intoxicating liquors in such a way as to prohibit immoral women from frequenting such places for the purposes of drinking, engaging in games, soliciting trade, or any other immoral purpose, but to say by an ordinance that a wife or mother may not enter a saloon without subjecting herself to a fine (as well as the proprietor) in search of a recreant husband or a wayward son, is beyond the legal power of the city. So long as the state and the city of Boise see fit to license the retail sale of liquors, so long must they protect parties lawfully engaged in that business in a reasonable way.

The judgment is reversed and cause remanded for further proceedings consistent with this opinion.

Ailshie, J., and Sullivan, J., concur.

For Authorities bearing upon the decision in the principal case, see Gastenu v. Commonwealth, 108 Ky. 473, 94 Am. St. Rep. 386; Dunn v. Commonwealth, 105 Ky. 834, 88 Am. St. Rep. 344; note to Booth v. People, 78 Am. St. Rep. 254.

SCHULER v. FORD.

[10 Idaho, 739, 80 Pac. 219.]

JUDGMENT—Estoppel—Parties and Privies.—A judgment is conclusive, not only upon those who were parties to the action, but also upon those who are in privity with them. (p. 236.)

JUDGMENT—Estoppel.—One in Possession of Land under a contract of purchase is not in privity with the vendor so as to be bound by a judgment against him affecting the property in an action commenced after the contract was made and possession taken. (p. 238.)

Alfred A. Fraser, for the appellant.

W. E. Borah, for the respondents.

⁷⁴² AILSHIE, J. The history of the transaction covered by this case and material to be considered in its determination are covered by the findings of fact made and filed by the trial judge, and are as follows:

1. "That upon the twenty-third day of April, 1898, an action was commenced in the superior court of the state of Washington, in and for the county of Spokane, by Nathan Toklas; H. W. Bonne, Ed. Erp. Brockhausen, C. J. Kemp, and Harry E. Schuler were plaintiffs, and Geo. Wirtz, John Welch, E. D. Ford, John Henderson, Joseph Phillips and the Traders' National Bank of Spokane, Washington, were defendants; that neither John Welch, F. D. Ford, John Henderson nor Joseph Phillips were served with summons or process in said action, and neither of them appeared in said action at any time by attorney or otherwise; that said cause was tried October 19, 1898, as against the defendant, George Wirtz; that findings of fact, conclusions of law and decree were entered, said decree bearing date February 16, 1900; that according to said decree it was recited and decreed inter alia 'that this cause was dismissed as to the defendants, John Welch and E. D. Ford, John Henderson and Joseph Phillips without prejudice,' and it was further decreed in substance that the plaintiffs were entitled to a decree for an undivided two-thirds interest in a one-fourth interest in the Summit mining claim, situated in Mountain View mining district, Washington county, Idaho. That said suit was appealed to the supreme court of the state of Washington and said decree was affirmed February 1, 1902. That thereafter a commissioner's deed was made under said decree for the two-thirds interest of said un-

divided one-fourth interest, which deed bore date February 20, 1900."

⁷⁴⁴ 2. "That on June 27, 1893, Joseph Phillips and John Henderson, who were then and there citizens of the United States, over the age of twenty-one years, located a certain mining claim in Mountain View mining district, Washington county, Idaho, to wit, the Summit mining claim; that on April 19, 1897, said Joseph Phillips and John Henderson sold and conveyed said mining claim to George Wirtz and John Welch and that said deed was duly recorded on the twenty-third day of April, 1897, with the recorder of Idaho county; that on July 27, 1897, George Wirtz and John Welch, who were then and there in possession of said Summit mining claim, entered into a contract to sell and convey said mining claim and all thereof to C. E. Page, which contract has been introduced in evidence as defendants' exhibit 'A.' That said contract was shortly thereafter assigned to E. D. Ford; that there was paid on said contract to George Wirtz, on or about November 1, 1897 the sum of two hundred dollars and that there has been paid upon the same altogether about two thousand dollars. That said contract covered other claims, and that the entire amount to be paid thereunder was forty thousand dollars. That E. D. Ford went into possession of the said Summit mining claim immediately after the execution of said contract, and not later than November 1, 1897, and, together with his associates under said contract and successors in interest, have been in possession of said mining claim ever since, and have expended large sums of money in working and developing said claim. That said contract of purchase under date of July 27, 1897, is still in force and effect, the time of payment having been extended and the sum of about thirteen or fourteen thousand dollars yet being due for said undivided one-fourth interest."

3. "That neither of the plaintiffs have at any time been in possession of said Summit mining claim prior to the commencement of this suit."

4. "That E. D. Ford acquired his interest in said property by virtue of said contract, and his right to purchase the same and his possession of said Summit mining claim under said contract long prior to the commencement of this action upon the part of the plaintiffs in the state of Washington as aforesaid."

⁷⁴⁵ 5. "That George Wirtz and John Welch have at all times herein mentioned been citizens of the United States, over

the age of twenty-one years, and citizens of the state of Idaho since 1894. That E. D. Ford is a citizen of the United States, and has been a citizen of the state of Idaho and a resident of the state of Idaho since June 1, 1898. That the defendant is a corporation organized and existing under and by virtue of the laws of the state of Colorado, and that since October 18, 1899, has maintained its agent upon whom process could be served, within the state of Idaho, in conformity with the laws of the State of Idaho."

As conclusions of law from the foregoing facts, the court found:

1. "That these defendants were in no wise bound or affected in their rights by the judgment or decree rendered in said cause heretofore referred to in the state of Washington, and that the said judgment or decree was wholly inoperative as to these defendants and their rights under the contract of purchase and their right to the possession of the Summit mining claim or any part thereof."

2. "That the plaintiffs can take nothing by this cause of action, and that the defendants are entitled to judgment for costs and disbursements herein, and it is ordered that judgment be entered accordingly."

The only question necessary for our determination in this case is whether or not the defendant Ford was bound by the judgment of the Washington court of February 16, 1900, in case of Toklas et al. v. Wirtz et al. Before considering that question it should be observed that the contract under which Ford acquired his interest in the property was entered into prior to the commencement of the action in the Washington court, and his entry into possession of the property was also prior to that date. It is also a conceded fact in this case that the plaintiffs in the action commenced in the Washington court had actual notice of the interest claimed in the property by Ford, as well as the constructive notice which was imparted by his possession ⁷⁴⁶ of the property at that time. It is admitted, on the other hand, by Ford's counsel, that he is not a bona fide purchaser within the meaning of the law of the interest claimed by him, for the reason that he had not made full payment of the purchase price prior to the commencement of that action.

The general rule of law applicable to a case of this kind is stated by Black on Judgments, volume 2, section 549, as follows: "It is well settled that a judgment is conclusive, not only

upon those who were actual parties to the litigation, but also upon all persons who are in privity with them." This we understand to be the correct rule of law upon the subject. There is no question in this case but that the appellant Ford was not a party to the action wherein the judgment and decree was obtained in the Washington court. The only question, therefore, remaining to be determined is: Was he a privy to the judgment or in privity with the defendant Wirtz in that action? Freeman on Judgments, volume 1, section 162, fourth edition, in discussing the question as to who are parties privy, says: "It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit."

In 24 American and English Encyclopedia of Law, second edition, page 746, it is said: "Every person is privy to a judgment or decree who has succeeded to an estate or interest held by one who was a party to such judgment or decree, if the succession occurred after the bringing of the action. But in order that privity shall exist, the succession must have occurred after the institution of the suit. One who succeeded to the right of property of a party prior to that time is not in privity with him and is not concluded by the judgment": *Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. Rep. 333, 42 L. ed. 733.

In *Shay v. McNamara*, 54 Cal. 174, the court, in determining whether certain parties were privy to a judgment which had been introduced against them, said: "This was the origin of whatever interest the Johnsons acquired under the Kellys; and having originated before the commencement of the suit of ⁷⁴⁷ *Morgans v. Kelly*, it follows that they are unaffected by the judgment in that case; for only those are privies whose interest in the subject matter of the suit originated subsequent to its commencement."

Weed Sewing Machine Co. v. Baker, 40 Fed. 56, was an action in some respects similar to the one under consideration, and it was there held that: "A party in possession of land, claiming an interest as purchaser, or under a contract to purchase, is not in privity with his grantor. On the contrary, his claim is adverse to his grantor, and it must follow that he is not bound by a decree against the latter in a case to which he is not a party and rendered in a suit commenced after he purchased and took possession."

In *Seymour v. Wallace*, 121 Mich. 402, 80 N. W. 242, the supreme court of Michigan, in determining to what extent a party was bound by a judgment to which he was not made a party, quoted with approval from *Coles v. Allen*, 64 Ala. 105, the following language: "No alienee, grantee, or assignee is bound or affected by a judgment or decree rendered in a suit commenced against the alienor, grantor, or assignor, subsequent to the alienation, grant, or assignment; for the plain reason that otherwise his rights of property could be divested without his consent, and the fraud or laches of the grantor could work a forfeiture of estates he had created by the most solemn conveyances. Whatever may be the force and effect of the judgment or decree against the grantor, if it is sought to be used to the prejudice of the grantee, there must be independent, distinct evidence of the facts which authorized its rendition": *Stone v. Stone*, 179 Mass. 555, 61 N. E. 268; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 600; *Cypreanson v. Berge*, 112 Wis. 260, 87 N. W. 1081; *Coles v. Allen*, 64 Ala. 105; *Sorenson v. Sorenson* (Neb.), 98 N. W. 337.

The judgment in *Toklas et al. v. Witz et al.*, having been rendered by a court which had no jurisdiction over the property situated in this state, became merely a judgment in personam, and was only binding upon those reached by personal service: *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165, 30 L. ed. 372; *Dull v. Blackman*, 169 U. S. 243, 18 Sup. Ct. Rep. 333, 42 L. ed. 733; *Pennoyer v. Neff*, 95 U. S. 723, 24 L. ed. 748 565. The plaintiff in the Washington court, appreciating this fact, dismissed his action as to Ford and all other defendants on whom he failed to get personal service. The "full faith and credit" commanded by section 1 of article 4 of the federal constitution to be given by each state to the judicial proceedings of every other state does not mean that such proceedings shall be given any greater "faith and credit" in a sister state than they would be accorded in the state where taken. If the judgment of *Toklas et al. v. Wirtz et al.* had been rendered in this state and the interest claimed by Ford had been acquired subsequent to the entry of that judgment, or subsequent to the filing of a *lis pendens* in the proper office, then Ford would be a party privy to Wirtz, his grantor, and bound by the judgment. The judgment, we apprehend, would have had the same effect in Washington had the property been situated in that state. But when Ford secured his contract

and entered into the possession of the premises no action was pending. After Wirtz had contracted to part with his title, he might have lost interest in defending a title which he had agreed to part with, and especially would this be true where but little remained due on the contract price and the grantor was thriftless and execution proof against any possible judgment for damages. In the latter case the law will not leave open so wide a door for fraud and injustice, but will allow the party acquiring such a property right his day in court to contest the claim on which a recovery is sought. The right acquired by Ford under his contract of July 27, 1897, became a property right; but under the contract for purchase, Ford did not become a party privy to an action subsequently instituted against his grantor and to which he was not made a party. There was no error in the conclusion reached by the trial judge, and the judgment will therefore be affirmed. Costs awarded to respondent.

Stockslager, C. J., and Sullivan, J., concur.

A Grantee of Land is not Affected by a Judgment against his grantor after the conveyance merely because of privity of estate: Bensimer v. Fell, 35 W. Va. 15, 29 Am. St. Rep. 774. See, however, Ahlers v. Thomas, 24 Nev. 407, 77 Am. St. Rep. 820.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

THOMPSON v. HEMENWAY.

[218 Ill. 46, 75 N. E. 791.]

JUDGMENT OF FORECLOSURE—Parties, When Bound by and by the Appearance of an Attorney.—If, in a suit to foreclose a mortgage, a corporation appears and answers the complaint by an attorney, it cannot avoid the effect of the judgment by showing that it did not employ such attorney, if the suit was prosecuted in its name and with its knowledge, and the decree therein was rendered after such knowledge and without objection on its part. (p. 244.)

JUDGMENT LIEN—Enforcement of by Another Judgment.—If the defendant in a suit to foreclose a lien claims that under a judgment rendered in a national court, he is entitled to a lien on the property paramount to the lien of the complainants, and they, for reasons specified in the pleadings, insist that such judgment is not a lien, a decree in favor of such defendant directing a sale of the property and awarding him priority out of the proceeds is a proper mode of enforcing such judgment lien and conclusive on all the parties to the foreclosure suit. (p. 245.)

JUDGMENT LIEN, Creation of Where the Sale is Made in Another Suit.—If the holder of a judgment is made a party defendant to a suit to foreclose a mortgage and by his answer sets up his judgment and lien, and the court, deciding in his favor, directs a sale of the property and awards him priority of payment out of the proceeds, such sale, when made, relates to the date of the inception of the judgment lien. It is not necessary that the judgment lien be enforced by the levy of execution. (p. 245.)

JUDGMENT LIEN, When Preserved by a Decree of Foreclosure.—If, in a suit to foreclose a mortgage, a judgment creditor is made a party defendant and pleads his judgment, and the court finds it to be paramount as a lien to the mortgage, and decrees that the land be sold free from the lien of the judgment as well as free from the lien of the mortgage, and that the lien of the judgment shall be transferred to and become a lien upon the proceeds of the sale, the sale so decreed is in execution of the judgment as well as of the mortgage, and the title resulting from the sale relates to the date of the judgment lien and cuts off all subsequently acquired titles and liens. (pp. 245, 246.)

RES JUDICATA.—In a Suit to Foreclose a Mortgage to which a Holder of a Judgment Rendered in One of the National Courts is Made a Party Defendant, and answering, sets up his judgment and claims a lien thereunder paramount to the mortgage, the questions whether such judgment could be enforced by a decree in such court without a cross-bill, or whether it could be enforced by a decree in the state court in any manner, or whether the only manner in which the defendant's lien could be enforced was by execution issued on the judgment and levied on the land, were matters properly involved in the foreclosure suit, and might have been, if they were not, raised and determined by it, and as to them, the decree of foreclosure is res judicata. (p. 246.)

MORTGAGE, Senior, When Out Off by Decree of Foreclosure. If, under a suit to foreclose a mortgage, a judgment creditor and also a prior mortgagee of the mortgagor are made parties defendant, and the judgment creditor sets up his judgment in his answer, claiming it to be paramount to both mortgages, and the court so finds and directs a sale of the property and awards priority to the judgment creditor out of the proceeds of the sale, the sale, when made, transfers title paramount to the lien of such prior mortgage, and the title of any purchaser claiming under a sale subsequently made thereunder. (pp. 247, 248.)

Ejectment. The land in controversy at one time belonged to the J. S. Keater Lumber Company, and became subject to liens as follows: 1. Of a judgment against that company in favor of the plaintiffs in this action, rendered in the circuit court of the United States for the northern district of Illinois, March 31, 1888, and affirmed by the supreme court of the United States in 1892; 2. Of a mortgage executed by the company to the Moline Savings Bank, December 11, 1891; and 3. Of a mortgage executed by the same company December 20, 1892, in favor of Charles H. Deere and others, to secure indebtedness due by the company to many of its creditors. On April 2, 1892, the Rock Island National Bank, one of the creditors secured by the last-named mortgage, brought suit to foreclose it, making parties defendant the plaintiffs in this action. On January 11, 1893, Ira O. Wilkinson filed appearances in this suit in the name of the Moline Savings Bank. It claimed to own one of the notes secured by the Deere mortgage. On the same day an amended bill was filed by which the bank became one of the complainants, and averred that it owned one of the notes secured by the Deere mortgage. On September 20, 1892, the plaintiffs in this action filed their answer, setting up their judgment and claiming it to be a superior lien to the premises. December 21, 1893, suit was begun to foreclose the mortgage given to the bank, and the plaintiffs in this action were made parties defendant, and filed their answer, again setting up their lien by judgment, and the suit was then permitted to languish, apparently awaiting the result

of the Deere foreclosure. In the latter suit a decree was entered November 17, 1896, in which it was found that the note claimed to be held by the bank and to be secured by the Deere mortgage had been paid; that the lien of the plaintiffs in this action was a first or superior lien, and a decree was entered directing a sale of the premises described in the Deere mortgage, declaring that the equities of the plaintiffs in this action were superior to those of the company and all other parties to the suit, and that the sale should be free from the lien of such judgment as well as from the lien of the bank's note and mortgage, that the lien of the judgment be transferred and become a lien on the proceeds of the sale, and that in case the plaintiffs in this suit should become purchasers at the sale, they should be allowed to retain out of the amount bid by them the sum found due them on their judgment. Nowhere in the decree nor in the pleadings or evidence was the mortgage of the Moline Savings Bank mentioned. On December 17, 1898, the plaintiffs in this action became the purchasers at a sale made under the decree hereinbefore mentioned. In the meantime plaintiffs had been dismissed as parties defendant to the suit brought by the Moline Savings Bank, and on July 8, 1898, a decree was entered in this latter suit foreclosing the mortgage held by that bank, and a sale was subsequently made thereunder under which the defendants in this action claimed title. Upon these facts the trial court held that the defendants were the purchasers of the legal title; that the lien of the judgment of the plaintiffs entered in the circuit court of the United States could only be enforced in proceedings in that court, as prescribed by the statute of the United States; that the bank was not a party complainant in the suit to foreclose the Deere mortgage; that its lien was superior to that mortgage, and it was not a necessary and proper party in the suit to foreclose it and was not affected by such suit; that the sale under the decree in the Deere mortgage suit was not a sale under the judgment of the circuit court of the United States; and finally, that the plaintiffs in this action were not entitled to the possession of the premises sued for by them. The plaintiffs appealed.

James Wickham, James O'Neill and Jackson, Hurst & Stafford, for the appellants.

Charles M. Osborn, George W. Wood and Burton F. Peek, for the appellees.

⁵⁴ RICKS, J. The contention of appellants is, that the Moline State Savings Bank, which foreclosed the six thousand dollar mortgage and purchased the property at the sale, and Porter Skinner, the assignee thereof and testate of appellees, who received the assignment of said certificate of purchase from said bank, were parties complainant in the suit of the Rock Island National Bank et al. against the J. S. Keater Lumber Company and appellants and other persons, and are bound by the provisions of the decree entered in that suit; that the effect of the sale under the decree in that suit was to vest in appellants, who were the purchasers at that sale, title to the premises both under the mortgage foreclosed and under the lien of appellants' judgment in the federal court and also of the interests in the premises held by the various parties to the suit; that the decree in that suit is *res judicata* as to rights of the parties in the premises; that the decree of foreclosure of the Moline State Savings Bank's mortgage was entered on July 8, 1899, after appellants had become the purchasers at the sale under the decree in the suit of the Rock Island National Bank et al. against the Keater Lumber Company et al., and that said decree, under which appellees claim title, was had and entered without appellants being made parties thereto, and that the only effect of such decree and sale was to vest in Porter Skinner, under the master's deed, an equitable assignment of the mortgage of the Moline State Savings Bank.

Appellees deny that the Moline State Savings Bank was a party to the decree in the foreclosure of the Deere blanket mortgage at the suit of the Rock Island National Bank and others, and say that, if it shall be held that said bank was a party to said proceeding, the decree therein was only binding upon said bank, and those claiming through or under it, as far as the matters in that case were actually litigated; that the rights of the Moline State Savings Bank under the mortgage ⁵⁵ through which appellees claim title were in no manner in question in that suit, and that the decree did not, and could not, make the lien of the Deere blanket mortgage superior to the lien of the prior mortgage held by the Moline State Savings Bank; that the judgment in favor of appellants in the United States circuit court was not, and could not be, enforced by a decree of the state courts, and that all the title that appellants got must depend upon and relate to the Deere blanket mortgage, which was a junior mortgage to that of

the Moline State Savings Bank, and that under it appellants could only obtain the right of redemption from the mortgage through which appellees claim. It therefore becomes material to first inquire whether the Moline State Savings Bank was a party to the foreclosure proceedings under the Deere blanket mortgage.

While it is true that some of the bank officers say that they do not think Judge Wilkinson was actually employed by the bank to enter its appearance and prosecute and join it in the prosecution of the bill in that case, it does appear that Judge Wilkinson, at the time the second amended bill was filed, in January, 1893, signed the bill as solicitor for all the parties complainant, including the bank; that Mr. Charles F. Hemenway, its cashier, and Mr. Porter Skinner, who was president of the bank, were also parties complainant, and a copy of the note, marked "Exhibit M," which the bill alleged belonged to the bank and was secured by the Deere blanket mortgage, was in the handwriting of Mr. Hemenway, the cashier of the bank. Judge Wood, one of the attorneys of the Moline State Savings Bank, who foreclosed the mortgage through which appellees claim, testified that about the time he filed the bill to foreclose that mortgage, which was in December, 1893, he knew that the Moline State Savings Bank was a party to the foreclosure proceeding in the other case and discussed the matter with the officers of the bank, and the record shows that a decree was not entered in the former proceeding until November, 1896, so that the officers ⁵⁶ of the bank, and its attorney, Judge Wood, had notice, more than three years before the termination of the suit, that it was a party, and so far as the record or evidence discloses it remained a party to it, and without any effort to dismiss or any protest, until the final decree and during the appeal of the case to this court. Not only did it remain a party to the suit with the Rock Island National Bank, under the Deere blanket mortgage, until the final determination thereof, but the record also shows that the proceeding for the foreclosure of its own mortgage was suspended and no decree taken until after the affirmance by this court of the decree under the Deere blanket mortgage. By the allegations in the bill of the Deere mortgage foreclosure proceeding the validity and lien of appellant's judgment in the federal court were put directly in question, the complainants in their bill alleging that if appellants had any lien it was subordinate to the Deere mortgage,

and that mortgage on its face purported to be subordinate to the mortgage of the savings bank, and it was a matter of material interest to the savings bank that appellants' judgment, which was prior in date to both, should be declared subservient to the lien of the Deere mortgage, as that would also make it subservient to the lien of the savings bank mortgage. The Deere mortgage case was earnestly contested at every stage, and the officers of the savings bank, as individuals, were materially interested in the proceeding and parties complainant to it, and it is incredible that they would be ignorant of the fact that the bank which they represented and which claimed to have an interest in the fund secured by the mortgage was a party thereto. It was not necessary that the savings bank should specifically or particularly employ Judge Wilkinson and authorize him to join it as complainant in the bill with the Rock Island National Bank in the foreclosure of the Deere mortgage in order to bind it as a party. It is sufficient that the suit was prosecuted in its name with its knowledge, and decree rendered therein after such knowledge without objection on its part: 2 Ency. of Pl. & Pr. 682; ⁵⁷ 24 Am. & Eng. Ency. of Law, 2d ed., 737; Logan v. Trayser, 77 Wis. 579, 46 N. W. 877; Carpenter v. Carpenter, 136 Mich. 362, 99 N. W. 395. The witness Hemenway, upon whom appellees rely to show that Judge Wilkinson was not the counsel of the savings bank and was not authorized to join it as complainant in said foreclosure proceeding, did not remember that he himself was a party to said proceeding, or that the Moline State Savings Bank, of which he was an officer and which was granted material relief, was also a party. From the whole record we are of opinion that the Moline State Savings Bank was a party complainant to that suit and was actively concerned with it.

In the foreclosure suit it was expressly found by the court that appellants had recovered a judgment against the J. S. Keater Lumber Company in the United States circuit court for the northern district of Illinois on March 31, 1888, for fifteen thousand five hundred and sixty-eight dollars and ninety-nine cents, and that the same became a lien upon all real estate, lands, tenements and hereditaments of said lumber company, including the lands described in the bill of complaint as amended, and that said judgment continued to be, and was at the time of said decree, a lien upon all lands of said lumber company and the lands described in said bill.

In that finding lay the chief bone of controversy in that case. It was contended by the complainants in that case that the judgment in the federal court entered in Cook county was not a lien upon lands in Rock Island county, that execution had not issued on the judgment in time to preserve the lien, and that the circuit court could not in that proceeding enforce the lien and make it superior to the lien of the blanket mortgage. The circuit court decided adversely to those contentions and the appellate court and this court sustained it. No cross-bill was necessary in that case to enforce the lien of appellants' judgment. It was proper to do so under their answer. It was so held by this court in that case.

Appellees say that the only benefit or title appellants obtained to the land in question by virtue of the proceedings in ⁵⁸ the foreclosure of the Deere mortgage was the right of redemption under that mortgage; that the title of appellants cannot relate back to the date of their judgment because, first, the decree in that case does not purport to enforce the judgment, and second, the judgment has never been enforced by the levy of an execution and sale thereunder in the manner prescribed by the statute of the United States.

We cannot agree with the contention that the court did not, in that decree, purport to enforce the judgment. It finds that it became a lien on March 31, 1888, that it continued to be a lien and was a lien at the time of the entry of the decree, and while it is true that the decree says that the lien of the judgment should "be transferred to and become a lien upon and against the said proceeds of the sale," that language is only used in connection with the manner of the sale. It was made manifest to the court that it was important to sell the land, not subject to but for the judgment as well as the mortgage debt, and the order is that it be sold "free and clear of and from the lien of said judgment . . . as well as from the lien of said . . . mortgage." We think this order not different from that ordinarily made where a judgment creditor is made a party to the foreclosure proceeding. If it can be said to have had any effect upon the judgment of appellants in addition to its enforcement, it was to make the lien of it specific as to the property involved in that suit. No case has been cited—and we should be averse to follow it if it were—in which it is held that where a judgment creditor is brought into a foreclosure proceeding and the order of sale is for the satisfaction of both the judgment and the

mortgage, the sale is not in execution of the lien of the judgment. There was nothing before that court but the question of liens—the lien or liens created by the mortgage and the lien of appellants' judgment. If a prior judgment creditor should be made a party to a foreclosure proceeding by a mortgagee who took his mortgage subsequent to the judgment lien, and the sale was decreed for the satisfaction of ⁵⁹ both the mortgage and the judgment lien, it would seem puerile to urge that the only title the purchaser obtained was by virtue of the mortgage lien. The power of a court of chancery to adjust the rights of various lienholders if one of them is such as gives the court jurisdiction, and to dispose of the property affected by the lien to the benefit of the holders according to priority, has been so long recognized that it would seem to be now beyond question. When the court has jurisdiction it acts upon the substance and not upon the form, and preserves instead of destroying rights. If it had the power at all to sell the property under the judgment lien in favor of appellants, then it had the power, and we must hold that it intended to preserve to appellants the benefit of that sale. The savings bank being a party complainant to that proceeding is bound by it as far as the chancellor or this court could bind it.

Whether the judgment of appellants in the United States circuit court could be enforced by a decree of a state court without a cross-bill, or whether it could have been enforced by a decree of a state court at all in any manner, or whether the only manner in which the lien could be enforced was by execution issued on the judgment and levy on the land, were matters properly involved in that suit, and might have been, if they were not, raised and determined in it, and as to them that decree is *res judicata*: *Hamilton v. Quimby*, 46 Ill. 90; *Kelly v. Donlin*, 70 Ill. 378; *Gage v. Ewing*, 107 Ill. 11; *Scates v. King*, 110 Ill. 456. What was done there was done at the request and prayer of the savings bank, and it, or those claiming under it, will not be heard to say that they are not bound by it.

There is much force in the argument of appellants that appellees are estopped to assert any lien of the savings bank mortgage as against this sale. The savings bank mortgage was dated December 8, 1891, was due in one year, with interest payable semi-annually in advance, and conditions of forfeiture on failure to pay interest. At the time the savings

⁶⁰ bank asked to be made a party complainant in the foreclosure of the Deere mortgage (January 31, 1893) the mortgage it held was wholly past due and unpaid, except the first semi-annual payment of interest, which was paid, presumably, at the time the mortgage was made, so that when the savings bank became a co-complainant with the Rock Island National Bank et al. in the foreclosure of the Deere mortgage, the mortgage of the savings bank could have been foreclosed and its rights adjusted in the same proceeding.

Appellants invoke the well-recognized rule that the doctrine of *res judicata* embraces not only what had actually been determined in the former suit, but also extends to any other matter properly involved and which might have been raised and determined in it, and contend that as the savings bank was a party and suffered a decree ordering the sale of the property in fee without having its rights under its mortgage saved by the terms of the decree, it is now estopped to say that its lien was superior to the lien of the blanket mortgage. Appellees answer this by saying that it did not lie within the powers of the circuit court to decree the lien of the blanket mortgage a prior lien to the lien of the savings bank mortgage, which was prior in date and recording. Whether the rule of *res judicata* can be carried to the extent contended for by appellants seems to us not controlling in this case, and we do not decide it. We think it clear that the chancellor, in the prior foreclosure proceeding, did determine that appellants had a lien upon the land under their judgment; that that lien dated back to the date of the judgment in 1888, which was prior to both mortgages; that the sale was as much to satisfy that lien as it was to satisfy the lien of the second mortgage, and that the proceeds of the sale, which in this case happened to be the land itself, did not amount to as much as the judgment in favor of appellants, which was the first lien, and that therefore there was nothing realized under the sale upon the second or blanket mortgage. We also hold that for the preservation of the title of appellants and in ⁶¹ determining who is possessed of the superior or paramount title as between appellants and appellees, appellants' title will and should relate back to the date of their judgment: Rorer on Judicial Sales, sec. 366; 5 Cruise on Real Property, 510; *Kruse v. Scripps*, 11 Ill. 98.

We regard the power of the circuit court to enforce the lien of the judgment in favor of appellants under the pro-

ceeding to foreclose the blanket mortgage as settled by the decree in that case, and its affirmance by this court on that record, on the principle of *res judicata*. The doctrine of relation is necessarily applicable to the preservation of the title claimed under such sale. Then, if we do not go to the extent of holding that the lien of the savings bank mortgage, under which appellees claim, was lost or made subservient to the lien of the second or blanket mortgage by the proceedings through which appellants purchased the land, it leaves appellees with their mortgage still subject and subservient to the lien of the judgment in favor of appellants as it was before any of the proceedings were begun, and the right of the savings bank under its said mortgage was to redeem from the sale made by virtue of the lien of appellants' judgment. Before any decree had been taken in the foreclosure of the savings bank mortgage appellants had become the purchasers of the land at the sale under the prior decree. Their right, then, to the land by virtue of that sale was fixed, and appellees could have exercised their statutory right of redemption through that sale, which included no part of the moneys or fund represented by the second or blanket mortgage. This they did not see fit to do, but proceeded to take a decree of sale without appellants being made parties to the proceeding or dismissing them therefrom after they had answered. We are of the opinion that that proceeding did not give them any right as against appellants, and certainly not a superior right or a superior title to that of appellants. We are also of opinion the circuit court was in error in making its holdings in favor of appellees and rendering judgment for them.

⁶² The judgment of the circuit court will be reversed and judgment entered in this court for appellants, as we think no different result should or could be had by remanding the cause.

Mr. Justice Hand dissenting.

A Judgment on the merits constitutes a bar to a subsequent action founded upon the same claim or demand, concluding the parties and their privies, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose; but where a second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those issues upon the determination of which the judgment was rendered, and does not extend to matters which might have been, but were not, litigated and determined in the former action: *Brack v. Boyd*, 211 Ill. 290.

103 Am. St. Rep. 200, and cases cited in the cross-reference note thereto; *Rew v. Independent School Dist.*, 125 Iowa, 28, 106 Am. St. Rep. 282. As to whether a person is concluded by a judgment when he was not a party to the record, although he appeared by attorney, or assumed the control of, or actively consents to, the proceedings, or had notice of the action, see *Central Baptist Church v. Manchester*, 17 R. I. 492, 33 Am. St. Rep. 893; *St. Paul Nat. Bank v. Cannon*, 46 Minn. 95, 24 Am. St. Rep. 189; *Baxter v. Myers*, 85 Iowa, 328, 39 Am. St. Rep. 298; *Brown v. Wilson*, 21 Colo. 309, 52 Am. St. Rep. 228; *Lower Latham Litch Co. v. Loudon etc. Canal Co.*, 27 Colo. 267, 83 Am. St. Rep. 80.

FORREST v. FEY.

[218 Ill. 165, 75 N. E. 789.]

DIVORCE.—Whether the Plaintiff had an Alleged Cause for Divorce or whether the allegations of his bill and the proofs to sustain them were true or not does not affect the validity of the decree of divorce, if the court had jurisdiction to enter it. (p. 252.)

DIVORCE Granted in Another State.—Where a transcript of a decree entered in another state, duly certified, is offered in evidence in this state, no questions are open to inquiry except those of jurisdiction. (p. 252.)

DIVORCE in Another State, Conclusiveness of.—A decree of divorce entered in another state, if the court has jurisdiction, has the same effect in every other state as in the state where rendered, and is conclusive of the merits of the controversy, no matter what fraud may have intervened. (p. 253.)

DIVORCE, Decree of, Presumption of Jurisdiction.—Where a court of general jurisdiction proceeds to adjudicate a cause, there is a presumption of jurisdiction, but this presumption applies only when the record is silent on the question, and if there is an affirmative showing in the record that there is no jurisdiction, the judgment or decree is void. (p. 253.)

JURISDICTION, Presumption of.—Where a decree is silent as to jurisdiction over the defendant, it will be presumed; but if the decree is silent as to service of process, and the summons shows a want of or an insufficient service, the presumption of jurisdiction is overcome. (p. 253.)

DIVORCE, Decree of in a Sister State, When Void.—If a decree of divorce is granted in another state against a nonresident defendant, and it appears that service of process was by publication, and the statute of the state, to authorize such publication, required an affidavit of such nonresidence, and the draft of affidavit found among the papers is neither signed by the proper deponent nor by any officer purporting to administer an oath, the court was without jurisdiction, and the decree is void. (pp. 253, 254.)

Schneider & Schneider and W. N. Carpenter, for the appellant.

Cloud & Thompson and Welty, Sterling & Whitmore, for the appellees.

¹⁶⁶ CARTWRIGHT, C. J. Appellant filed in the circuit court of Ford county her petition for the assignment to her of dower in one hundred and twenty acres of land in said county, alleging that she was the widow of Frederick Fey, to whom she was married in Arkansas, and making the appellees, Anna K. Fey, from whom she alleged that Frederick Fey had been divorced before his marriage to her, and the heirs of Frederick Fey and John A. Montelius, defendants. The answers to the petition raised an issue as to the validity of the divorce obtained by Frederick Fey in the chancery court of Arkansas county, Arkansas, and alleged that it was void for want of jurisdiction in said court. The cause was referred to a special master to take and report the evidence, and upon a hearing of the evidence so taken the petition for dower was dismissed and this appeal was prosecuted.

Frederick Fey was the owner of two hundred acres of land in Ford county, in this state, and lived upon it with his wife, Anna K. Fey, and their children. In the spring of 1897 he went to Arkansas and brought a piece of land and remained there a few weeks. He returned and remained at home with his wife and children until the spring of 1899, when he again went to Arkansas and came back in the fall of that year. He remained at home with his wife and family for about three weeks, and again left for Arkansas on November 4, 1899. While at home he and his wife, Anna K. Fey, conveyed the farm to John A. Montelius, who gave back the following contracts, one to Frederick Fey, agreeing to convey to him one hundred and twenty acres upon his obtaining a divorce from his wife and paying her one thousand dollars, and ¹⁶⁷ the other agreeing to convey eighty acres to Anna K. Fey when her husband obtained a legal divorce from her:

“Piper City, Illinois, Nov. 1, 1899.

“Whereas Fred Fey and wife have this day deeded to me their farm upon this condition, that in order to settle their differences I am to hold the title to said land until Fred Fey procures a legal divorce from his wife and pays to said Anna K. Fey the sum of one thousand dollars as a settlement in full for her dower interest in the east half of the south-east quarter and the south-west quarter of the south-east quarter of section twenty-two (22), town twenty-six (26), north, range nine (9), east of the third principal meridian. When this is done said

party of second party agrees to deed this part of the farm of said Fred Fey.

his
"FRED X FEY.

mark
"JOHN A. MONTELIUS.

"Witness: GEORGE D. MONTELIUS."

"Piper City, Illinois, Nov. 1, 1899.

"Whereas Fred Fey and Anna Fey have deeded to me their farm in settlement of their differences, as soon as Fred Fey procures a legal divorce party of the second part agrees to re-convey the east half of the north-east quarter of section twenty-two (22), town twenty-six (26), north, range nine (9), east of the third principal meridian.

"ANNA K. FEY.

"JOHN A. MONTELIUS."

On April 24, 1900, Frederick Fey filed in the chancery court of Arkansas county, Arkansas, his bill for divorce from his wife, Anna K. Fey, and on August 9, 1900, a decree of divorce was entered, finding that said Anna K. Fey abandoned said Frederick Fey in March, 1898, and annulling their marriage. On August 14, 1900, Frederick Fey was married to appellant, Mrs. Lou Walker. In October, 1900, Frederick Fey died, and appellant afterward married Morgan Forrest.

The only question which will be considered is whether the chancery court of Arkansas county, Arkansas, acquired jurisdiction to hear and determine the suit for divorce of Frederick Fey against Catarina Fey, as Anna K. Fey was styled in that proceeding, and all other questions raised and argued by counsel will be ignored.

The defendant, Anna K. Fey, resided in this state and did not appear in the suit. The service upon her was by publication ¹⁶⁸ of a warning order. The statute of Arkansas provides that when it appears by the affidavit of the plaintiff, filed in the clerk's office at or after the commencement of an action, that the defendant is a nonresident of the state, the clerk shall make upon the complaint an order warning such defendant to appear in the action within thirty days from the time of making the order. The affidavit required by the statute before a warning order is made and publication thereof is jurisdictional, and if the affidavit is not made it is fatal to the jurisdiction: *Memphis Land Co. v. Levee District*, 70 Ark. 409, 68 S. W. 242. No affidavit was found in the files or of record in the cause, and there was no finding by the court

that such an affidavit was ever filed, but there was attached to the bill of complaint a draft of an affidavit, not signed or sworn to, as follows:

“Now on this day comes the complainant, Frederick Fey, who on his oath says that the foregoing complaint is true. And he further states that the defendant, Catarina Fey, is a non-resident of the state of Arkansas, and asks that a warning order be issued.

“_____.

“Subscribed and sworn to before me this —— day of April, A. D. 1900.

“_____.

“No. 400.—Frederick Fey vs. Catarina Fey.”

Indorsed: “Filed in my office and L. C. Smith appointed atty. ad litem, and warning order issued, April 24, 1900.

“I. G. GIBSON, Clerk.

“H. B. Dudley, D. C.

“WILLIAM CARPENTER, for Plaintiff.”

The warning order so issued, dated April 24, 1900, and signed by the clerk, was published in a newspaper for four successive weeks. In the decree for divorce the court found that the defendant had been properly served by a warning order published in fit and ample time, but found nothing as to the affidavit.

One of the grounds upon which it is contended that the decree of divorce was void is, that Frederick Fey had no legal ground for a divorce and that the decree was obtained by fraudulent averments and proof. Whether he had any ¹⁶⁹ legal ground for a divorce, or whether the allegations of his bill of complaint, or the proofs to sustain them, were true or false, does not affect the validity of the decree if the court had jurisdiction to enter it. Where a transcript of a decree entered by a court of another state, duly certified, is offered in evidence in this state, no questions are open to inquiry except questions of jurisdiction (*McMillan v. Lovejoy*, 115 Ill. 498, 4 N. E. 772), including fraud affecting the jurisdiction or the discretion of the court to exercise such jurisdiction: *Dunham v. Dunham*, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70. After a court has acquired jurisdiction its findings are conclusive in all collateral proceedings, and a decree rendered by the chancery court of Arkansas, if it had jurisdiction, has the same effect in every other state as in the state where it

was rendered, and is conclusive on the merits of the controversy, no matter what fraud may have intervened: *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. E. 841. In the absence of jurisdiction to pronounce a decree it is absolutely void, and may be attacked either directly or collaterally. Where a court of general jurisdiction proceeds to adjudicate a cause there is a presumption of jurisdiction; but this presumption applies only when the record is silent upon the question, and if there is an affirmative showing in the record that there was no jurisdiction the judgment or decree will be void. Where the decree is silent as to the jurisdiction of the court over the defendants, if there is no evidence showing that the jurisdiction was not acquired, it will be presumed that the court had jurisdiction: *Benefield v. Albert*, 132 Ill. 665, 24 N. E. 634. Where a decree is silent as to the service of process, and the summons in the case shows want of or insufficient service, the presumption of jurisdiction is overcome: *Swearengen v. Gulick*, 67 Ill. 208. If it appears from the whole record in a case that the court did not have jurisdiction, the presumption in favor of jurisdiction is overcome: *Osgood v. Blackmore*, 59 Ill. 261. When the record itself shows a service which is insufficient and there is no finding from which it may be presumed that there is ¹⁷⁰ another service, the presumption in favor of jurisdiction is rebutted: *Clark v. Thompson*, 47 Ill. 25, 95 Am. Dec. 457. Where the record itself shows that notice was not given as required by law the jurisdiction does not attach, and where it shows that the finding of jurisdiction upon which the court acted was insufficient, the finding of the court as to its jurisdiction is not conclusive, and the recital of proper service on the face of the decree makes no difference: *Whitney v. Porter*, 23 Ill. 445; *Hemmer v. Wolfer*, 124 Ill. 435, 16 N. E. 652. Jurisdiction over the defendant in the divorce suit could be obtained by publication in accordance with the statute of Arkansas, but if process was not served or notice given as required by law the court did not acquire jurisdiction and its decree was void: *Goudy v. Hall*, 30 Ill. 109. Where the facts appearing on the face of the record show that the court of another state rendering a decree of divorce had no jurisdiction of the person of the defendant, the decree is void: *Tucker v. People*, 122 Ill. 583, 13 N. E. 809.

In this case it appears on the face of the record that there was no affidavit of nonresidence as required by the statute

of Arkansas. A paper intended to be sworn to, annexed to the bill of complaint, and upon which the filing and notation of the clerk that a warning order was issued appeared, was neither signed nor sworn to. There was no finding by the court that any affidavit was made or filed, and there is nothing from which any presumption can arise that there was any other paper filed as an affidavit. The complaint with that paper attached was filed and the warning order was issued on April 24, 1900, and it is manifest that the unsworn paper was acted upon by the clerk as a basis for the warning order. It follows that the chancery court in Arkansas had no jurisdiction to enter the decree of divorce and the decree was void. For that reason the court did not err in dismissing the petition.

The decree of the circuit court is affirmed.

While We do not Doubt the Correctness of the final conclusion reached by the court in the principal case, some of its statements respecting the effect of decrees of divorce entered in another state may not be reconcilable with the most recent utterances of the supreme court of the United States on that subject. Until recently we had supposed that a court of the state of the bona fide domicile of the plaintiff in a suit for divorce was competent, in effect, to compel the defendant to answer in such suit though a resident of another state, and if, in proceeding against such nonresident, all the steps required by the laws of the state in which the suit was prosecuted were taken, then that the decree therein was conclusive against such defendant, though a nonresident, both in the state where entered and also in all the other states. This last proposition seems to be no longer maintainable. The court of the other state in which the defendant actually resided may refuse to recognize the decree against her as terminating the marriage relation. The latest views of the majority of the judges of the supreme court of the United States upon the subject are best expressed in the prevailing opinion of Mr. Justice White, affirming the judgment of the court of appeals of New York, reported in 178 N. Y. 557, 70 N. E. 1099. The opinion of Mr. Justice White in *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. Rep. 525, 50 L. ed., is as follows:

“The plaintiff in error will be called the husband and the defendant in error the wife.

“The wife, a resident of the state of New York, sued the husband in that state in 1899, and there obtained personal service upon him. The complaint charged that the parties had been married in New York in 1868, where they both resided and where the wife continued to reside, and it was averred that the husband, immediately following the marriage, abandoned the wife, and thereafter failed to support her, and that he was the owner of property.

A decree of separation from bed and board and for alimony was prayed. The answer admitted the marriage, but averred that its celebration was procured by the fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent. It was also alleged that during the long period between the celebration and the bringing of this action the wife had in no manner asserted her rights, and was barred by her laches from doing so. Besides, the answer alleged that the husband had, in 1881, obtained in a court of the state of Connecticut a divorce which was conclusive. At the trial before a referee the judgment-roll in the suit for divorce in Connecticut was offered by the husband and was objected to, first, because the Connecticut court had not obtained jurisdiction over the person of the defendant wife, as the notice of the pendency of the petition was by publication and she had not appeared in the action; and, second, because the ground upon which the divorce was granted, viz., desertion by the wife, was false. The referee sustained the objections and an exception was noted. The judgment-roll in question was then marked for identification and forms a part of the record before us.

"Having thus excluded the proceedings in the Connecticut court, the referee found that the parties were married in New York in 1868, that the wife was a resident of the state of New York, that after the marriage the parties never lived together, and shortly thereafter that the husband, without justifiable cause, abandoned the wife, and has since neglected to provide for her. The legal conclusion was that the wife was entitled to a separation from bed and board and alimony in the sum of seven hundred and eighty dollars a year from the date of the judgment. The action of the referee was sustained by the supreme court of the state of New York, and a judgment for separation and alimony was entered in favor of the wife. This judgment was affirmed by the court of appeals. As, by the law of the state of New York, after the affirmance by the court of appeals the record was remitted to the supreme court, this writ of error to that court was prosecuted.

"The federal question is, Did the court below violate the constitution of the United States by refusing to give to the decree of divorce rendered in the state of Connecticut the faith and credit to which it was entitled?

"As the averments concerning the alleged fraud in contracting the marriage and the subsequent laches of the wife are solely matters of state cognizance, we may not allow them to even indirectly influence our judgment upon the federal question to which we are confined, and we, therefore, put these subjects entirely out of view. Moreover, as, for the purpose of the federal issue, we are concerned not with the mere form of proceeding by which the federal right if any, was denied, but alone have power to decide whether such right was denied, we do not inquire whether the New York court should preferably have admitted the record of the Connecticut divorce suit, and, after so admitting it, determined what effect it

would give to it, instead of excluding the record, and thus refusing to give effect to the judgment. In order to decide whether the refusal of the court to admit in evidence the Connecticut decree denied to that decree the efficacy to which it was entitled under the full faith and credit clause, we must first examine the judgment-roll of the Connecticut cause in order to fix the precise circumstances under which the decree in that cause was rendered.

“Without going into detail, it suffices to say that on the face of the Connecticut record it appeared that the husband, alleging that he had acquired a domicile in Connecticut, sued the wife in that state as a person whose residence was unknown, but whose last known place of residence was in the state of New York, at a place stated, and charged desertion by the wife and fraud on her part in procuring the marriage; and, further, it is shown that no service was made upon the wife except by publication and by mailing a copy of the petition to her at her last known place of residence in the state of New York.

“With the object of confining our attention to the real question arising from this condition of the Connecticut record, we state at the outset certain legal propositions irrevocably concluded by previous decisions of this court, and which are required to be borne in mind in analyzing the ultimate issue to be decided.

“1. The requirement of the constitution is not that some, but that full, faith and credit shall be given by states to the judicial decrees of other states. That is to say, where a decree rendered in one state is embraced by the full faith and credit clause, that constitutional provision commands that the other states shall give to the decree the force and effect to which it was entitled in the state where rendered: *Harding v. Harding*, 198 U. S. 317, 25 Sup. Ct. Rep. 679, 49 L. ed. 1066.

“2. Where a personal judgment has been rendered in the courts of a state against a nonresident merely upon constructive service, and therefore without acquiring jurisdiction over the person of the defendant, such judgment may not be enforced in another state in virtue of the full faith and credit clause. Indeed, a personal judgment so rendered is, by operation of the due process clause of the fourteenth amendment, void as against the nonresident, even in the state where rendered; and, therefore, such nonresident, in virtue of rights granted by the constitution of the United States, may successfully resist, even in the state where rendered, the enforcement of such a judgment: *Pennoyer v. Neff*, 95 U. S. 714, 25 L. ed. 565. The facts in that case were these: Neff, who was a resident of a state other than Oregon, owned a tract of land in Oregon. Mitchell, resident of Oregon, brought a suit in a court of that state upon a money demand against Neff. The Oregon statutes required, in the case of personal action against a nonresident, a publication of notice, calling upon the defendant to appear and defend, and also required the mailing to such defendant at his last known place of residence of a copy of the summons and complaint. Upon af-

fidavit of the absence of Neff, and that he resided in the state of California, the exact place being unknown, the publication required by the statute was ordered and made, and judgment by default was entered against Neff. Upon this judgment execution was issued and real estate of Neff was sold and was ultimately acquired by Pennoyer. Neff sued in the circuit court of the United States for the district of Oregon to recover the property, and the question presented was the validity in Oregon of the judgment there rendered against Neff. After the most elaborate consideration it was expressly decided that the judgment rendered in Oregon, under the circumstances stated, was void for want of jurisdiction and was repugnant to the due process clause of the constitution of the United States. The ruling was based on the proposition that a court of one state could not acquire jurisdiction to render personal judgment against a nonresident who did not appear by the mere publication of a summons, and that the want of power to acquire such jurisdiction by publication could not be aided by the fact that under the statutes of the state in which the suit against the nonresident was brought, the sending of a copy of the summons and complaint to the postoffice address in another state of the defendant was required and complied with. The court said (p. 727, 25 L. ed. 570): 'Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state and process published within it are equally unavailing in proceedings to establish his personal liability.'

"And the doctrine thus stated but expressed a general principle expounded in previous decisions: *Bischoff v. Wethered*, 9 Wall. 812, 19 L. ed. 829. In that case, speaking of a money judgment recovered in the common pleas of Westminster Hall, England, upon personal notice served in the city of Baltimore, Mr. Justice Bradley, speaking for the court said (p. 814, 25 L. ed. 830): 'It is enough to say [of this proceeding] that it was wholly without jurisdiction of the person, and whatever validity it may have in England, by virtue of statute law, against property of the defendant there situate, it can have no validity here, even of a *prima facie* character. It is simply null.'

"3. The principles, however, stated in the previous proposition, are controlling only as to judgments in personam, and do not relate to proceedings in rem. That is to say, in consequence of the authority which government possesses over things within its borders, there is jurisdiction in a court of a state by a proceeding in rem, after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although

jurisdiction is not directly acquired over the person of the owner of the thing: *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 566.

“4. The general rule stated in the second proposition is, moreover, limited by the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one state, conformably to the laws of such state, or the state, through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that state, such action is binding in that state as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the state in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the constitution: *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. Rep. 723, 31 L. ed. 654. In that case the facts were these: Maynard was married in Vermont, and the husband and wife removed to Ohio, from whence Maynard left his wife and family and went to California. Subsequently he acquired a domicile in the territory of Washington. Being there so domiciled, an act of the legislature of the territory was passed granting a divorce to the husband. Maynard continued to reside in Washington, and there remarried and died. The children of the former wife, claiming in right of their mother, sued in a court of the territory of Washington to recover real estate situated in the territory, and one of the issues for decision was the validity of the legislative divorce granted to the father. The statute was assailed as invalid, on the ground that Mrs. Maynard had no notice, and that she was not a resident of the territory when the act was passed. From a decree of the supreme court of the territory adverse to their claim the children brought the case to this court. The power of the territorial legislature, in the absence of restrictions in the organic act, to grant a divorce to a citizen of the territory, was, however, upheld, in view of the nature and extent of the authority which government possessed over the marriage relation. It was therefore decided that the courts of the territory committed no error in giving effect within the territory to the divorce in question. And as a corollary of the recognized power of a government thus to deal with its own citizen by a decree which would be operative within its own borders, irrespective of any extraterritorial efficacy, it follows that the right of another sovereignty exists, under principles of comity, to give to a decree so rendered such efficacy as to that government may seem to be justified by its conceptions of duty and public policy.

“5. It is no longer open to question that where husband and wife are domiciled in a state there exists jurisdiction in such state, for good cause, to enter a decree of divorce which will be entitled to enforcement in another state by virtue of the full faith and credit clause. It has, moreover, been decided that where a bona fide domicile has been acquired in a state by either of the

parties to a marriage, and a suit is brought by the domiciled party in such state for divorce, the courts of that state, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every state by the full faith and credit clause: *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604.

"6. Where the domicile of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and, therefore, is not to be treated as the actual or constructive domicile of the wife; hence, the place where the wife was domiciled when so abandoned constitutes her legal domicile until a new actual domicile be by her elsewhere acquired. This was clearly expressed in *Barber v. Barber*, 21 How. 582, 16 L. ed. 226, where it was said (p. 595, L. ed. 230): 'The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicile and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her the necessaries nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers.'

"And the same doctrine was expressly upheld in *Cheever v. Wilson*, where the court said (9 Wall. 123, 19 L. ed. 608): 'It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's; and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues.'

"7. So also it is settled that where the domicile of a husband is in a particular state, and that state is also the domicile of matrimony, the courts of such state having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile, disregard an unjustifiable absence therefrom, and treat the wife as having her domicile in the state of the matrimonial domicile for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other states by virtue of the full faith and credit clause: *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. Rep. 544, 45 L. ed. 794.

"Coming to apply these settled propositions to the case before us, three things are beyond dispute: a. In view of the authority

which government possesses over the marriage relation, no question can arise on this record concerning the right of the state of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that state. *b.* As New York was the domicile of the wife and the domicile of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicile of the wife continued in New York. *c.* As, then, there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicile in that state, and was not there individually domiciled, and did not appear in the divorce cause, and was only constructively served with notice of the pendency of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicile of the wife within the state or as the result of personal service upon her within its borders.

“These subjects being thus eliminated, the case reduces itself to this: Whether the Connecticut court, in virtue alone of the domicile of the husband in that state, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced in other states in and by virtue of the full faith and credit clause of the constitution. In other words, the final question is whether, to enforce in another jurisdiction the Connecticut decree, would not be to enforce in one state a personal judgment rendered in another state against a defendant over whom the court of the state rendering the judgment had not acquired jurisdiction? Otherwise stated, the question is this: Is a proceeding for divorce of such an exceptional character as not to come within the rule limiting the authority of a state to persons within its jurisdiction, but, on the contrary, because of the power which government may exercise over the marriage relation, constitutes an exception to that rule, and is therefore embraced either within the letter or spirit of the doctrine stated in the third or fourth propositions?

“Before reviewing the authorities relied on to establish that a divorce proceeding is of the exceptional nature indicated, we propose first to consider the reasons advanced to sustain the contention. In doing so, however, it must always be borne in mind that it is elementary that where the full faith and credit clause of the constitution is invoked to compel the enforcement in one state of a decree rendered in another, the question of the jurisdiction of the court by which the decree was rendered is open to inquiry. And if there was no jurisdiction, either of the subject matter or of the person of the defendant, the courts of another state are not required, by virtue of the full faith and credit clause of the constitution, to enforce such decree: *National Exch. Bank v. Wiley*,

195 U. S. 259, 269, 25 Sup. Ct. Rep. 70, 49 L. ed. 184, 190, and cases cited.

"1. The wide scope of the authority which government possesses over the contract of marriage and its dissolution is the basis upon which it is argued that the domicile within one state of one party to the marriage gives to such a state jurisdiction to decree a dissolution of the marriage tie which will be obligatory in all the other states by force of the full faith and credit clause of the constitution. But the deduction is destructive of the premise upon which it rests. This becomes clear when it is perceived that if one government, because of its authority over its own citizens, has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution. For if it be that one government, in virtue of its authority over marriage, may dissolve the tie as to citizens of another government, other governments would have a similar power and hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed. To concretely illustrate: If the fact be that where persons are married in the state of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the state of Connecticut, there acquiring a domicile and procure a dissolution of the marriage which would be binding in the state of New York as to the party to the marriage there domiciled, it would follow that the power of the state of New York as to the dissolution of the marriage as to its domiciled citizen would be of no practical avail. And conversely, the like result would follow if the marriage had been celebrated in Connecticut and desertion had been from that state to New York, and consequently the decree of divorce had been rendered in New York. Even a superficial analysis will make this clear. Under the rule contended for it would follow that the states whose laws were the most lax as to length of residence required for domicile, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other states. In other words, any person who was married in one state and who wished to violate the marital obligations, would be able, by following the lines of least resistance, to go into the state whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and the public policy of the other states. Thus the argument comes necessarily to this—that to preserve the lawful authority of all the states over marriage it is essential to decide that all the states have such authority only at the sufferance of the other states. And the consideration just stated serve to dispose of the argument that the contention relied on finds support in the ruling made in *Maynard v. Hill*, 125 U. S. 190, 8 Sup. Ct. Rep. 723, 31 L. ed. 654, referred to

in the fourth proposition, which was at the outset stated. For in that case the sole question was the effect within the territory of Washington of a legislative divorce granted in the territory to a citizen thereof. The upholding of the divorce within the territory was, therefore, but a recognition of the power of the territorial government, in virtue of its authority over marriage, to deal with a person domiciled within its jurisdiction. The case, therefore, did not concern the extraterritorial efficacy of the legislative divorce. In other words, whilst the ruling recognized the ample powers which government possesses over marriage as to one within its jurisdiction, it did not purport to hold that such ample powers might be exercised and enforced by virtue of the constitution of the United States in another jurisdiction as to citizens of other states to whom the jurisdiction of the territory did not extend.

“The anomalous result which it is therefore apparent would arise from maintaining the proposition contended for is made more manifest by considering the instrument from which such result would be produced—that is, the full faith and credit clause of the constitution. No one denies that the states, at the time of the adoption of the constitution, possessed full power over the subject of marriage and divorce. No one, moreover, can deny that, prior to the adoption of the constitution, the extent to which the states would recognize a divorce obtained in a foreign jurisdiction depended upon their conceptions of duty and comity. Besides, it must be conceded that the constitution delegated no authority to the government of the United States on the subject of marriage and divorce. Yet, if the proposition be maintained, it would follow that the destruction of the power of the states over the dissolution of marriage, as to their own citizens, would be brought about by the operation of the full faith and credit clause of the constitution. That is to say, it would come to pass that, although the constitution of the United States does not interfere with the authority of the states over marriage, nevertheless the full faith and credit clause of that instrument destroyed the authority of the states over the marriage relation. And as the government of the United States has no delegated authority on the subject, that government would be powerless to prevent the evil thus brought about by the full faith and credit clause. Thus neither the states nor the national government would be able to exert that authority over the marriage tie possessed by every other civilized government. Yet more remarkable would be such result when it is borne in mind that, when the constitution was adopted, nowhere, either in the mother country or on the continent of Europe, either in adjudged cases or in the treatises of authoritative writers, had the theory ever been upheld or been taught or even suggested that one government, solely because of the domicile within its borders of one of the parties to a marriage, had authority, without the actual or constructive presence of the other, to exert its authority by a dissolution of the

marriage tie, which exertion of power it would be the duty of other states to respect as to those subject to their jurisdiction.

"2. It is urged that the suit for divorce was a proceeding in rem. and, therefore, the Connecticut court had complete jurisdiction to enter a decree as to the res, entitled to be enforced in the state of New York. But here again the argument is contradictory. It rests upon the theory that jurisdiction in Connecticut depended upon the domicile of the person there suing, and yet attributes to the decree resting upon the domicile of one of the parties alone a force and effect based upon the theory that a thing within the jurisdiction of Connecticut was the subject matter of the controversy. But putting this contradiction aside, what, may we ask, was the res in Connecticut? Certainly it cannot in reason be said that it was the cause of action or the mere presence of the person of the plaintiff within the jurisdiction. The only possible theory, then, upon which the proposition proceeds, must be that the res in Connecticut, from which the jurisdiction is assumed to have arisen, was the marriage relation. But as the marriage was celebrated in New York between citizens of that state, it must be admitted under the hypothesis stated, that before the husband deserted the wife in New York the res was in New York, and not in Connecticut. As the husband, after wrongfully abandoning the wife in New York, never established a matrimonial domicile in Connecticut, it cannot be said that he took with him the marital relation from which he fled to Connecticut. Conceding, however, that he took with him to Connecticut so much of the marital relation as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the status of the wife. From any point of view, then, under the proposition referred to, if the marriage relation be treated as the res, it follows that it was divisible, and therefore there was a res in the state of New York and one in the state of Connecticut. Thus considered, it is clear that the power of one state did not extend to affecting the thing situated in another state. As illustrating this conception, we notice the case of *Mississippi etc. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311. The facts in that case were these: A bill was filed in a district court of the United States for the district of Iowa to abate a nuisance alleged to have been occasioned by a bridge across the Mississippi river, dividing the states of Illinois and Iowa. Under the assumption that the nuisance was occasioned by the operation of the bridge on the Illinois side, the court, after pointing out that the United States circuit court for the district of Iowa exercised the same jurisdiction that a state court of Iowa could exercise, and no more, said (p. 494, 17 L. ed. 315): 'The district court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court's jurisdiction and powers of inquiry, and outside of the case.'

“Nor is the conclusive force of the view which we have stated been met by the suggestion that the res was indivisible, and therefore was wholly in Connecticut and wholly in New York, for this amounts but to saying that the same thing can be at one and the same time in different places. Further, the reasoning above expressed disposes of the contention that, as the suit in Connecticut involved the status of the husband, therefore the courts of that state had the power to determine the status of the nonresident wife by a decree which had obligatory force outside of the state of Connecticut. Here, again, the argument comes to this—that, because the state of Connecticut had jurisdiction to fix the status of one domiciled within its borders, that state also had the authority to oust the state of New York of the power to fix the status of a person who was undeniably subject to the jurisdiction of that state.

“3. It is urged that whilst marriage is, in one aspect, a contract, it is nevertheless a contract in which society is deeply interested, and, therefore, government must have the power to determine whether a marriage exists or to dissolve it, and hence the Connecticut court had jurisdiction of the relation and the right to dissolve it, not only as to its own citizen, but as to a citizen of New York who was not subject to the jurisdiction of the state of Connecticut. The proposition involves in another form of statement the non sequitur which we have previously pointed out; that is, that because government possesses power over marriage, therefore the existence of that power must be rendered unavailing.

“Nor is the contention aided by the proposition that because it is impossible to conceive of the dissolution of the marriage as to one of the parties in one jurisdiction without, at the same time, saying that the marriage is dissolved as to both in every other jurisdiction, therefore the Connecticut decree should have obligatory effect in New York as to the citizen of that state. For, again, by a change of form of statement, the same contention which we have disposed of is reiterated. Besides, the proposition presupposes that because, in the exercise of its power over its own citizens, a state may determine to dissolve the marriage tie by a decree which is efficacious within its borders, therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a state may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another state. The distinction was clearly pointed out in *Blackinton v. Blackinton*, 141 Mass. 432, 55 Am. Rep. 484, 5 N. E. 830. In that case the parties were married and lived in Massachusetts. The husband abandoned the wife without cause and became domiciled in New York. The wife remained at the matrimonial domicile in Massachusetts and instituted a proceeding to prohibit her husband from imposing any restraint upon her personal liberty and for separate maintenance. Service was made upon the husband in New York. The court, recognizing

fully that under the circumstances disclosed the domicile of the husband was not the domicile of the wife, concluded that, under the statutes of Massachusetts, it had authority to grant the relief prayed, and was then brought to determine whether the decree ought to be made, in view of the fact that such decree might not have extraterritorial force. But this circumstance was held not to be controlling, and the decree was awarded. The same doctrine was clearly expounded by the privy council, in an opinion delivered by Lord Watson, in the divorce case of *Le Mesurier v. Le Mesurier*, [1895] App. Cas. 517, where it was said (p. 527): 'When the jurisdiction of the court is exercised according to the rules of international law, as in the case where the parties have their domicile within its forum, its decree dissolving their marriage ought to be respected by the tribunals of every civilized country. . . . On the other hand, a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to its forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extraterritorial authority.'

"4. The contention that if the power of one state to decree a dissolution of a marriage which would be compulsory upon the other states be limited to cases where both parties are subject to the jurisdiction, the right to obtain a divorce could be so hampered and restricted as to be in effect impossible of exercise, is but to insist that in order to favor the dissolution of marriage and to cause its permanency to depend upon the mere caprice or wrong of the parties, there should not be applied to the right to obtain a divorce those fundamental principles which safeguard the exercise of the simplest rights. In other words, the argument but reproduces the fallacy already exposed, which is, that one state must be endowed with the attribute of destroying the authority of all the others concerning the dissolution of marriage in order to render such dissolution easy of procurement. But even if the true and controlling principles be for a moment put aside and mere considerations of inconvenience be looked at, it would follow that the preponderance of inconvenience would be against the contention that a state should have the power to exert its authority concerning the dissolution of marriage as to those not amenable to its jurisdiction. By the application of that rule each state is given the power of overshadowing the authority of all the other states, thus causing the marriage tie to be less protected than any other civil obligation, and this to be accomplished by destroying individual rights without a hearing and by tribunals having no jurisdiction. Further, the admission that jurisdiction in the courts of one state over one party alone was the test of the right to dissolve the marriage tie as to the other party, although domiciled in another state, would at once render such test impossible of general application. In other words, the test, if admitted, would destroy itself. This follows, since if that test were the rule, each party to the marriage in one state

would have a right to acquire a domicile in a different state and there institute proceedings for divorce. It would hence necessarily arise that domicile would be no longer the determinative criterion, but the mere race of diligence between the parties in seeking different forums in other states or the celerity by which in such states judgments of divorce might be procured would have to be considered in order to decide which forum was controlling.

“On the other hand, the denial of the power to enforce in another state a decree of divorce rendered against a person who was not subject to the jurisdiction of the state in which the decree was rendered obviates all the contradictions and inconveniences which are above indicated. It leaves uncurtailed the legitimate power of all the states over a subject peculiarly within their authority, and thus not only enables them to maintain their public policy, but also to protect the individual rights of their citizens. It does not deprive a state of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction, and does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity. It causes the full faith and credit clause of the constitution to operate upon decrees of divorce in the respective states just as that clause operates upon other rights—that is, it compels all the states to recognize and enforce a judgment of divorce rendered in other states where both parties were subject to the jurisdiction of the state in which the decree was rendered, and it enables the states rendering such decrees to take into view, for the purpose of the exercise of their authority, the existence of a matrimonial domicile from which the presence of a party not physically present within the borders of a state may be constructively found to exist.

“Having thus disposed of the reasoning advanced to sustain the assertion that the courts of the state of New York were bound by the full effect to the Connecticut decree, we are brought to consider the authorities relied upon to support that proposition.

“Whilst the continental and English authorities are not alluded to in the argument, it may be well, in the most summary way, to refer to them as a means of illustrating the question for consideration. The extent of the power which independent sovereignties exercised over the dissolution of the marriage tie, as to their own citizens, gave rise, in the nature of things, to controversies concerning the extraterritorial effect to be given to a dissolution of such tie when made between citizens of one country by judicial tribunals of another country in which such citizens had become domiciled. We do not deem it essential, however, to consider the conflicting theories and divergent rules of public policy which were thus engendered. We are relieved of the necessity of entering upon such an inquiry, since it cannot be doubted that neither the practice nor the theories controlling in the countries on the continent lend the slightest sanction to the contention that a government, simply because

one of the parties to a marriage was domiciled within its borders, where no matrimonial domicile ever existed, had power to render a decree dissolving a marriage, which, on principles of international law, was entitled to obligatory extraterritorial effect as to the other party to the marriage, a citizen of another country: 1 Wharton on Conflict of Laws, 3d ed., sec. 209, p. 441, and notes.

"It cannot be doubted, also, that the courts of England decline to treat a foreign decree of divorce as having obligatory extraterritorial force when both parties to the marriage were not subject to the jurisdiction of the court which rendered the decree: *Shaw v. Gould*, L. R. 3 H. L. 55; *Harvey v. Farnie*, L. R. 8 App. Cas. 43. And, although it has been suggested in opinions of English judges treating of divorce questions, that exceptional cases might arise which perhaps would justify a relaxation of the rigor of a presumption that the domicile of the husband was the domicile of the wife (per Lords Eldon and Redesdale, in *Tovey v. Lindsay*, 1 Dow P. C. 133, 140; per Lord Westbury, in *Pitt v. Pitt*, 4 Macq. H. L. Cas. 640; per Brett, L. J., in *Niboyet v. Niboyet*, L. R. 4 Prob. Div. 14; *Briggs v. Briggs*, L. R. 5 Prob. Div. 165; and per James and Cotton, L. JJ., in *Harvey v. Farnie*, L. R. 6 Prob. Div. 47, 49), the courts of England, in cases where the jurisdiction was dependent upon domicile, have enforced the presumption, and treated the wife as being within the jurisdiction where the husband was legally domiciled. But this conception was not a departure from the principle uniformly maintained, that, internationally considered, jurisdiction over both parties to a marriage was essential to the exercise of power to decree a divorce, but was simply a means of determining by a legal presumption whether both parties were within the jurisdiction. Of course, the rigor of the English rule as to the domicile of the husband being the domicile of the wife is not controlling in this court, in view of the decisions to which we have previously referred, recognizing the right of the wife, for the fault of the husband, to acquire a separate domicile: *Barber v. Barber*, 21 How. 582, 16 L. ed. 226; *Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604; *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. Rep. 544, 45 L. ed. 794.

"And even in Scotland, where residence, as distinguished from domicile, was deemed to authorize the exercise of jurisdiction to grant divorces, it was invariably recognized that the presence within the jurisdiction of both parties to the marriage was essential to authorize a decree in favor of the complainant: 1 Wharton on Conflict of Laws, sec. 215, p. 447; per Lord Westbury, in *Shaw v. Gould*, L. R. 3 H. L. 55.

"As respects the decisions of this court: We at once treat as inapposite, and therefore unnecessary to be here specially reviewed those holding (a) that where the domicile of a plaintiff in a divorce cause is in the state where the suit was brought, and the defendant appears and defends, as both parties are before the court, there is power to render a decree of divorce which will be entitled in other states to recognition under the full faith and credit

clause (*Cheever v. Wilson*, 9 Wall. 108, 19 L. ed. 604); (b) that, as distinguished from legal domicile, mere residence within a particular state of the plaintiff in a divorce cause brought in a court of such state is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a nonresident defendant: *Andrews v. Andrews*, 188 U. S. 14, 23 Sup. Ct. Rep. 237, 47 L. ed. 366; *Streitwolf v. Streitwolf*, 181 U. S. 179, 21 Sup. Ct. Rep. 553, 45 L. ed. 807; *Bell v. Bell*, 181 U. S. 175, 21 Sup. Ct. Rep. 551, 45 L. ed. 804. This brings us to again consider a case heretofore referred to, principally relied upon as sustaining the contention that the domicile of one party alone is sufficient to confer jurisdiction upon a judicial tribunal to render a decree of divorce having extraterritorial effect, viz., *Atherton v. Atherton*, 181 U. S. 155, 21 Sup. Ct. Rep. 544, 45 L. ed. 794. The decision in that case, however, as we have previously said, was expressly placed upon the ground of matrimonial domicile. This is apparent from the following passage, which we excerpt from the opinion, at page 171, L. ed. at page 803, and Sup. Ct. Rep. at page 550: 'This case does not involve the validity of a divorce granted, on constructive service, by the court of a state in which only one of the parties ever had a domicile; nor the question to what extent the good faith of the domicile may be afterward inquired into. In this case the divorce in Kentucky was by the court of the state which had always been the undoubted domicile of the husband, and which was the only matrimonial domicile of the husband and wife. The single question to be decided is the validity of that divorce, granted after such notice had been given as was required by the statutes of Kentucky.'

"The contention, therefore, that the reasoning of the opinion demonstrates that the domicile of one of the parties alone was contemplated as being sufficient to found jurisdiction, but insists that the case decided a proposition which was excluded in unmistakable language. But, moreover, it is clear, when the facts which were involved in the *Atherton* case are taken into view, that the case could not have been decided merely upon the ground of the domicile of one of the parties, because that consideration alone would have afforded no solution of the problem which the case presented. The salient facts were these: The husband lived in Kentucky, married a citizen of New York, and the married couple took up their domicile at the home of the husband in Kentucky, where they continued to reside and where children were born to them. The wife left the matrimonial domicile and went to New York. The husband sued her in Kentucky for a divorce. Before the Kentucky suit merged into a decree the wife, having a residence in New York sufficient, under ordinary circumstances, to constitute a domicile in that state, sued the husband in the courts of New York for a limited divorce. Thus the two suits, one by the husband against the wife and the other by the wife against the husband, were pending in the respective states at the same time. The

husband obtained a decree in the Kentucky suit before the suit of the wife had been determined, and pleaded such decree in the suit brought by the wife in New York. The New York court, however, refused to recognize the Kentucky decree, and the case came here, and this court decided that the courts of New York were bound to give effect to the Kentucky decree by virtue of the full faith and credit clause. Under these conditions it is clear that the case could not have been disposed of on the mere ground of the individual domicile of the parties, since upon that hypothesis, even if the efficacy of the individual domicile had been admitted, no solution would have been thereby afforded of the problem which would have risen for decision, that problem being which of the two courts wherein the conflicting proceedings were pending had the paramount right to enter a binding decree. Having disposed of the case upon the principle of matrimonial domicile, it cannot in reason be conceived that the court intended to express an opinion upon the soundness of the theory of individual and separate domicile which, isolatedly considered, was inadequate to dispose of, and was therefore irrelevant to, the question for decision.

“It is contended that an overwhelming preponderance of the decisions of state courts enforce the doctrine that it is the duty of the states, by virtue of the full faith and credit clause, to give within their borders the full effect required by that clause to decrees of divorce rendered in other states, where there was jurisdiction alone by virtue of the domicile of one of the parties. Whilst we may not avoid the duty of interpreting for ourselves the constitution of the United States, in view of the persuasive force that would result if an overwhelming line of state decisions held the asserted doctrine, we come to consider that subject. To examine in detail the many decisions of state courts of last resort, most of which are referred to in the margin, would expand this opinion to undue length. To avoid so doing, if possible, we propose to more particularly direct our attention to the cases in state courts which are specially relied on. In doing so we shall add cases in several of the states not particularly counted on in the argument. We shall do this for the purpose of evolving, if possible, from the state cases thus to be referred to, some classification typical of all the state decisions, hence enabling all the cases to which we do not specially refer to be brought within the appropriate class to which they pertain, without the necessity of reviewing them in detail. We shall not confine ourselves to the particular state decisions relied on, but shall consider such decisions in the light of the general rule obtaining in the particular state.

“The cases specially relied on are *Thompson v. State*, 28 Ala. 12, *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549, *Ditson v. Ditson*, 4 R. I. 87, *Burlen v. Shannon*, 115 Mass. 438, and *Felt v. Felt*, 59 N. J. Eq. 606, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546, to which we shall add, for the purposes above stated,

cases on the same subject decided in New York, Ohio, Wisconsin, Indiana, and Missouri.

“*New York*.—It is not questioned that the courts of New York are vested by statute with authority to render decrees of divorce where the plaintiff is domiciled within the state, which shall be operative in that state, even although the defendant is a nonresident and is proceeded against by constructive service.

“*Borden v. Fitch*, 15 Johns. 121, 9 Am. Dec. 225, and *Bradshaw v. Heath*, 13 Wend. 407, were decided, respectively, in the years 1818 and 1835. These cases, as declared by the court of appeals of New York in *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274, upheld the principle that a court of another state could not dissolve the matrimonial relation of a citizen of New York, domiciled in New York, unless he was actually served with notice within the other state or voluntarily appeared in the cause. The doctrine that an action of divorce is one inter partes was thus clearly reiterated by Andrews, J., in *Jones v. Jones*, 108 N. Y. 415, 2 Am. St. Rep. 447, 15 N. E. 707: ‘The contract of marriage cannot be annulled by judicial sanction any more than any other contract inter partes, without jurisdiction of the person of the defendant. The marriage relation is not a res within the state of the party invoking the jurisdiction of a court to dissolve it, so as to authorize the court to bind the absent party, a citizen of another jurisdiction, by substituted service or actual notice of the proceeding given without the jurisdiction of the court where the proceeding is pending.’

“That the principle referred to is still enforced by the New York court is shown by recent cases, viz., *Lynde v. Lynde*, 162 N. Y. 405, 76 Am. St. Rep. 332, 48 L. R. A. 679, 56 N. E. 979, *Winston v. Winston*, 165 N. Y. 553, 59 N. E. 273, and the case at bar. And it is indubitable that under this doctrine the courts of New York have invariably refused, as they have done in the case at bar, to treat a divorce rendered in another state, under the circumstances stated, as entitled to be enforced in New York by virtue of the full faith and credit clause of the constitution of the United States; and, indeed, have refused generally to give effect to such decrees even by state comity.

“*Massachusetts*.—*Barber v. Rost*, 10 Mass. 260, *Hanover v. Turner*, 14 Mass. 227, 7 Am. Dec. 203, and *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372, were decided respectively in 1813, 1817 and 1833. In 1835 the legislature of Massachusetts incorporated into the statutes of that state, following a section forbidding the recognition of divorces obtained in another jurisdiction in fraud of the laws of Massachusetts, a provision reading as follows: ‘In all other cases, a divorce decreed in another state or country, according to the law of the place, by a court having jurisdiction of the cause and of both of the parties, shall be valid and effectual in this state.’ And it may be observed that this section, when submitted to the legislature by the commissioners for revising the Mass-

achusetts statutes, was accompanied by the following comment (Rept. Commrs., pt. 1, p. 123): 'This is founded on the rule established by the comity of all civilized nations; and is proposed merely that no doubt should arise on a question so interesting and important as this may sometimes be.'

"In *Lyon v. Lyon* (1854), 2 Gray, 367, the question was as to the validity in Massachusetts of a divorce decreed in Rhode Island in favor of one party to a marriage against the other, who was domiciled in Massachusetts. The court refused to give extraterritorial effect to the Rhode Island decree. In the opinion by Chief Justice Shaw it was declared that the three cases which we have previously referred to sustained the doctrine, based upon general principles of law, that a decree of divorce rendered in another state without jurisdiction of both of the parties possessed no extraterritorial force.

"In *Hood v. Hood* (1865), 11 Allen, 196, 87 Am. Dec. 709, the controversy was this: The parties were married in Massachusetts, and, after a residence in that state, moved together to Illinois. The wife left the domicile of the husband in Illinois and returned to Massachusetts. Thereafter, in Illinois, the husband sued the wife for a divorce on the ground of her desertion, obtained a decree, and married again. The case decided in Massachusetts was a suit brought in that state by the former wife against the former husband for divorce on the ground of adultery alleged to have been committed by him with the person whom he had married after the decree of divorce in Illinois had been rendered. The Illinois decree was pleaded in bar. The question whether the Illinois decree should be given extraterritorial effect in Massachusetts depended, under the rule announced in the previous cases, upon whether both the husband and wife were parties to the Illinois decree. For the purpose of the determination of this jurisdictional question it was held that it was necessary to ascertain whether the wife was justified, by the fault of the husband, in leaving him in Illinois and going back to Massachusetts. It was decided that if she was justified in leaving the husband, her legal domicile was in Massachusetts, and she was not a party to the Illinois decree, and that if she was not justified in living separate from the husband, the ordinary rule being that the domicile of the husband was the domicile of the wife, she was domiciled in Illinois, and must be considered as subject to the jurisdiction of the Illinois court. Applying this legal principle to the facts in the case before it, the court held that as there was no evidence showing that the wife had justifiable cause for leaving her husband, the legal presumption that the domicile of the husband was the domicile of the wife prevailed, and that the Illinois decree was entitled to extraterritorial effect in Massachusetts, and bound the wife, because rendered by a court having jurisdiction over both parties.

"In *Shaw v. Shaw* (1867), 98 Mass. 158, the facts were these: The parties were married in Massachusetts, lived there, and left

together for the purpose of settling in Colorado. On the journey, at Philadelphia, the wife was forced by the extreme cruelty of the husband to leave him. She returned to Massachusetts, while he went on to Colorado. Subsequently the wife sued in Massachusetts for a divorce from bed and board. The husband was brought in by substituted service and defaulted. The court, in the most explicit terms, recognized that a decree of divorce, to have extraterritorial effect, must be rendered with jurisdiction over both parties. It said (page 159): 'For the purposes of divorce the general rule of jurisprudence is that a divorce granted in the place of the domicile of both parties, and there valid, is good everywhere.' The court came then to consider whether it could render a decree in Massachusetts in favor of the wife. This depended upon a statute of Massachusetts, which authorized the granting of a divorce where the cause for divorce occurred while the parties had lived together as husband and wife in Massachusetts, and where one of them lived in that state when the cause for divorce occurred. It was held that as at the time of the commission of the cruelty in Philadelphia charged against the husband the domicile of the parties in Massachusetts had not been lost, and as by that cruelty the wife was justified in returning to Massachusetts, and the subsequent acquisition of a new domicile by the husband in Colorado did not make such domicile that of the wife, there was jurisdiction, and the divorce was granted.

"Hood v. Hood (1872), 110 Mass. 463, was an attempt again to assail the validity of the Illinois decree of divorce which had been adjudged valid in 11 Allen, 196, 87 Am. Dec. 709, because it was found that both the husband and wife had been parties to the decree. The Massachusetts decree so holding was therefore held to be res judicata as to all persons, and to foreclose further inquiry into the validity of the Illinois decree of divorce.

"In Burlen v. Shannon (1874), 115 Mass. 438, the facts leading up to the controversy and those involved therein were as follows: Shannon and his wife lived together in Massachusetts, where she left him. Without stopping to refer to prior legal controversies which arose between Shannon and his wife and between Shannon and Mrs. Burlen, which are irrelevant to be considered, it suffices to say that Mrs. Burlen sued Shannon in 1850 to hold him liable for necessary supplies furnished to the wife. Shannon resisted on the ground that the wife had been living apart from him without his fault or consent, and this defense was maintained: 3 Gray, 387. Shannon went to Indiana in 1855 and took up his domicile in that state, where, in 1856, he obtained a decree of divorce upon constructive service. Subsequently, in Massachusetts, Mrs. Burlen again sued Shannon for necessities furnished to the wife between February 22, 1860, and February 7, 1866. He pleaded the Indiana divorce, and the validity of the divorce was assailed by Mrs. Burlen on the ground that the wife had not been a party to the divorce cause, and therefore the Indiana decree had not extraterritorial effect in

Massachusetts. The court, in effect, after reiterating the previous rulings and referring to the statute concerning the necessity for the presence of both parties within the jurisdiction where a decree for divorce of another state was sought to be given effect in Massachusetts, also reiterated the previous ruling that the wife might acquire a separate domicile from the husband if she lived separate from him for justifiable cause. The court was brought, therefore, to consider whether Mr. and Mrs. Shannon were both parties to the Indiana decree on the ground that the domicile of the husband was the domicile of the wife. The solution of this question depended, as it had depended in *Hood v. Hood*, 11 Allen, 196, 87 Am. Dec. 709, upon whether the wife was absent from the husband because of his fault. On this subject it was decided that the previous judgment in favor of Shannon and against Mrs. Burlen in the prior action between the parties had conclusively determined between them that Mrs. Shannon was absent from her husband without his fault or consent, and therefore, under the legal presumption that the domicile of the husband was the domicile of the wife, both the husband and wife were parties to the Indiana decree and it was not subject to attack in Massachusetts. To cite, as has sometimes been done, the language of the opinion of the court referring to the previous judgment in the earlier action between Mrs. Burlen and Shannon as if that language referred to the Indiana decree of divorce, leading to the implication that that decree was held to be conclusive, even if only one of the parties was domiciled in the state where the decree was rendered, not only is a plain misconception, but is equivalent to asserting that the Massachusetts court had overruled its previous decisions and disregarded the spirit, if not the letter, of the state statute without the slightest intimation to that effect.

“In *Cumington v. Belchertown*, 149 Mass. 223, 21 N. E. 435, 4 L. R. A. 131, the facts were these: The parties to a marriage, celebrated in Massachusetts, lived together in that state until the wife was taken to a Massachusetts asylum for the insane, when the husband abandoned her, acquired a domicile in New York, there brought suit on the ground of fraud for the annulment of the marriage, and obtained a decree. The wife was only constructively served with process, did not appear, and was not represented. The Massachusetts court held, upon the authority of *Blackinton v. Blackinton*, 141 Mass. 432, 55 Am. Rep. 484, 5 N. E. 830, to which we have already referred, that if the decree was to be recognized in Massachusetts, it could only be on grounds of comity. And in concluding its opinion the court said: ‘Upon the ground, then, that the decree of the New York court attempts to annul a marriage in Massachusetts between Massachusetts citizens, and thus affect the legal status of the woman, who has remained domiciled in Massachusetts, and has never been within the jurisdiction of the New York court, and deprive her of the rights acquired by her marriage, and especially because it declares

the marriage void for a reason on account of which by the Massachusetts law it cannot be avoided, we are of opinion that it should not be enforced here, and that no principle of interstate comity requires that we should give it effect.'

"True it is the court reserved the question as to what effect might be given to a divorce if granted by a New York court under circumstances such as existed in that case. But as a suit for a declaration of nullity and one for divorce are both but modes for determining judicially the status of the parties, it must in reason follow if jurisdiction over both is a prerequisite in the one class, it is of necessity also essential in the other.

"*Maine.*—In *Harding v. Alden* (1832), 9 Me. 140, 23 Am. Dec. 549, the facts were these: While living together in Maine a husband deserted his wife. He went to North Carolina, where he pretended to marry, and lived there with another woman. In the meantime the wife whom he had deserted took up her residence in Rhode Island, where she sued for a divorce on the ground of the adultery committed by the husband in North Carolina. The husband, who was notified in North Carolina, did not appear in the Rhode Island divorce cause. A decree of divorce was granted and the wife then remarried. The first husband, during the coverture, owned and alienated real estate in Maine, and a statute of that state provided that where a divorce was decreed for adultery by the husband, dower might be assigned to the divorced wife in the same manner as if the husband were dead. The divorced wife brought an action of dower in a court in Maine. The Rhode Island decree was held to possess validity in Maine and the statute relating to dower was decided not to be limited to divorces decreed within the state of Maine. Considering the opinion in its entirety, it is plain that the Rhode Island divorce was given recognition from considerations of right and justice and upon the ground of state comity. Thus, the court called attention to the fact that adultery was a cause for divorce in both states and that divorces were granted in Maine against nonresidents, and it was observed that 'there would be great inconvenience in holding' that divorces ought not to be recognized in other states when granted in the state where the injured party resided, against one who had established his domicile in another state and there committed adultery.

"True it is in the course of the opinion reasoning was employed tending to show that the Rhode Island court might be considered to have had jurisdiction in the complete sense and it was intimated that the full faith and credit clause might have application, but the operation of the Rhode Island decree in Maine was, by the decree of the Maine court, expressly limited to the dissolution of the marriage (page 151). How far removed this was from giving to the Rhode Island decree the benefit of the full faith and credit clause will, we think, be made clear by what follows.

"*Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549, was decided at the July term, 1832. Less than two years afterward, on March 5,

1834 (1 Maine Laws, c. 71, sec. 4), the statute of Maine regulating divorces was supplemented by various provisions, one such being the following: 'Sec. 2. Be it further enacted, that in all cases where one party has been or shall be divorced from the bonds of matrimony, the court granting the same may, upon application therefor, grant to the other party a like divorce, on such terms and conditions as the said court in the exercise of a sound discretion may judge reasonable.' This provision was carried into the Revised Statutes of 1841, chapter 89, section 2, and although repealed in 1850, in a general revision of the divorce laws, it was held that the legislature did not intend to deprive the courts of Maine of the power to entertain a suit for divorce brought by a person from whom the other party to a marriage had already been divorced, and that the courts of Maine still possessed power to exercise jurisdiction over such suits: *Stilphen v. Stilphen*, 58 Me. 508, 4 Am. Rep. 305. In the cited case, although a husband had already obtained an absolute divorce, a like divorce was granted to the wife, and the court allowed to her certain articles of personal property and the sum of five hundred dollars. In overruling exceptions to the decree the appellate court adopted the theory that the second decree in nowise impugned the first, and was 'important only as enabling the court to make such ancillary decrees concerning the property as justice may seem to require' (page 517, 4 Am. Rep. 309). In the course of the opinion the court said (p. 516, 4 Am. Rep. 308): 'There is no class of cases in which the court is so liable to be imposed upon, and a decision obtained contrary to the truth, as *ex parte* divorce suits. The notice is often imperfect, so that the confession of guilt implied in the default is deceptive. And it is well known that witnesses, testifying in the presence of one of the parties, and in the absence of the other, will so alter and magnify the faults of the absent, and suppress everything that makes against the party present, that it is impossible to tell where the truth and real merits of the controversy are. When both parties are present, each is sure to put the other in the wrong; and, a fortiori is this true when one of the parties is permitted to testify in the absence of the other, as is now the case in divorce suits. We repeat, therefore, that there is no class of cases in which the court is so liable to be imposed upon; and it seems to us of the utmost importance that the court should be possessed of the power in some form to revise their decisions in this class of cases; otherwise, the grossest injustice is liable to be done.'

"In the light of this decision it cannot be assumed that the courts of Maine would give to a citizen of that state against whom a divorce had been obtained in a foreign jurisdiction, upon constructive service, a less degree of relief than they afford as to a decree rendered in Maine, both parties being present and bound by the decree.

"*Rhode Island*.—*Ditson v. Ditson* (1856), 4 R. I. 87, was a suit for divorce on the grounds of desertion, extreme cruelty, and non-support, brought by a wife domiciled in Rhode Island against the

husband, who had never resided in Rhode Island, and whose whereabouts was unknown. The question was whether the Rhode Island court ought to exercise jurisdiction. The opinion was mainly devoted to refuting the reasoning employed by Chief Justice Shaw in his opinion in the case of *Lyon v. Lyon*, 2 Gray, 367, in which case, as we have previously shown, the Massachusetts court refused to give effect to a Rhode Island decree of divorce where both parties were not within the jurisdiction. The Rhode Island court (in the *Ditson* case) in effect declared that it would not exercise jurisdiction to grant a divorce if it considered that a decree rendered by it would not be entitled to extraterritorial effect because of a lack of actual jurisdiction over the defendant. The court, however, proceeded to reason that a suit for divorce was in effect a proceeding in rem, and that jurisdiction over one of the parties to a suit for the dissolution of the marriage tie drew to the court jurisdiction of the other party, and thereby gave full and complete jurisdiction over the status of both parties, and upon that hypothesis decided that it would exercise jurisdiction, and that its decree dissolving the marriage would be entitled to the benefit of the full faith and credit clause of the constitution and have binding efficacy in every other state.

New Jersey.—Whilst the courts of New Jersey have exercised the power to grant a divorce from a nonresident defendant, upon constructive service, those courts have from the beginning applied to similar decrees of divorce granted in other states, when sought to be enforced in New Jersey against citizens of that state, a rule like the one prevailing in New York; that is, they decline to enforce them even upon the principles of comity: *Doughty v. Doughty*, 28 N. J. Eq. 581; *Flower v. Flower*, 42 N. J. Eq. 152, 7 Atl. 669. Recently, however, it has been decided (*Felt v. Felt*, 59 N. J. Eq. 606, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546), that where a decree of divorce was rendered in another state, and the complainant alone was subject to the jurisdiction of the court, but it was shown that the defendant had been personally served outside of the jurisdiction with notice of the pendency of the divorce proceeding, and was afforded reasonable opportunity to make defense, and did not avail of the opportunity, effect would be given to such decree in New Jersey, upon principles of comity, provided that the ground upon which the decree rested was one which the public policy of New Jersey recognized as a sufficient cause for divorce. In *Wallace v. Wallace*, 62 N. J. Eq. 509, 50 Atl. 788, the subject is quite fully reviewed.

Ohio.—In *Cooper v. Cooper* (1836), 7 Ohio, pt. 2, p. 238, without citation of authority, a divorce granted in Indiana, from a resident of Ohio, upon constructive service, was held to bar an application for divorce and alimony in Ohio. In *Mansfield v. McIntyre* (1840), 10 Ohio, 27, despite a divorce obtained in Kentucky by a husband, upon constructive service, the divorced wife was regarded in Ohio

as the widow of her former husband after his decease, and as such widow entitled to dower.

"In *Cox v. Cox*, 19 Ohio St. 502, 2 Am. Rep. 415, decided at the December term, 1869, the facts were these: The husband deserted the wife in Ohio, went to Indiana, and there obtained a divorce, upon constructive service. The wife remained in Ohio, and three years after the granting of the Indiana divorce to the husband she sued him for divorce and for alimony, alleging abandonment and gross neglect of duty. The trial court granted a divorce and alimony. The husband appealed, but as such an appeal, under the statutes of Ohio, did not affect the decree as to the divorce, the district court considered only the question of alimony, and rendered a new decree for alimony against the defendant. The case was then taken to the supreme court of the state. In that court attention was called to the fact that under the statutes of Ohio and the decisions of its courts jurisdiction might be exercised over nonresidents in divorce cases, and reference was made to various authorities as tending to show that public policy required the recognition of the validity of such decrees in other states as to the dissolution of the marriage. After stating the facts, and observing that the wife was entitled under the laws of Ohio to either divorce or alimony, or both, at her election, and alluding to the Indiana decree, the court said (p. 512, 2 Am. Rep. 417): 'The question, therefore, is whether the ex parte decree can be made available, not merely to effect a dissolution of the marriage, but to defeat the right of the petitioner to the alimony which the statute, upon the facts as they exist in regard to the husband's desertion, intended to provide for her.'

" 'We think the decree ought not to have such effect.

" 'In arriving at this conclusion we make no distinction between a decree rendered, under the circumstances of this case, in a foreign, and one rendered in a domestic, forum.

" 'In either case, to give to a decree thus obtained the effect claimed for it would be to allow it to work a fraud upon the pecuniary rights of the wife. Such a result, in our opinion, is rendered necessary by no principle of comity or public policy—the only grounds upon which ex parte decrees of divorce are authorized and supported.

" 'It is not essential to the allowance of alimony that the marriage relation should subsist up to the time it is allowed. On appeal, alimony may be decreed by the district court, notwithstanding the subsisting divorce pronounced by the court of common pleas. It is true that the statute speaks of the allowance as being made to the wife. But the term "wife" may be regarded as used to designate the person, and not the actual existing relation; or the petitioner may still be regarded as holding the relation of wife for the purpose of enforcing her claim to alimony.'

"The following cases were cited by the court as sustaining the right of the wife to maintain an independent proceeding for alimony,

even after the husband had obtained a divorce: *Richardson v. Wilson*, 8 Yerg. 67; *Crane v. Meginnis*, 1 Gill & J. 463, 19 Am. Dec. 237; *Shotwell v. Shotwell*, Smedes & M. Ch. 51.

“In *Doerr v. Forsythe* (1893), 50 Ohio St. 726, 40 Am. St. Rep. 703, 35 N. E. 1055, an Indiana divorce granted to a husband, upon constructive service, was held not to bar the right of the wife to dower in lands in Ohio owned during coverture by the husband.

“*Alabama*.—In *Thompson v. State* (1856), 28 Ala. 12, the facts were these: Thompson deserted his family in Mississippi, went to Arkansas, and there obtained a divorce upon constructive service. The wife returned to her father's home in Alabama, and, after the divorce, the husband also went to Alabama, where he again married. He was prosecuted for and convicted of bigamy. The conviction was set aside, however, upon the ground that the guilt or innocence of the accused depended upon the question as to whether he had a bona fide domicile in Arkansas during the pendency of the proceedings for divorce. *Harding v. Alden*, 2 Me. 140, 23 Am. Dec. 549, was cited as authority.

“In a subsequent case, however (*Turner v. Turner* (1870), 44 Ala. 437), the supreme court of Alabama strictly limited, as against a citizen of Alabama, the effect of divorce rendered in another state upon constructive service. The parties were married in Alabama, where the husband deserted the wife, and located in Indiana, where he obtained a divorce upon constructive service. The wife remained in Alabama, and, after the granting of the divorce to the husband, she sued him in Alabama for a divorce and alimony. The husband pleaded the Indiana decree in bar. The trial court, however, held that the wife was entitled to maintain her suit, and entered a decree for divorce and alimony. In affirming the decree the supreme court of Alabama, upon the authority of *Thompson v. State*, 28 Ala. 12, said that the decree of divorce obtained by the husband in Indiana might protect him against prosecution for bigamy should he marry again in Alabama. Referring to that decree it further said (p. 450): ‘But without stopping to inquire whether it was obtained by him by fraud, and therefore is vicious on that account or not, it certainly cannot affect the rights of the complainant, except her right in the husband as husband. If it is valid, it unmarries him and sets him free from his marital vows to her. He is no longer the complainant's husband. But it does not settle her right to alimony; it does not settle her right to dower in his lands, and her statutory right to distribution of his property in this state, in the event she should survive him, nor any other interest of a pecuniary character she may have against him. . . . It is the duty of the state to protect its own citizens, within its own borders. This is the natural compensation for allegiance. This high duty extends to all the pecuniary rights of the citizens, as well as to the rights of security of person. . . . No obligation of comity is paramount to this duty. Without a constant and effective exertion of it, citizenship would become a farce. . . . The wife is as much the citi-

zen of the state as the husband, and is entitled to the protection of its laws to the same extent, so long as she remains within its jurisdiction. It would be a scandal to justice to imperil her, and sacrifice her most important and cherished rights upon a mere technicality—a technicality that often contradicts the truth. When her protection requires it, it would be cruelly unjust for the state of her actual residence and domicile to repudiate its own right of jurisdiction to give her aid. I therefore think that the better opinion is that she has the right to file her bill here, and to all the relief that the court could give her, notwithstanding her husband might not be domiciled in this state at the commencement and during the whole pendency of her litigation with him. . . .

“‘Then, if the state courts have competent jurisdiction in such a case, as undoubtedly they have, they may go on and exercise that jurisdiction in the manner and to the extent prescribed by their own laws.

“‘Under the laws of this state, by the contract and consummation of a marriage, the wife, if she has no separate estate, becomes entitled to dower in the husband’s lands, and a certain distributive interest in his personal estate, if she survives him, and to temporary and permanent alimony out of his estate, upon a separation by divorce in her favor. These are rights that she cannot legally be deprived of without her consent or her fault. . . . If this were not so, then these important statutory provisions in favor of the wife would be repealed or rendered null by a foreign divorce, of which she had no notice and no knowledge, during its whole progress through the forms of a foreign court. To sue in her own domicile is necessary for the protection of the wife. It, therefore, overrides the technical rule that the husband’s domicile is also the domicile of the wife. . . . Here the testimony shows that the wife has no separate estate. The witnesses for the defendants say when she was married she “‘brought nothing with her.” It also appears that during her connection with the defendant, Matthew Turner, as his wife she was a chaste, industrious, economical, faithful, useful, and obedient wife; and that the husband’s property is very considerable, worth possibly not less than one hundred thousand dollars. It is also shown that his three children by a former marriage were already sufficiently provided for.

“‘Under such a state of facts the sum of thirty thousand dollars was not an unreasonable sum for permanent alimony to be allowed to the wife, nor the sum of eight hundred dollars too large for temporary alimony.’

“*Indiana*.—In *Tolen v. Tolen* (1831), 2 Blackf. 407, 20 Am. Dec. 742, the facts were these: A wife, on being deserted in Kentucky, removed to and became domiciled in Indiana, and after a residence there of five years sued for a divorce from the nonresident husband. In an opinion of great length the court considered the question of its power to grant a divorce which would be valid in Indiana,

and decided it had such power, but expressly reserved passing on the question whether the decree would have extraterritorial force.

“In *Hood v. State* (1877), 56 Ind. 263, 26 Am. Rep. 21, it was declared that as an *ex parte* divorce in favor of one domiciled within the jurisdiction of a state, and against a nonresident, although founded upon constructive service, was valid as to the plaintiff, ‘public policy demands that it should be held valid as to both parties.’

“In *Hilbish v. Hattle* (1896), 145 Ind. 59, 44 N. E. 20, 33 L. R. A. 783, certain sections of the Indiana Revised Statutes, wherein it was provided that the divorce of one party to a marriage should dissolve the contract as to both, and that a divorce decreed in another state by a court having jurisdiction of the cause should have full effect in Indiana, were held to be applicable to a decree of divorce granted in another state, in favor of a husband, upon constructive service, and the same effect was given to the decree, as to the rights of the wife in the property of the husband in Indiana, as if the divorce had been rendered in Indiana.

“*Missouri*.—In *Gould v. Crow*, 57 Mo. 200, a decree of divorce regularly obtained by a husband in Indiana, on an order of publication, without personal service, was held to operate as a divorce in favor of the husband in Missouri, so as to prevent the wife from claiming her dower in lands in Missouri owned by the husband. *Harding v. Alden*, 9 Me. 140, 23 Am. Dec. 549, was relied upon as authority. A statute of Missouri, barring the claim of a wife for dower after divorce granted by reason of her fault, was held to apply to all divorces, whether obtained in Missouri or in other states, and whether obtained on personal service or by order of publication. The doctrine of *Gould v. Crow*, 57 Mo. 200, was reaffirmed and applied in *Anthony v. Rice*, 110 Mo. 233, 19 S. W. 423.

“*Wisconsin*.—In *Shafer v. Bushnell* (1869), 24 Wis. 372, an *ex parte* divorce granted a wife in Minnesota upon constructive service of the defendant, a citizen of Minnesota, was held upon the grounds of comity to be conclusive in Wisconsin in respect to the status or domestic and social condition of the wife. The decree was held to bar an action for criminal intercourse against the person whom the complainant in the divorce suit married after the granting of the divorce.

“In *Cook v. Cook* (1882), 56 Wis. 195, 43 Am. Rep. 706, 14 N. W. 33, 443, however, in an elaborate opinion, an *ex parte* divorce obtained in Michigan upon constructive service merely, by a husband who had deserted his wife in Wisconsin, was held not to affect the status of the wife in Wisconsin, nor to bar her from suing in Wisconsin for divorce, alimony, allowance, and a division of the property of such husband situated within Wisconsin.

“Deducing the law of the several states from the rulings of their courts of last resort which we have just reviewed, and ignoring mere minor differences, the law of such states is embraced within one or the other of the following headings:

"a. States where the power to decree a divorce is recognized, based upon the mere domicile of the plaintiff, although the decree when rendered will be but operative within the borders of the state, wholly irrespective of any force which may be given such decree in other states. Under this heading all of the states are embraced with the possible exception of Rhode Island.

"b. States which decline, even upon principles of comity, to recognize and enforce as to their own citizens, within their own borders, decrees of divorce rendered in other states, when the court rendering the same had jurisdiction over only one of the parties. Under this heading are embraced Massachusetts, New Jersey (with the qualification made by the decision in *Felt v. Felt*, 59 N. J. Eq. 606, 83 Am. St. Rep. 612, 45 Atl. 105, 49 Atl. 1071, 47 L. R. A. 546), and New York.

"c. States which, whilst giving some effect to decrees of divorce rendered against its citizens in other states where the court had jurisdiction of the plaintiff alone, either place the effect given to such decrees upon the principle of state comity alone, or make such limitations upon the effect given to such decree as indubitably establishes that the recognition given is a result merely of state comity. As the greater includes the less, this class of course embraces the cases under the previous heading. It also includes the states of Alabama, Maine, Ohio, and Wisconsin.

"d. Cases which, although not actually so deciding, yet lend themselves to the view that ex parte decrees of divorce rendered in other states would receive recognition by virtue of the due faith and credit clause. And this class embraces Missouri and Rhode Island.

"Coming to consider, for the purpose of classification, the decided cases in other states than those previously reviewed, which have been called to our attention, the law of such states may be said to come under one or the other of the foregoing headings, as follows:

"Proposition 'a' embraces the law of all the states, since in the decision of no state is there an intimation expressing the exception found in the Rhode Island case which caused us to exclude that state from this classification.

"Under proposition 'b' comes the law of the states of Pennsylvania, Vermont, and South Carolina. A line of decisions of the state of North Carolina would also cause us to embrace the law of that state within this classification, but for a doubt engendered in our minds as to the effect of the law of North Carolina on the subject, resulting from suggestions made by the North Carolina court in the opinion in *Bidwell v. Bidwell*, 139 N. C. 402, 52 S. E. 55.

"Proposition 'c' embraces the law of Kansas, Louisiana, Maryland, Michigan, Minnesota, Nebraska, and New Hampshire. And it is pertinent here to remark that in Michigan (3 Mich. Comp. Laws (1897), c. 232, sec. 2, par. 8617), the obtaining of a divorce in another state from a citizen of Michigan is made cause for the grant-

ing of a divorce in Michigan to its citizen. A like provision is also in the statutes of Florida: Fla. Rev. Stats. (1902), sec. 1480.

“Under proposition ‘d’ we embrace the remaining states, although as to several the classification may admit of doubt, viz., California, Illinois, Iowa, Kentucky, and Tennessee.

“It indubitably, therefore, follows from the special review we have made of cases in certain states, and the classification just made of the remaining state cases which were called to our attention and which we have previously cited in the margin, that the contention is without foundation, that such cases establish by an overwhelming preponderance that, by the law of the several states, decrees of divorce obtained in a state with jurisdiction alone of the plaintiff are, in virtue of the full faith and credit clause of the constitution, entitled to be enforced in another state as against citizens of such state. Indeed, the analysis and classification which we have made serves conclusively to demonstrate that the limited recognition which is given in most of the states to such *ex parte* decrees of divorce rendered in other states is wholly inconsistent with the theory that such limited recognition is based upon the operation of the full faith and credit clause of the constitution of the United States, and, on the contrary, is consistent only with the conception that such limited recognition as is given is based upon state comity. No clearer demonstration can be made of the accuracy of this statement than the obvious consequence that if the full faith and credit clause were now to be held applicable to the enforcement in the states generally of decrees of divorce of the character of the one here involved it would follow that the law of nearly all of the states would be overthrown, and thus it would come to pass that the decisions which were relied upon as establishing that the due faith and credit clause applies to such decrees would be overruled by the adoption of the proposition which it is insisted those decisions maintain. The only escape from this conclusion would be to say that the law of the states as shown by the decisions in question would remain unaffected by the ruling of the full faith and credit clause, because not repugnant to that clause. This would be, however, but to assert that the full faith and credit clause required not that full faith and credit be given in one state to the decrees of another state, but that only a limited and restricted enforcement of a decree of one state in another would fulfill the requirements of that provision of the constitution. To so decide would be to destroy the true import of the full faith and credit clause, as pointed out in the outset of this opinion. Thus, in its ultimate aspect, the proposition relied upon reduces itself to this—either that the settled law of most of the states of the Union as to divorce decrees rendered in one state where the court rendering the decree had jurisdiction only of the plaintiff, must be held to be invalid, or that an important provision of the constitution of the United States must be shorn of its rightful meaning.

“Without questioning the power of the state of Connecticut to enforce within its own borders the decree of divorce which is

here in issue, and without intimating a doubt as to the power of the state of New York to give to a decree of that character rendered in Connecticut, within the borders of the state of New York and as to its own citizens, such efficacy as it may be entitled to in view of the public policy of that state, we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the state of New York by virtue of the full faith and credit clause. It therefore follows that the court below did not violate the full faith and credit clause of the constitution in refusing to admit the Connecticut decree in evidence; and its judgment is, therefore, affirmed."

The Effect of Decrees of divorce rendered in another country or commonwealth is discussed in the recent monographic note to *Felt v. Felt*, 83 Am. St. Rep. 616; *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 553; *Montgomery v. Consolidated etc. Co.*, 103 Am. St. Rep. 328. Want of jurisdiction may be shown by extrinsic evidence, even against the recital of a judgment record of a sister state, that the defendant was not served or appeared by attorney, or of any other jurisdictional fact: *Woodward v. Mutual Reserve Life Ins. Co.*, 178 N. Y. 485, 102 Am. St. Rep. 519; *Chicago Title etc. Co. v. Smith*, 185 Mass. 363, 102 Am. St. Rep. 350, and see the cases cited in the cross-reference note thereto.

FREUND v. FREUND.

[218 Ill. 189, 75 N. E. 925.]

INSURANCE, LIFE—Effect of Statutory Provisions.—The provisions of a statute of a state where a life insurance policy is issued become a part thereof as if embodied in the policy itself. (p. 288.)

INSURANCE, LIFE—Title of Beneficiary—Effect of Noncompliance with the Statute.—If the statutes of a state where a policy of life insurance is issued provide that the person whose life is insured has the right at any time, with the consent of the insurer, to change the beneficiary, no change of beneficiary can take place until assented to by the insurer. (p. 289.)

INSURANCE, LIFE—Change of Beneficiary—Necessity for Indorsement of Consent by the Insurer.—Where a policy of life insurance provides that a change of beneficiary shall be made by indorsement in writing and shall not take effect until indorsed on the policy by the home office, no act of the assured can effect such a change in the absence of such indorsement. (p. 289.)

INSURANCE, LIFE—Change of Beneficiary, When not Accomplished.—Though the person whose life is insured adopts and signs printed forms prepared by the insurer making known his intention to change the name of the beneficiary and receives a receipt from the local office of the insurer stating that the papers have been received for transmission to the home office for a change of beneficiary, still if the insurer does not, in the lifetime of the assured, indorse the requisite consent as required by the terms of the policy no change of beneficiary is accomplished. (p. 290.)

LIFE INSURANCE and Mutual Benefit Insurance—Distinction Between as to Change of Beneficiary.—There is a distinction between certificates issued by a mutual benefit society and an ordinary life insurance in that the right to change the beneficiary does not, as a general thing, exist in the latter, and when the right does exist by the terms of a statute or a policy, it can be exercised only by complying with the provisions of the statute or policy upon the subject. (pp. 290, 291.)

INSURANCE, LIFE—Indorsement of Consent to Change the Beneficiary, Whether a Merely Formal Act.—Though the person whose life is insured does every act which is on his part required to be done to change the name of the beneficiary, still if the statute requires the insurer to consent to such change before it becomes effective, and the policy provides that such consent must be indorsed thereon, equity cannot treat a change as accomplished where the assured dies before such consent is given and such indorsement made. (pp. 294, 295.)

INSURANCE, LIFE—Consent to Change of Beneficiary Given After the Death of the Assured.—When the person whose life is insured dies before the insurer has consented to a change of the beneficiary, the rights of the beneficiary become vested and cannot be taken away and conferred on another by any consent or waiver of the insurer taking place after such death. (p. 296.)

INSURANCE, LIFE—Change of Beneficiary.—The Filing of an Interpleader and the Payment of the Money into Court where the person whose life was insured did all the acts necessary to be done by him to accomplish a change of beneficiary cannot make such change effective if the insurer did not, in the lifetime of the assured, indorse on the policy the consent to such change as therein required. (p. 296.)

Bill of interpleader filed by the New York Life Insurance Company against the son and widow of Josef Freund to determine which as beneficiary was entitled to insurance effected on his life. The policy issued June 10, 1901, in the name of the wife as beneficiary. On January 10, 1902, the son was made beneficiary by proper notice and indorsement; on January 22d of the same year, the widow in like manner became beneficiary; on May 16, 1902, the son was again made beneficiary. On June 16th of the same year the insured presented his policy at the branch office of the insurer in Chicago, with a proper written statement of his desire to change the beneficiary to his wife, Bertha, and received the receipt shown in the opinion of the court. On the next day, the insured died. The superior court of Cook county entered a decree in favor of the son. An appeal was taken from this decree to the appellate court of the first district, where it was reversed. The present appeal was taken from this decree of reversal.

Max Robinson, for the appellants.

Castle, Williams & Smith and Arista B. Williams, for the appellee.

¹⁹⁴ MAGRUDER, J. The question in this case is, whether the fund in controversy belongs to the appellants, as guardians of the estate of the minor child, Karl Freund, son of the deceased Josef Freund, the insured party named in the insurance policy, or whether it belongs to the appellee, Bertha Freund, the widow of the deceased Josef Freund.

The instrument of insurance in this case was a policy of insurance, issued by the New York Life Insurance Company, and not a benefit or endowment certificate. The matter to be determined is, whether the last change of the beneficiary, attempted to be made by the insured party on June 16, 1902, was valid, and had the effect of making the wife the beneficiary, or whether the son, who was theretofore the beneficiary, still remained so after the death of the insured on June 17, 1902. The laws of New York—the state where the contract of insurance was made—were introduced in evidence, and section 211 in the article on insurance in the code of New York is as follows: “Membership ¹⁹⁵ in any such corporation, association or society shall give to any member thereof the right, at any time, with the consent of such corporation, association or society, to make a change in his payee or payees, or beneficiary or beneficiaries, without requiring the consent of such payee or beneficiaries.” The policy of insurance upon the life of Josef Freund for five thousand dollars contained the following provisions:

“Change of Beneficiary.—The insured may, at any time during the continuance of this policy, provided the policy is not then assigned, change the beneficiary or beneficiaries by written notice to the company, at its home office, accompanied by this policy, such change to take effect on the indorsement of the same upon the policy by the company. If there is no beneficiary living at the death of the insured, the amount then insured by this policy shall be paid to the executors, administrators or assigns of the insured,” etc.

“General Provisions of the Policy.—No. 1. Only the president, a vice-president, the actuary or the secretary has power in behalf of the company to make or modify this or any contract of insurance or to extend the time for paying any premium, and the company shall not be bound by any promise or representation, heretofore or hereafter given by any person other than the above.”

Indorsed on the policy, also, was the following: “Each selection, change or revocation of a selection shall be made

by the insured in writing, and shall not take effect until indorsed on this policy by the company at the home office.”

The first written notice, signed by the insured, Josef Freund, at Chicago on January 10, 1902, and addressed to the insurance company at Broadway, New York, recites as follows: “The beneficiary under the accompanying policy, in accordance with the change of beneficiary clause thereof, is hereby changed from Bertha Freund, wife to Karl Freund, son. The policy is not now assigned.” There was a witness to this written notice of change, and it was forwarded from the branch office at Chicago to the home ¹⁹⁰² office in New York on January 11, 1902. The next notice, signed by the insured, dated at Chicago, January 22, 1902, and addressed to the insurance company, was of the same tenor and effect, and changed the beneficiary from Karl Freund, son, to Bertha Freund, wife, and was forwarded from the branch office in Chicago to the home office in New York, and received by the latter on January 24, 1902. The third written notice, signed by the insured and dated May 16, 1902, witnessed and addressed to the insurance company, was of like tenor and effect, except that the beneficiary was changed from Bertha Freund, wife, to Karl Freund, son, and was forwarded from the Chicago clearing-house of the company to New York, and received in the latter city by the home office on May 19, 1902.

The company at its home office in New York, upon receiving the first notice of change, dated January 10, 1902, made a written indorsement upon the original policy of that date, signed by its assistant secretary in the following words: “By written notice to the company the insured has changed the beneficiary of this policy to Karl Freund, his son.” After the receipt at its home office in New York of the second notice of change dated January 22, 1902, the company made a written indorsement upon the original policy, signed by its assistant secretary, as follows: “By written notice to the company the insured has changed the beneficiary of this policy to Bertha Freund, his wife.” After the receipt of the third notice of change, dated May 16, 1902, by the company at its home office in New York, it made a written indorsement upon the policy, signed by its assistant secretary, in the following words: “By written notice to the company the insured has changed the beneficiary of this policy to Karl Freund, his son.”

It is conceded that, by the written notice of May 16, 1902, and by the written indorsement of that day upon the original policy as above set forth, Karl Freund, the son, was made, under the terms of the policy, the beneficiary then ¹⁹⁷ entitled to the fund. Upon the death of the insured, Josef Freund, Karl Freund was the legal beneficiary, and entitled to the fund, unless the next change, sought to be made on June 16, 1902, was effectual in making the appellee, wife of the insured, the real beneficiary.

When the deceased, Josef Freund, the insured party, took the policy to the local office of the company in Chicago and left there the written notice, dated June 16, 1902, signed by himself, for a change of beneficiary from Karl Freund, son, to Bertha Freund, wife, he received the following receipt:

“Chicago, Ill., 6-16, 1902.

“1118 New York Life Building.

“Received of Joseph Freund the papers listed below, for transmission to the New York Life Insurance Company for change of beneficiary.—Policy No. 3,157,265.

“F. A. JACKSON,

“HUNT, Cashier.”

As has been before stated, the assured died on the next day, to wit, June 17, 1902. The policy and the written notice of June 16, 1902, were forwarded from the Chicago clearing-house branch office by F. A. Jackson, cashier, on June 19, 1902, two days after the death of the assured, and were received at the home office in New York on June 21, 1902. But no indorsement was made upon the policy, such as was made when the other changes already indicated were requested by the assured. That is to say, no indorsement of the written notice, given by the assured dated June 16, 1902, was ever made by the company at its home office, or anywhere else, upon the original policy.

The position of the appellants is that, under the statute of New York, the assured Josef Freund had no right to change the beneficiary in the policy without the consent of the company; that such consent, under the terms of the policy, could only be indicated by an indorsement on the policy by the company at the home office, and could only take effect when the indorsement of the same upon the policy was made by the company at its home office; and that in this case, as this was not done in the matter of the attempted ¹⁹⁸ change of the bene-

ficiary from the son to the wife on June 16, 1902, the latter had no right to claim the fund. On the contrary, the appellee's claim is that, under the terms of the policy, the assured had the right to change the beneficiary, and that, inasmuch as he went to the company's office in Chicago on June 16, 1902, and left a written notice of a change of beneficiary from the son to the wife, and at the same time left the original policy there for the purpose of having it transmitted to the home office in New York, he did all that he could do, or was required to do, in order to change the beneficiary, and that, although he died before the company acted upon the last notice of change, yet that equity will decree that to be done which ought to be done, and will act as though the change was complete, and that for this reason the wife, appellee herein, is entitled to the fund in question.

1. It is said by counsel for appellee that there is nothing in the insurance policy issued to Josef Freund which required the consent of the company to the change of the beneficiary. It is true that in the policy itself, which is the contract between the company and the assured, there are no express words requiring the consent of the company; but the statute of the state of New York provides, in substance, that the assured shall have "the right at any time with the consent of such corporation, association or society to make a change in his payee or payees, or beneficiary or beneficiaries without requiring the consent of such payee or beneficiaries." This provision of the New York statute, being section 211 of the article on insurance in the New York code, which is admitted to have been in force in New York when the policy here in question was issued, became a part of the contract, embodied in the policy by implication, with the same effect as if it had been embodied in the policy itself: *Havens v. Germania Fire Ins. Co.*, 123 Mo. 417, 45 Am. St. Rep. 570, 27 S. W. 718, 26 L. R. A. 107; *Christian v. Connecticut Mut. Life Ins. Co.*, 143 Mo. 460, 45 S. W. 268; *Ritchie v. Home Ins. Co.*, 104 Mo. App. 146, 78 S. W. 341. All stipulations of the policy must yield to the statute: *Havens v. Germania Fire Ins. Co.*, 123 Mo. 417, 45 Am. St. Rep. 570, 27 S. W. 718, 26 L. R. A. 107. Inasmuch, therefore, ¹⁸⁹ as the provision of the New York statute thus quoted is by implication a part of the policy or contract, this policy is to be regarded as one which requires the consent of the company to the change, the same as though the provision of the statute was written into the policy itself.

In addition to the fact that the consent of the company was thus required, the policy provides that the change of beneficiary shall be made by the assured in writing, "and shall not take effect until indorsed on this policy by the company at the home office." Evidently the policy of the contract, in recognition of the requirement of the statute as to consent, provides for an indorsement upon the policy by the company at the home office, as evidence of the company's consent to the change of the beneficiary. This is a plain and clear contract between the company and the assured, and we see no reason why the contract is not valid, and should not be enforced as made. The proof in this case shows clearly, and without dispute, that the company never did give its consent to the change of the beneficiary from the son to the wife, as attempted to be made by the writing of June 16, 1902, and that the company never did make the indorsement, required by the contract, upon the policy, at its home office, or at any other place. Therefore the change did not take effect.

It is said, however, that the printed forms, dated as of the respective dates already indicated, upon which the assured directed that the changes be made, were prepared by the company and furnished to the assured by the company, and that these printed forms by their terms indicate that, as soon as the insured signed one of them, the consent of the company to the change was thereby indicated. We cannot concur in this view. The printed forms, signed by the insured, and by which he made known to the company his intention to change the name of the beneficiary, are to be considered in connection with the language of the policy or contract itself between the company and the assured. ²⁰⁰ The policy provides that "the insured may at any time during the continuance of this policy, provided the policy is not then assigned, change the beneficiary or beneficiaries by written notice to the company at its home office accompanied by this policy, such change to take effect on the indorsement of the same upon the policy by the company." The written statement of change of the beneficiary thus signed by the assured is designated in the policy or contract as a "written notice to the company at its home office." It being only a notice to the company as to the change desired, it cannot be said that the mere signing of the written notice by the assured at the branch office accomplished the change. This view is further strengthened by the language of the

receipt, given by the cashier at the Chicago office to the assured on June 16, 1902, when he left the policy and the written notice with the cashier. The language of the receipt is: "Received of Josef Freund the papers listed below for transmission to the New York Life Insurance Company for change of beneficiary." They are to be transmitted that a change might be made thereafter. The mere fact that they were left with the branch office to be forwarded to the home office did not accomplish the change of beneficiary without action by the home office any more than was such change accomplished by the signing of the written notice by the assured. In addition to this, the policy provides that such change was to take effect only upon the indorsement of the same upon the policy by the company. In one clause of the policy this language is used, to wit: "Such change to take effect on the indorsement of the same upon the policy by the company." In another clause of the policy the following language is used: "Each change of a selection shall be made by the insured in writing, and shall not take effect until indorsed on this policy by the company at the home office." As if to enforce the fact that the change is only to take effect by reason of the indorsement, the provision in relation thereto is set forth twice in the policy, once ²⁰¹ in the affirmative, and a second time in the negative. If it was only to take effect when the indorsement was made by the company upon the policy at its home office, it cannot be said that the change was effected before such indorsement was made by anything done at the branch office by the assured, or by the employé of the company there, whose duty it was to forward the papers for the purpose of having the change made. We are, therefore, of the opinion that the change of the beneficiary could only be made with the consent of the company and in the manner pointed out by the statute and by the insurance policy. This was not done in the present case.

2. It is to be noted that this is an insurance policy, issued by an insurance company, and is not a benefit or endowment certificate issued by a fraternal society. The right of the assured to change the name of the beneficiary would seem to exist in the case of mutual benefit insurance fraternities where the contract does not take away the power to change the beneficiary: *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961. But there is a well-recognized distinction between certificates issued by a mutual benefit society and an ordinary life insur-

ance policy. The right of the assured to change the beneficiary does not exist as a general thing in the case of an ordinary life insurance policy: *Delaney v. Delaney*, 175 Ill. 187, 51 N. E. 961. In the present case, where the policy was issued by a New York company and must be governed by the laws of that state, the right of the assured to change the beneficiary is a qualified right; that is, subject to the consent of the company and to the indorsement upon the policy by the company at its home office. The tendency of the decisions in the state of New York, when carefully examined, is to sustain the rule that a change of beneficiary cannot be accomplished, except by compliance with the provisions in the statute and in the contract for such change, and only by and with the consent of the company: *Thomas v. Thomas*, 131 N. Y. 205, 27 Am. St. Rep. 522, 30 N. E. 61; *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 506; *Hellenberg v. District No. 1* ²⁰² of I. O. of B. B., 94 N. Y. 580; *Story v. Williamsburg M. M. B. Assn.*, 95 N. Y. 474; *Tillman v. John Hancock Mutual Life Ins. Co.*, 27 App. Div (N. Y.) 392, 50 N. Y. Supp. 470; *Gladding v. Gladding*, 29 N. Y. St. 485; *Ireland v. Ireland*, 42 Hun, 212.

In *Olmstead v. Masonic Mut. Ben. Soc.*, 37 Kan. 93, 14 Pac. 449, the court said: "If we assume, as the authorities appear to hold, that a member of a co-operative society retains the power to change the beneficiary, still he cannot exercise his power, except with the consent of the society and in conformity with the rules and regulations of the society." In *Hellenberg v. District No. 1 of I. O. of B. B.*, 94 N. Y. 580, the court held that the death of the insured, however sudden or unexpected, in no manner excused this prior necessity of completing the change of beneficiary prior to his decease. In *Thomas v. Thomas*, 131 N. Y. 205, 27 Am. St. Rep. 522, 30 N. E. 61, the court said: "Undoubtedly the assured in this case acted in good faith, and from the best motives. . . . Very likely he believed he had so far modified his first appointment of a beneficiary as to include his wife therein, and that, if he had supposed any action on the part of the corporation was necessary, it would have been sought and obtained. But it is not a case where equity can interfere to remedy a defective execution of a power. . . . The insurance company did not in the lifetime of the insured assent to the change of the beneficiary."

In *American Legion of Honor v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770, it was said: "No person can successfully assert

a right to the fund payable on the death of a member, unless he can show that he has been appointed the beneficiary of such member in the manner required by the contract, and that, in cases where the contract requires the assent of the corporation to his designation, he will acquire no right to the fund unless such assent be given": See, also, *National Mutual Aid Soc. v. Lupold*, 101 Pa. St. 111; *Wendt v. Iowa Legion of Honor*, 72 Iowa, 682, 34 N. W. 470; *Jinks v. Banner Lodge*, 139 Pa. St. 414, 21 Atl. 4; *Mutual Life Ins. Co. v. Watson*, 30 Fed. 653; ²⁰³ *McLaughlin v. McLaughlin*, 104 Cal. 171, 43 Am. St. Rep. 83, 37 Pac. 865; *Grand Lodge of A. O. U. W. v. Gandy*, 63 N. J. Eq. 692, 53 Atl. 142.

In the case at bar, the attempted change of June 16, 1902, from the son to the wife was not made in accordance with the provisions of the statute and the contract.

3. It is insisted, however, on the part of the appellee, that if the insured does all that he is required to do and all that it is in his power to do, and dies, equity will declare the change complete. In other words, it is said that, in the case at bar, Josef Freund took his written notice of change and his policy on June 16, 1902, to the cashier at the local branch office in Chicago, and delivered them to him to be forwarded to the home office in New York for the requisite indorsement, and that, although he died on the next day, June 17, 1902, he had done all that he was required to do, and that nothing remained for the company to do, except the formal act of making the required indorsement upon the policy. Whether this rule, laid down in some of the cases, applies here depends upon several considerations. In the first place, it must be true that the company was obliged to make the indorsement upon the policy upon the ground that the making of such indorsement was a merely formal act, not requiring the exercise of any discretion. The question then arises whether or not the making of such indorsement was merely a ministerial act.

It is said in *Joyce on Insurance*, volume 2, section 751: "As a general rule, it is probably true that, if the assured has taken all the steps necessary and otherwise done all in his power to effect a change of beneficiary, and all that remains to be done is some purely ministerial duty on the part of the officers of the society, then the change will be regarded as complete." In *Niblack on Accident Insurance and Benefit Societies*, second edition, section 223, it is said: "When a member has done all that he is required to do under the contract to effect a

change of beneficiaries, the change will be deemed complete,²⁰⁴ even though some ministerial acts of the officers of the society are still to be performed."

A ministerial act may be defined to be "one which a person performs upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority without regard to or the exercise of his own judgment upon the propriety of doing the act": 20 Am. & Eng. Ency. of Law, 2d ed., p. 793.

In the case at bar, the company, under the statute, was required to give its consent to the change, and under the contract the company could only indicate its consent to such change by an indorsement in writing upon the policy at the home office. Certainly, the statute meant something when it stated that the right of the assured to change the beneficiary was dependent upon the consent of the company. The giving of consent is not a mere ministerial act, because it involves the exercise of judgment. We do not construe the New York statute as requiring the company to give its consent independent of the exercise of any judgment on its part whether it was right or proper to give such consent. Therefore, the act here required to be done by the company not being a mere ministerial act, the principle invoked does not apply.

The principle thus invoked by counsel for appellee that, when the assured has done all that he is required to do, and dies, equity will declare the change complete, is not really a rule, but it is an exception to the general rule, that the change can only be accomplished in compliance with the provisions relating to such change by and with the consent of the company. Most of the cases cited in support of this exception to the rule are cases in relation to certificates issued by fraternal or benefit insurance societies. In many of these cases the assured was required to surrender the old certificate that had been issued to him before a new certificate was issued, and the facts showed that the beneficiary had refused to surrender the old certificate, so that the insured was unable to²⁰⁵ deliver it up to the company when he applied for a new certificate; and in such cases it was held that the assured had done all he could do, and that it would be inequitable to allow a beneficiary to take advantage of his own wrong. No such state of facts exists here.

In the next place, although it may be true that the beneficiary has no vested right in the fund named in the policy during the life of the assured, and has no greater than a mere

expectancy, yet, when the assured dies, the beneficiary acquires rights which cannot be cut off except in the manner prescribed by the contract. If no other valid appointment has been made—that is to say, if no other selection of a beneficiary has been made in the manner prescribed by the statute and the contract before the assured dies—then, upon his death, the beneficiary, whose selection was valid, or was in accordance with the provisions of the statute and the contract, has a vested interest in the fund. So, in the case at bar, although the interest of her son, Karl Freund, was a mere expectancy during the lifetime of his father, yet when his father died on June 17, 1902, the son's interest became a vested one, because the change sought to be made in favor of his mother had not been made in accordance with the provisions of the statute and the contract, and did not amount to a valid appointment. This is the rule in the case of a mutual benefit society, and is much more readily applied in case of a regular insurance policy issued by an insurance company. In Niblack's work on Accident Insurance and Benefit Societies, second edition, section 218, it is said: "The power reserved to the member to change the beneficiary qualifies the right of the beneficiary in the contract. It makes the interest of the beneficiary a mere expectancy while the power to revoke the appointment continues; but this expectancy becomes an absolute right upon the death of the member, unless he has in the manner prescribed defeated it by the affirmative act of changing the beneficiary." This doctrine is sustained by many of the authorities, already referred to and quoted ²⁰⁶ from. Such is the rule as laid down by the decisions in this state. In *Martin v. Stubbings*, 126 Ill. 387, 9 Am. St. Rep. 620, 18 N. E. 657, where the contest was between the widow of the deceased and a creditor, it was held that, in the case of mutual benefit societies, the beneficiary named in the certificate of membership acquires no vested right to the benefit to accrue upon the death of the member until such death occurs, and that all the beneficiary has during the life of the member, owing to the right of revocation in the latter, is a mere expectancy dependent upon the will and act of the holder of the certificate; and it was there said: "She was to all intents and purposes a stranger to the transaction. Her rights could arise only upon the death of Martin, and then only in case he had wholly failed to make a valid and effectual appointment of another beneficiary in her place." In *Benton v. Brotherhood of Railroad Brakeman*,

146 Ill. 570, 34 N. E. 939, it was held that the person designated in the certificate of membership of the assured, during the lifetime of the latter, has no vested interest in the certificate or the money that may become payable thereunder, and that the position and rights of the beneficiary become vested at the death of the assured; and it was there said: "Her title to the position and rights of beneficiary became vested, if at all, at Benton's death, and must depend upon the facts as they then existed." So, here, the rights of Karl Freund, the son, depend upon the facts as they existed at the time of the death of his father, and the rights of appellee, the wife of the assured, must depend upon the facts as they then existed. This being so, Karl Freund, the son, was the legal beneficiary, and the attempted appointment of the wife on June 16, 1902, had not become complete by reason of the failure of the company to consent thereto and to make the indorsement upon the policy, as required thereby.

4. It follows from this that, under the facts of this case, there was no waiver by the company of its right to give its consent in the way required by the statute and the policy. It is said by counsel for appellee that the provisions ²⁰⁷ in regard to consent and indorsement, and in regard to the mode of changing the name of the beneficiary, were solely for the protection of the company, and, therefore, could be waived by the company. This is true, provided the acts alleged to amount to a waiver were performed during the lifetime of the assured, but the company could not perform any acts which would amount to a waiver as against the son, Karl Freund, after his rights had vested by the death of his father. The contention is that the company, by filing the present bill of interpleader and paying the money into court, thereby waived a noncompliance with the provisions for a change of beneficiary. But the filing of the bill for interpleader was an act which occurred long after the death of the assured, Josef Freund. Some of the authorities seem to hold that the filing of such bill of interpleader amounts to a waiver even after the death of the assured, but these are cases which arose where there was no such statute as that of New York, here quoted, and where the fact that the rights of the beneficiary had become vested by reason of the death of the assured seems to have been overlooked.

In Niblack's work on Accident Insurance and Benefit Societies, second edition, section 222, it is said: "The member and

the society may, during the life of the member, waive these requirements, and may agree upon a new beneficiary of the contract, in any manner satisfactory to both parties. It does not follow, however, that after the death of a member the society may waive these requirements, and recognize as valid an attempted change of beneficiaries made by the member in a manner different from that set forth in the contract. The rights of the parties are controlled by the contract as it was at the date of the death of the member, and, after these rights have attached by the death of the member, no consent or act of the society can defeat or even affect them. . . . The payment of the fund into the court for the benefit of the person, who may be declared to be entitled to it, in no way improves or prejudices the legal position of ²⁰⁸ either the original or the substituted beneficiary": See, also, *Fink v. Fink*, 171 N. Y. 616, 64 N. E. 506; *Thomas v. Thomas*, 131 N. Y. 205, 27 Am. St. Rep. 522, 30 N. E. 161; *Wendt v. Legion of Honor*, 72 Iowa, 682, 34 N. W. 470. In *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561, it was said: "The fact that the association had paid the money into court, instead of paying it directly to the widow to avoid litigation with other claimants, can make no difference as to the rights of the persons claiming the same. If the appellant could not have recovered this money in a direct action against the association, he cannot recover it in this action." In *Ireland v. Ireland*, 42 Hun, 214, it was said: "The insurance association was thus allowed to drop out of the contest, upon the theory that it was ready to pay the rightful claimant. Its payment of the money does not in any way better or prejudice the legal position of either party against the other. The party that succeeds must make a case that would have entitled her to succeed against the association."

So, in the case at bar, the mere fact that the company paid the money into court to be disposed of as the court should direct cannot operate as a waiver of any of the vested rights of Karl Freund, which accrued by reason of the death of his father. The waiver by the company can only operate in favor of the assured as between the company and the assured, but not as between the company and the third persons, whose rights have vested by the death of the insured.

For reasons above stated, we are of the opinion the decree of the superior court of Cook county was correct, and that the judgment of the appellate court reversing the decree was erroneous.

Accordingly, the judgment of the appellate court is reversed and the decree of the superior court affirmed.

A Change in the Beneficiaries named in a policy of insurance issued by a benefit society cannot ordinarily be made except by a substantial compliance with the regulations of the society; and yet courts of equity recognize exceptions to this general principle: *Jory v. Supreme Council*, 105 Cal. 20, 45 Am. St. Rep. 17. See, also, *Independent Foresters v. Keliher*, 36 Or. 501, 78 Am. St. Rep. 785, and cases cited in the cross-reference note thereto; *Lahey v. Lahey*, 174 N. Y. 146, 95 Am. St. Rep. 554; *McCarthy v. Supreme Lodge*, 115 Mass. 314, 25 Am. St. Rep. 637.

FOLSOM v. HARR.

[218 Ill. 369, 75 N. E. 987.]

SPECIFIC PERFORMANCE.—An Agreement in Case the Landlord Agreed to Sell the Leased Premises, He Would Give the Lessee the First Chance to buy them, no price being suggested nor any method provided by which to determine what the price will be, will not be specifically enforced. (p. 301.)

Franklin L. Chase, for the appellant.

Pierson, Pease & De Young, for the appellees.

³⁰⁰ **MAGRUDER, J.** The original bill in this case was filed on January 5, 1905, to which a demurrer was sustained. An amended bill was filed on March 13, 1905, to which a demurrer was filed and sustained. A second amended bill was filed on May 22, 1905. A general demurrer was filed to the latter bill, and sustained. The plaintiff elected to stand by his second ³⁷⁰ amended bill, and it was thereupon dismissed for want of equity at complainant's costs. The present appeal is prosecuted from such decree of dismissal.

The bill alleges that, on September 25, 1902, the appellee Harr, being the owner in fee of a certain lot 29 in Staples' subdivision, etc., in Cook county, by William P. Gronen, his agent thereunto duly constituted, on the day aforesaid entered into a certain written agreement under seal with appellant, Eugene Folsom, complainant in the bill, for the lease and sale thereof to appellant. The bill sets out said agreement in haec verba, dated September 25, 1902, between William P. Gronen, agent, party of the first part, and Eugene Folsom, party of the second part. By the terms thereof the first party leased said lot to the second party

from October 1, 1902, to September 30, 1905, for the rental of \$276, payable monthly in advance at the rate of \$7 per month for the first year, and at \$8 per month for the residue of the term, with covenants for yielding possession, payment of water tax, against subletting, for re-entry, and for removal of improvements made by second party, and containing the following covenant: "Should said party of the first part conclude to sell this property, then said second party is to have the first chance to buy the same." The said contract is signed "William P. Gronen, Agent (Seal); Eugene Folsom (Seal)," and was filed for record in the recorder's office of Cook county on December 13, 1904. The bill alleges that, under the contract, appellee Harr let appellant into possession of said lot on or about October 1, 1902; that appellant ever since has been and is now in possession and occupation of the same; that, in expectation that a sale would be made to him of said lands under the terms of the said contract, appellant has expended more than \$2,000 in improving said lands and erecting buildings thereon; that since September 25, 1902, appellant has been and is now ready and willing and able to perform said agreement on his part and accept a deed of said lot; that on November 24, 1904, appellee Harr concluded and determined to sell said lands for the sum and price of \$2,600, and, in violation of his said contract with appellant, without giving appellant any chance or opportunity to buy said land, and without notice to or the knowledge of appellant, entered into a contract in writing with one John W. Warnshuis of Chicago for the sale and conveyance to said Warnshuis of said lot for \$2,600. The bill then sets out in *haec verba* the contract between Harr and Warnshuis, by which Harr agrees to convey to Warnshuis in fee simple by good and sufficient warranty deed said lot 29, and Warnshuis covenants to pay therefor \$2,600—\$1,500 on the signing of the contract, and the balance of \$1,100 on or before six months after date with interest at six per cent, and pay all taxes and assessments after 1903. The contract contains covenants for forfeiture of same and all payments made thereon in case of nonpayment, for re-entry, making time of the essence of the contract, and making the contract binding on the heirs and personal representatives of both parties, which contract was duly signed by the parties, and recorded in the recorder's office of Cook county on December 20, 1904. The bill al-

leges that Warnshuis had notice and knowledge, when the contract was executed to him on November 24, 1904, of the prior contract of September 25, 1902, for the leasing and sale of said lands to appellant, and that any interest which Warnshuis took in the lands is charged with the older and superior equity of appellant; that, in and by said contract with Warnshuis, Harr has concluded to sell said land at the price of \$2,600; that appellant is ready and willing and able and offers to pay Harr said sum of \$2,600 for said lands, and applied to Harr and offered to pay him said sum, and requested him to make to appellant a deed, but Harr denied that appellant had any right to such a conveyance, and refused to make the same, or to receive payment; that appellant is now entitled to have said lands conveyed to him by Harr for the price of \$2,600. The bill makes ³⁷² Harr and Warnshuis defendants, but does not make Gronen a defendant; and prays that the contract made by Harr with appellant may be specifically performed, and Harr be decreed to make complainant a deed of the said lands, and, in case of his failure to do so, that one of the masters may be ordered to make the same.

The question in the case is, whether the court properly sustained the demurrer to the bill, and properly dismissed the same for want of equity.

The bill is alleged by appellees to be demurrable upon several grounds. We only deem it necessary, however, to mention one of them. The demurrer to the bill was properly sustained, because the contract therein set up is so uncertain and indefinite that a court of equity could not decree its specific performance. It is well settled that a contract, in order to be specifically enforced by a court of equity, must be complete and specific and certain: *Brix v. Ott*, 101 Ill. 70; *Hamilton v. Harvey*, 121 Ill. 469, 2 Am. St. Rep. 118, 13 N. E. 210; *Barrett v. Geisinger*, 148 Ill. 98, 35 N. E. 354; *Winter v. Trainor*, 151 Ill. 191, 37 N. E. 869. The contract is uncertain, in that it states no price for which the land is to be sold, and states no method for the determination of such price. The language is: "Should said party of the first part conclude to sell this property, then said second party is to have the first chance to buy the same." The terms upon which the second party is to buy the land are not stated; nor is it stated at what price the party of the first part is to sell the land.

In *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741, the covenant was: "If the premises are for sale at any time, the lessee shall have the refusal of them." In that case it was said in regard to this covenant: "This is simply an agreement to give the lessee the first chance to make a contract—an agreement to sell, if the parties can agree, and not otherwise. It neither fixes the price nor provides a way in which it can be fixed." In *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555, in commenting upon the case of *Fogg v. Price*, 145 Mass. 513, 14 N. E. 741, this court said ³⁷³ (p. 417): "And it is manifest, as said by that court, that to justify specific performance at the suit of the lessee, 'a term would have to be added which is not in the contract.' And the court in that case further say: 'The contract certainly does not contemplate a sale to somebody else as a mode of ascertaining the price at which the lessor will sell to the lessee.' " In this respect the contract in the case at bar is different from the contract in *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555. In the latter case, the stipulation was as follows: "Said party of the first part hereby reserves the right or privilege of selling that portion of said land at any time from and after this date, but no such sale of said land shall be made by said first party without first having given said second party the privilege of purchasing said land upon such terms, and at the same price per acre, as any other person or purchaser might have offered therefor." There, the lessee was to have the privilege of purchasing the land upon such terms and at the same price as any other purchaser might offer therefor. No such language is contained in the covenant in the case at bar. Appellant was not given, by the clause contained in the lease to him, the first chance to buy the property at any price which another purchaser might offer therefor. If such language had been contained in the covenant, then it might be said, under the doctrine announced in *Hayes v. O'Brien*, 149 Ill. 403, 37 N. E. 73, 23 L. R. A. 555, that he could compel a specific performance of the contract upon offering to pay the price offered by Warnshuis, and upon the terms agreed upon with Warnshuis. But in the case at bar, the covenant not only does not fix any price, but it does not provide a way in which a price can be fixed—that is, it does not state that appellant should have a chance to buy the property upon such terms as another purchaser may offer to buy the same, the latter words amounting to the provision of a way in which the

price could be fixed. In *Hayes v. O'Brien*, it was said: "In most of the reported cases there has been an offer to sell, or an option to purchase, at a fixed price named in the written contract. ³⁷⁴ But this is not necessary where the written instrument fixes a definite mode of its ascertainment." In that case it was also said that, under the language there used, to wit, "upon such terms and at the same price per acre as any other person or purchaser might have offered therefor," the lessor "covenanted that, before he would sell to any other person than the lessee, at any price, the lessee might exercise his option to take the land at the price offered—that is, the lessee might purchase upon the terms and at the price the lessor was offered by another, which he decided to accept." There is no such language in the covenant here under consideration.

In *Hayes v. O'Brien*, quoting from *Fry on Specific Performance*, it is said: "It is evident that the price is an essential ingredient in the contract, and that where this is neither ascertained nor rendered ascertainable, the contract is void for incompleteness and incapable of enforcement. It is not, however, necessary that the contract should determine the price in the first place. It may appoint a way by which it is to be thereafter determined, in which case the contract is perfected only when the price has been so determined." "The principle governing is: When the contract appoints the mode of determining the price, and the price is determined according to that mode, the contract becomes perfect and complete, in all respects as if it had been originally fixed in the writing."

For the reason that the covenant in the lease executed between appellant and appellee Harr fixed no price and fixed no mode of determining the price, the contract is so uncertain and incomplete that a court of equity will not grant a specific performance of it. Consequently, the demurrer to the bill was properly sustained.

The decree of the superior court of Cook county dismissing the bill is affirmed.

Specific Performance cannot be decreed of an agreement the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable: *Russell v. Agar*, 121 Cal. 396, 66 Am. St. Rep. 35; *Bomer v. Canady*, 79 Miss. 222, 89 Am. St. Rep. 593. Uncertainty as to the amount to be paid as the consideration for an agreement is fatal to an application for specific performance: See the monographic note to *Atwood v. Cobb*, 26 Am. Dec. 668.

SIEGEL-COOPER & CO. v. TRCKA.

[218 Ill. 559, 75 N. E. 1053.]

NEGLIGENCE, CONCURRENT.—If the defendant is guilty of the negligence charged and without which the injury complained of would not have occurred, it makes no difference as to his liability that some act or agency of some other person also contributed to bring about the result for which damages are claimed. (p. 305.)

NEGLIGENCE.—The Defense that the Employer Could not Have Foreseen the Condition or Circumstances Leading to the Injury of the Plaintiff Employé, and therefore must be exonerated from the charge of negligence, cannot be sustained if the resulting accident proves that the conditions were dangerous, and the jury were of the opinion, which the evidence tended to sustain, that reasonable prudence and care required a different construction of the appliance causing the injury. (p. 306.)

MASTER AND SERVANT—Minor Employés, Risks not Assumed by.—The fact that an elevator which a minor employé was expected to use was of a visibly faulty construction which might expose him to injury does not establish his assumption of the risk of injury, where he was under fourteen years of age, and there is nothing to show that his attention was ever called to the claimed defect. Obedience to those in authority should be expected and commended in a child of his immature years. (p. 307.)

MASTER AND SERVANT—Minor Employés, Assumption of Risks by.—The rule in respect to the assumption of risks by employés is modified in the case of young persons of inexperience and immature judgment who are not capable of understanding and appreciating the perils to which they are exposed. They are entitled to recover for injuries resulting from such perils, unless they have been instructed how to avoid them. (p. 307.)

MASTER AND SERVANT—Minor Employés—Question for the Jury.—Whether an employé fourteen years of age should have appreciated the danger to which he subjected himself by reason of the construction of an elevator which he was required to use is a question for the jury. (p. 308.)

EVIDENCE OF EXPERTS, When Inadmissible.—It is error to refuse to receive the evidence of an expert witness as to whether it was as safe to have the doorway of an elevator constructed in the place charged as in a different place, and whether the plaintiff would have been injured if a different construction of the elevator had been pursued, or whether the construction of the doorway inflicting the injury was the usual and customary one as to such place, when the question of construction is not so intricate that the jury could not understand the situation, and it was their province to say whether the defendant was at fault in maintaining the arrangement by him. (p. 308.)

MASTER AND SERVANT.—If an Injury Results from the Negligence of a Master Combined with that of a Fellow-servant and the injury would not have happened had the master observed due care for the safety of the injured servant, the master is liable. (p. 309.)

Charles E. Pain, and Frank M. Cox, for the appellant.

A. M. Johnson, Charles Veseley and Beach & Beach, for the appellee.

⁵⁶⁰ RICKS, J. This is an appeal from a judgment of the appellate court for the first district affirming a judgment of the superior court of Cook county rendered in favor of appellee for the sum of fifteen hundred dollars for injuries received by appellee on October 25, 1901, while in the employ of appellant, and while he was, in the performance of his duties, riding upon an elevator in the building occupied by it.

The appellee, at the time of his injury, was fourteen years of age and had been in the employ of appellant about two months. The appellant conducted a department store in Chicago, occupying an eight story building, in which elevators were maintained and operated for the use of the employés in ascending and descending to and from the various floors in the discharge of their duties. Appellee was engaged in the window-shade department on the seventh floor, and in the performance of his duties was required to use the elevators of the building. On the day in question and in the performance of his duties he got upon the elevator in question at the fourth floor to ascend to the seventh. The first count of the declaration charges that this elevator "was negligently and carelessly constructed and maintained, in that at the entrance on the fourth story of said building to the shaft through which said elevator ran there was a doorway through the wall or partition (said wall or partition being of the thickness of, to wit, ten inches), about seven feet in height and about five feet in width, and the door or doors at said entrance ⁵⁶¹ leading to said elevator shaft were negligently, carelessly and without due regard to the safety of persons using said elevator placed on the side of said doorway most remote from the platform of the elevator car as it passed through the shaft in going from the fourth to the upper stories of the building. Said door or doors were thereby so separated from the elevator car that an open space of, to wit, ten inches, intervened between the outer edge of the platform of the car and the adjoining floor, which open space, when the car arrived on a level with the floor of the fourth story, was of the height of, to wit, seven feet, and the breadth of, to wit, five feet, and depth of, to wit, ten inches, the top of said doorway being closed by a solid wood or iron casing of the width of

the doorway and the thickness of the wall or partition, by reason whereof a passenger on said elevator, without any fault on his part, might sustain great and serious injury—all of which things the defendant knew or in the exercise of reasonable care might have known. On said day, after the plaintiff had executed the defendant's instructions, it became necessary and proper for him, in returning from the fourth story to the seventh story of the building, to take the elevator at the fourth story for the purpose of ascending to the seventh story. When the elevator, in ascending, arrived at the fourth floor the plaintiff entered it, and was received therein by the defendant's agent who was operating it, for the purpose of being transported to the seventh floor. While the elevator was ascending from the fourth floor, and before it reached the top of the said doorway, and while he was in the exercise of due care and caution for his own safety, another passenger, also an employe in said store, who was riding on said car, negligently, carelessly, wrongfully and wantonly seized the plaintiff, who was without fault or negligence, and pushed, pulled and threw him upon the floor of the car, causing his right foot and part of his right leg to extend over and beyond the platform of the car and to extend into the said open space. By reason of the negligent and careless ⁵⁶² conduct of the defendant in operating and maintaining the elevator with the entrance and door so constructed, said right foot and part of the right leg struck against the upper casing of the doorway with great violence and were caught therein as the elevator was ascending from the fourth floor, and said right foot was crushed, and the flesh pulled and scraped from the right leg and foot, and the muscles and tendons thereof were lacerated, torn and injured, and he became sick, sore, lame and disordered," etc. Three additional counts were filed, each differing but slightly from the first, and the defendant pleaded the general issue.

Appellant complains that the court refused to direct a verdict in its behalf at the close of all the evidence. We have examined the evidence with care, and are satisfied that there is ample evidence in the record tending to show that appellant was guilty of negligence. It is conceded that appellee was but fourteen years of age and had worked in the store but about two months, and that his work had nothing to do with the elevator in question, except that he was, in the discharge of his duties, required occasionally to ride on it

while being operated by the man regularly in charge thereof. In view of appellee's age and the rules of law governing the questions of contributory negligence and assumption of risk in case of minors, it was proper that these questions should be submitted to the jury for its determination. In support of appellant's contention with reference to this motion many questions are argued and much space consumed, cases from this court upon the subject of assumed risk, fellow-servant and contributory negligence being printed in the brief in extenso. Such of these as seem to require notice or consideration will be briefly considered.

It is first contended that appellant is not liable in this action because the proximate cause of the injury was the negligent act of the boy who threw appellee upon the floor of the elevator. If, however, appellant was guilty of the negligence charged in the declaration and without which the ⁵⁶³ injury in question would not have occurred, then it would make no difference, as to its liability, that some act or agency or some other person or thing also contributed to bring about the result for which damages are claimed. Both or either of the contributing agencies were liable for the injury occasioned by their negligence, appellee being without fault and not held to have assumed the risk involved in the improper construction. In the case of *McGregor v. Reid, Murdoch & Co.*, 178 Ill. 464, 69 Am. St. Rep. 332, 53 N. E. 323, which also grew out of an elevator accident, we said (p. 470): "Appellee insists that the pulling out of the cable ends from their fastenings was the proximate cause of the injury and that no recovery can be had for what is supposed to be the remote cause of the accident—the defective condition of the safety device. But this position is clearly untenable. The two causes operated together, and neither, alone, would have caused the elevator to fall, and if the pulling out of the cables was attributed to an accident or to the negligence of a third person, and still the elevator would not have fallen without the negligence of appellee, appellee would be liable, for both causes, operating proximately at the same time, caused the injury." And in *St. Louis Bridge Co. v. Miller*, 138 Ill. 465, 28 N. E. 1091, which grew out of an injury occasioned by the combination of negligence from two different sources, we also said (p. 476): "In legal contemplation the case is one where the injury was inflicted by the co-operating negligence of the bridge company and the persons in charge of the mules, and the rule is well settled that

a person contributing to a tort, whether his fellow-contributors are men, natural or other forces or things, is responsible for the whole, the same as though he had done all without help." And to the same effect is the case of *Village of Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, 22 N. E. 14, 4 L. R. A. 721, in which it is stated: "Where a party is injured by the concurring negligence of two different parties, each and both are liable, and they may be sued jointly or separately." This latter case appellant argues has no application to the case at bar, but in principle we see no difference, so far ⁵⁶⁴ as relates to that phase of the case with reference to liability for damage occasioned by two contributing causes. *Armour v. Golkowska*, 202 Ill. 14, 66 N. E. 1037, is also in point.

Counsel for appellant, however, insist that the appellant could not foresee such a combination of circumstances as led to the injury in this case and therefore cannot be held to have been negligent, citing *Armour v. Golkowska*. Whether this particular set of circumstances might have been foreseen or not, the fact of the accident proves the conditions to have been dangerous, and if the jury were of the opinion, as we think, under the evidence, they might well have been, that reasonable prudence and care would have required a different construction, then appellant is chargeable with negligence for permitting the conditions to exist as they were. The case above noted, cited by counsel for appellant, is directly adverse to their contention. In that case a barrel fell on appellee and injured her. She sued and obtained damages, and on appeal to the appellate court, and then to this court, the judgment of the lower court was sustained, and in that case the rule as announced in 21 American and English Encyclopedia of Law, second edition, page 509, was quoted, as follows: "The question whether, from the act or omission complained of, the likelihood of injurious consequences should reasonably have been foreseen is also for the jury." And in discussing the facts of that case the court said (p. 147): "Whether an ordinarily thoughtful and prudent man would have foreseen that it was reasonably necessary to the safety of persons working on the floor beneath the edges of the platform that a railing or barrier of some sort should be placed upon the platform was not a question of law for the court, but of fact for the jury."

Counsel for appellant next insist that appellee assumed the risk involved in the particular construction of the ele-

vator, and entrance thereto, by reason of his continued employment and the open, visible condition of the construction complained of. We do not agree that appellee is precluded⁵⁶⁵ from recovery in this case by reason of the doctrine of assumed risk. He was a child of but about fourteen years of age, and, under the conditions here presented, the rule to be applied and the doctrine universally followed in such cases is well stated in volume 7 of the American and English Encyclopedia of Law, second edition, page 408, as follows: "As the standard of care thus varies with the age, capacity and experience of the child, it is usually, if not always, where the child is not wholly irresponsible, a question of fact for the jury whether the child exercised the ordinary care and prudence of a child similarly situated; and if such care was exercised, a recovery can be had for an injury negligently inflicted, no matter how far the care used by the child falls short of the standard which the law erects for determining what is ordinary care in a person of full age and capacity." There is no question in this case but that appellee did exercise reasonable care, unless it be said that he should have comprehended the danger involved in the construction complained of and refused to subject himself to the risk occasioned by it. There is no evidence that his attention was ever specially directed to this, and the evidence shows he was expected and directed by his superiors to use the elevator in question in the regular line of his duties. Obedience to those in authority, in a child of immature years, should be expected and commended; and that the appellee should not question the security of his surroundings with the same discriminating judgment as would a person of mature years and ripe experience is not to be wondered at, and is a circumstance which a jury might well consider in passing upon the question of assumed risk.

In speaking of the difference to be observed in the application of the rule of assumed risk as between minors and adults, this court, in *Chicago Anderson Pressed Brick Co. v. Reinneiger*, 140 Ill. 334, 33 Am. St. Rep. 249, 29 N. E. 1106, said (p. 338): "But the rule is modified in the case of young persons of inexperience and immature judgment, who are not capable of fully understanding and appreciating the perils to which they are exposed."⁵⁶⁶ They are entitled to recover for injuries which result from such perils unless they have been instructed how to avoid them." And in discussing this subject in *Herdman-Harrison Milling Co. v. Spehr*, 145 Ill. 329, 33 N. E. 944,

with reference to the general rule applicable to adults and its limitations when applied to minors, we said (p. 334): "That this general rule does not apply to employes who from youth or want of the natural faculties are unable to appreciate the danger incident to the employment or which may result from the continued use of defective machinery or tools is equally well settled."

Under the circumstances shown in this case, whether appellee should have appreciated the danger to which he was subjected by reason of the construction complained of was a question of fact for the jury. The jury, in returning a verdict for appellee, under proper instructions, found that he did not appreciate this danger, and that finding has been concurred in by the appellate court, since it sustained the judgment of the lower court; consequently the question is not now open to our consideration.

It is next insisted by counsel for appellant that the trial court erred in not permitting certain expert witnesses offered by appellant to testify whether it was as safe to have the doorway in question on the outside as the inside of the entrance; and also in not permitting certain witnesses to express their opinions whether appellee would not have lost his foot if an iron grill-work and gate had been maintained, and to state whether the construction of the doorway was the usual and customary one as to such places. We do not think error was committed in the regard mentioned. This question of construction was not so intricate but that the jury could understand the situation, and it was their province to say whether appellant was at fault in maintaining the arrangement adopted by it. In *Beidler v. Branshaw*, 200 Ill. 425, 65 N. E. 1086, it was expressly held that evidence as to the usual and customary ⁵⁶⁷ manner of the construction of elevators was not admissible in determining whether a defendant was negligent in maintaining an elevator shaft in a particular manner.

It is insisted by counsel for appellant that the trial court erred in refusing an instruction offered by appellant relative to the doctrine of fellow-servant. It was not error to refuse this instruction because the doctrine of fellow-servant was not involved. The charge against appellant was for negligence in maintaining an improper construction, and if the appellant was guilty in this regard the jury were justified in finding the issues for appellee. And even if a fellow-servant

did contribute to the injury sustained by appellee, as we have already stated, if appellant contributed also to the injury by the maintenance of an improper construction and without which the injury would not have been occasioned, appellant would be liable. As said in *Armour v. Golkowska*, 202 Ill. 144, 66 N. E. 1037: "If an injury result from the negligence of the master combined with that of a fellow-servant, and the injury would not have happened had the master observed due care for the safety of the injured servant, the master is liable"; citing *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215, and 12 Am. & Eng. Ency. of Law, 2d ed., 905.

Other objections are urged by counsel for appellant, but we think it unnecessary to discuss them seriatim, for, as we understand them, they are all included in the objections already considered, and according to the views we have already expressed they must be held to be untenable.

We find no material errors to have been committed in the trial of this case, and the judgment of the appellate court is affirmed.

The Liability of Owners of Elevators used by passengers or employés is discussed in the monographic note to *Southern Bldg. etc. Assn. v. Dawson*, 56 Am. St. Rep. 806-810. If the pulling out of elevator cables and the defective condition of a safety device operate together, and neither alone would have caused the elevator to fall, and if the pulling out of the cable is attributable to the negligence of a third person, and still the elevator would not have fallen without the negligence of its owner in regard to keeping the safety device in working order, the latter is liable: *McGregor v. Reid*, 178 Ill. 464, 69 Am. St. Rep. 332.

If an Injury is Produced by the Concurrent Acts of Negligence of two or more persons, although their acts are distinct and separate, yet they incur a joint and several liability for the injury which they produce: *Pugh v. Chesapeake etc. Ry. Co.*, 101 Ky. 77, 72 Am. St. Rep. 392; *Dolg v. Cook*, 126 Cal. 213, 77 Am. St. Rep. 171; *Carterville v. Cook*, 129 Ill. 152, 16 Am. St. Rep. 248, and note.

CREIGHTON v. ROE.

[218 Ill. 619, 75 N. E. 1073.]

DEED.—The Delivery of a Deed may be by acts or words or both, or by one without the other; but what is said or done must clearly manifest the intention of the grantor and the grantee that the deed shall at once become operative to pass the title to the land conveyed and that the grantor shall lose all control of it. (p. 311.)

DEED, Delivery of.—In the Case of a Voluntary Settlement the law makes a stronger presumption in favor of delivery than in the ordinary case of bargain and sale, for the reason that it is an attempt on the part of the grantor to make a settlement. (p. 311.)

DEEDS, Delivery of.—The Placing of Record by a Grantor of a Voluntary Conveyance to his daughter raises a presumption of its delivery, though he retained possession of the property as his own. (p. 313.)

DEED to Defraud Wife of Her Right of Dower—Relief Against in Equity.—A grantor cannot maintain a suit in equity to cancel a voluntary conveyance from himself to his daughter, on the ground that, though he placed it of record, he never delivered it, and his object was to deprive his wife of her right to dower in the premises conveyed. (pp. 313, 314.)

Bill in equity by Isaac Creighton against his daughter, Sarah C. Roe, to have set aside and canceled the record of a certain deed executed by him and his wife to such daughter, but claimed by him to have never been delivered. When the deed was signed and acknowledged, the plaintiff, then more than seventy years of age, lived unhappily with his wife, and a separation and litigation between them were expected. He claimed that the deed was executed for the purpose of preventing his wife from getting the property in anticipated divorce proceedings. The wife was induced to sign the deed by the fact that she then had four hundred dollars on deposit in bank in the husband's name, which he refused to give to her until she signed the deed. It was executed December 20, 1900, and remained in her husband's possession until February 1, 1901, at which time the wife left home, and on the day following he filed the deed for record, with instructions to the recorder to record and return it by mail, and it was thereafter so recorded and returned. The grantee was not a member of the grantor's family, but was a married woman of mature years, having a home of her own. The property was leased and the rents were thereafter paid to the grantor, and two years after the date of the conveyance a suit was brought against the wife for divorce on the ground of desertion, abandonment, and extreme cruelty, and a divorce was obtained on

March 21, 1903, and on the 11th of September following this suit was commenced. The cause was referred to a master, who found that the deed was executed in pursuance of an intention of the plaintiff to make a distribution of his property to his children and to place the title beyond the reach of his wife, so that she could have no inchoate right of dower or other interest therein. The master also found that the plaintiff was not entitled to any relief and that the bill should be dismissed for want of equity. Exceptions to the master's report were overruled and a decree entered in accordance therewith, and the plaintiff appealed.

D. D. Evans and Waldo Carl Evans, for the plaintiff in error.

O. M. Jones, for the defendant in error.

⁶²¹ WILKIN, J. It is first claimed as a ground of reversal that the deed was never delivered by plaintiff in error, and that this is evidenced by the fact that he always retained the possession of the same, together with the property conveyed. The question as to what acts are necessary to constitute a sufficient delivery to render a deed operative and to pass the title to land has been the subject of much discussion in this court. The deed may be delivered to the grantee or to his agent. No particular form or ceremony is necessary to constitute such a delivery. It may be by acts or words or both, or by one without the other; but what is said or done must clearly manifest the intention of the grantor and of the grantee that the deed shall at once become operative to pass the title to the land conveyed and that the grantor shall lose all control over the deed: *Byars v. Spencer*, 101 Ill. 429, 40 Am. Rep. 212. The question of delivery is one both of law and of fact. From the details of such facts and attending circumstances is to be determined the legal question as to whether such acts and declarations ⁶²² constitute a legal delivery: *Shults v. Shults*, 159 Ill. 654, 50 Am. St. Rep. 188, 43 N. E. 800. In cases of voluntary settlement the law makes stronger presumptions in favor of the delivery than in any ordinary case of bargain and sale, for the reason that it is an attempt on the part of the grantor to make a settlement: *Bryan v. Wash*, 2 Gilm. 557; *Cline v. Jones*, 111 Ill. 563. Such settlements, fairly made, are binding on the grantor unless there be clear and decisive proof that he never parted or intended to part with

the possession of the deed, and if he retained it the weight of authority is decidedly in favor of its validity, unless there are other circumstances besides the mere fact of his retaining it to show that it was not intended to be absolute: *Shults v. Shults*, 159 Ill. 654, 50 Am. St. Rep. 188, 43 N. E. 800; *Otis v. Beckwith*, 49 Ill. 121; *Perry on Trusts*, sec. 103. It therefore follows that the intention of the grantor is the controlling element.

In the case of *Brady v. Huber*, 197 Ill. 291, 90 Am. St. Rep. 161, 64 N. E. 264, the appellee sought to avoid a deed made to his daughter in fraud of creditors, and on page 294 we said: "We think it must be held the deeds were delivered at the time of the making thereof. The evidence shows two deeds from the father to the daughter were executed at the same time, one conveying to her the property here involved—the Alton property, in Madison county, Illinois—and the other the land in the county of St. Charles, in the state of Missouri; that the appellee, her father, sent the appellant, the daughter, with the deed to the Missouri land to St. Charles to be filed for record, and that he took the other deed to Edwardsville, the county seat of Madison county, and filed it with the recorder to be recorded. Both deeds were duly recorded. The appellee testified the deeds were both returned to him by mail by the respective recording officers, and the appellant, his daughter, swears they were sent to her by such officers. The execution and recording of the deed here involved, by the appellee, raise the presumption, in law, that he intended to divest himself of title, and unless such presumption is rebutted it must be held the deeds were delivered: 9 Am. & 623 Eng. Ency. of Law, 2d ed., p. 159, and many cases decided in this court, cited in note 4. In *Union Mutual Life Ins. Co. v. Campbell*, 95 Ill. 267, 35 Am. Rep. 166, we said (p. 284): 'The mere act of recording, alone, as we have seen, is but prima facie evidence of a delivery and liable to be rebutted; and it is successfully rebutted, as all the cases agree, when it is shown that the deed was not in the nature of a family settlement or of a gift to a minor (as to which hereafter), but is intended to confer no benefit upon the grantee, and its execution and recording are wholly unknown to him until after the death of the grantor.' In *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68, 11 N. E. 893, we said (p. 97): 'We think, in the case of an adult grantee, the acknowledging and recording of the deed without his knowledge or consent does

not, of itself, according to the weight of authority, amount to a delivery.' In *Sullivan v. Eddy*, 154 Ill. 199, 40 N. E. 482, we held the presumption of delivery arising from the registration of a deed had been successfully rebutted by proof, among other things, that the grantee was ignorant of the execution and recording of the deed and claimed nothing under it But here no question of acceptance can arise. It appeared without dispute the appellee, influenced by the fear that his lands might be seized by a creditor, executed a conveyance thereof to his daughter with intent to divest himself of title so that it would be beyond reach of his creditors; that the deed imposed no burden on the grantee, but was without condition or qualification and was beneficial to her; that the daughter, the grantee, well knew of the execution of the deeds and consented that the conveyances should be made to her, and that the grantor, with the knowledge and consent of the grantee, placed the deed upon the public records, with the intent it should be deemed and taken by his creditors as a completed and effective conveyance of the premises. Under such circumstances the grantor must be deemed concluded by the presumption of delivery which arises from the recording of the deed: *Walton v. Burton*, 107 Ill. 54; *Thompson v. Dearborn*, 107 Ill. 87; ⁶²⁴ *Moore v. Giles*, 49 Conn. 570. Manual delivery by the grantor to the grantee is not essential: *Rivard v. Walker*, 39 Ill. 413; *Rodemeier v. Brown*, 169 Ill. 347, 61 Am. St. Rep. 176, 48 N. E. 468."

From the above authorities and from the evidence in this case we are of the opinion that there was a prima facie delivery of the deed to the defendant in error and such an acceptance of the same by her as to convey title, and that this prima facie case has not been so rebutted as to overcome the presumption. The circuit court was therefore not in error in decreeing that the deed was delivered.

There is another good reason why the decree of the circuit court must be affirmed. The bill is a confession on the part of the plaintiff in error that he made the deed which he now seeks to avoid, for the purpose of placing his property in such condition that his wife could not secure her dower out of it. He does not, on his own showing, come into court with clean hands, and on that ground alone is not in a position to ask relief in equity. He does not claim in his bill that he was induced by others to form the unlawful purpose, but only that he was taken advantage of in the execution of that purpose.

The only lawful means by which he could place his property in a condition so that it would not be charged with the right of dower of his wife was to divest himself of the title to it by a conveyance made in good faith. That he could not put it out of his hands for the purpose of defeating dower, and when the motive for so doing had ceased invoke the aid of a court of equity to reinvest himself with the title, is too well known for controversy: *Muller v. Balke*, 154 Ill. 110, 39 N. E. 658; *Tyler v. Tyler*, 126 Ill. 525, 9 Am. St. Rep. 642, 21 N. E. 616.

We find no reversible error, and the decree of the circuit court will be affirmed.

The Recording of a Deed is prima facie evidence of its delivery: See the monographic note to *Brown v. Westerfield*, 53 Am. St. Rep. 547; *Dewitt v. Shea*, 203 Ill. 393, 96 Am. St. Rep. 311; *Brady v. Huber*, 197 Ill. 291, 90 Am. St. Rep. 161, and cases cited in the cross-reference note thereto; *Gulf Red Cedar Lumber Co. v. O'Neal*, 131 Ala. 117, 90 Am. St. Rep. 22. The recording of a deed of gift with intent to pass it is a sufficient delivery: *Holmes v. McDonald*, 119 Mich. 563, 75 Am. St. Rep. 430.

A Conveyance Made to Defraud Creditors is binding upon the parties when fully consummated. Neither of them can rescind or defeat it, nor does the law afford a remedy either to disturb or enforce it, if they are in pari delicto: *Kirby v. Raynes*, 138 Ala. 194, 100 Am. St. Rep. 39; *Brady v. Huber*, 197 Ill. 291, 90 Am. St. Rep. 161, and cases cited in the cross-reference note thereto.

CHICAGO HEIGHTS LUMBER COMPANY v. MILLER.

[213 Ill. 79, 76 N. E. 52.]

STATUTE OF FRAUDS.—Verbal Acceptance of a written request of another to pay his debt, where the person accepting is not indebted to such other and has none of his funds in his hands, and payment of part of the amount by check, together with a verbal agreement to pay the balance and the retention of the written request in his possession, is nevertheless within the statute of frauds as a verbal promise to pay the debt of another, and cannot be enforced. (p. 315.)

STATUTE OF FRAUDS.—Verbal Acceptance by the drawee of a bill of exchange, who holds no funds of the drawer, is no more than a parol promise to answer for the debt of another, and therefore within the statute of frauds. (p. 315.)

Rosenthal, Kurz & Hirschl, for the appellant.

W. H. Johnson and R. W. Millar, for the appellee.

⁸² SCOTT, J. Miller Brothers held no fund belonging to Frink and were not indebted to him. If Frink, under these

circumstances had orally requested Miller Brothers to pay his debt to Chicago Heights Lumber Company, and Miller Brothers had verbally promised the company to do so, the promise would have been within the statute of frauds. Does the fact that Frink's request to Miller Brothers to pay his debt was in writing and that the written request was left with appellee when he paid a part of the debt and verbally agreed to pay the remainder, make a material difference? We think not. In either event Miller Brothers could recover from Frink any amount paid in pursuance of his request. The only difference is, that in one instance the evidence of Frink's request lies in parol while in the other it is in writing. In either case the promise to pay Frink's debt is verbal and the statute of frauds presents a complete defense.

The only case to which our attention has been called, where, upon the oral acceptance of such an order, the writing itself was left with the acceptor, is that of *Louisville etc. Ry. Co. v. Caldwell*, 98 Ind. 245. The views there expressed by the court of last resort of the state of Indiana are consonant with the conclusion reached above.

If the written request of Frink be regarded as a bill of exchange the result would not be different, as the verbal acceptance by the drawee of a bill of exchange, who holds no funds of the drawer, is no more than a parol promise to answer for the debt of another: *Browne on Frauds*, 174; 2 Rob. Pr. 152; *Quinn v. Hanford*, 1 Hill, 82; *Pike v. Irwin*, 1 Sand. 14; *Manley v. Geagan*, 105 Mass. 445; *Plummer v. Lyman*, 49 Me. 229; *Wakefield v. Greenhood*, 29 Cal. 597; *Walton v. Mandeville*, 56 Iowa, 597, 41 Am. Rep. 123, 9 N. W. 913.

The judgment of the appellate court will be affirmed.

Authorities Bearing upon the Decision in the principal case will be found in the monographic note to *Packer v. Benton*, 95 Am. Dec. 261. The general rule is, that the promise to answer for the debt or default of another must be evidenced by a writing: *Stewart v. Jerome*, 71 Mich. 201, 15 Am. St. Rep. 252; *Riegelman v. Focht*, 141 Pa. St. 380, 23 Am. St. Rep. 293.

HIGGINS v. HIGGINS.

[219 Ill. 146, 76 N. E. 86.]

HUSBAND AND WIFE—Conveyance in Fraud of Intended Wife.—If a conveyance is voluntary and without consideration, and the intention of the grantor is to defraud any person whom he should marry of her marital rights, it makes no difference, as affecting the validity of the transaction, that he has not yet selected any particular person as his wife. To render the conveyance void for fraudulent intent, it need not be directed against any particular person. (p. 320.)

HUSBAND AND WIFE—Conveyance in Fraud of Wife.—With respect to her marital rights the law affords the same protection to a wife as to a creditor of the husband, and a voluntary disposition of property made with specific intent to defraud a future wife of her marital rights is void. (p. 320.)

HUSBAND AND WIFE.—The wife is within the protection of the statute against conveyances made with intent to defraud; and if the conveyance made by the husband is purely voluntary, it is not necessary that the grantee participate in the intent of the grantor. (p. 320.)

HUSBAND AND WIFE—Conveyance in Fraud of Intended Wife.—It is as much a fraud for a man, on the eve of his marriage, unknown to his wife, to make a voluntary conveyance of property to defeat the interests which she would acquire in the property by virtue of her marriage, as it is for a debtor who contemplates contracting a debt, to voluntarily dispose of his property in order to defeat the interests of future creditors. (p. 320.)

HUSBAND AND WIFE—Conveyance in Fraud of Wife—Laches.—As soon as a wife learns the facts, she may, even though her husband is still living, bring suit to set aside a deed executed by him in fraud of her marital rights, and may therefore lose her right by long delay after she knows the material facts. (p. 320.)

HUSBAND AND WIFE—Conveyance in Fraud of Wife—Laches.—A wife may, during her husband's lifetime, sue to set aside a deed by him in fraud of her marital rights. (p. 320.)

PLEADINGS.—Proof and Decree must correspond, and facts disclosed by the evidence which would warrant relief will not sustain a decree where such facts are not alleged. (p. 321.)

A. C. Norton and R. B. Campbell, for the appellants.

E. A. Simmons and R. S. McIlduff, for the appellee.

147 **CARTWRIGHT, C. J.** The appellee, Johanna Higgins, was the second wife of John Higgins, and was married to him on May 17, 1887. She filed her bill in this case in the circuit court of Livingston county on March 19, 1903, for the purpose of setting aside a deed of eighty acres of land made by her husband, dated May 2, 1887, and recorded July 23, 1887, alleging that the deed was not in fact made and delivered until after her marriage, and was without consideration

and in fraud of her marital rights. John Higgins and the grantees in the deed, with the husbands and wives of such of the children as were married, were defendants. The husband, John Higgins, was defaulted, and the other defendants, except Margaret Higgins, a daughter, answered, alleging that the deed was made, acknowledged and delivered on the day it was dated, and denying that it was executed to defraud the complainant of her marital rights. A replication having been filed, the cause was referred to a master in chancery to take and report the evidence and his conclusions. Before the master reported John Higgins died, and his death was suggested and leave was given to make his personal representative a defendant. A supplemental bill was filed on July 15, 1905, in which the death of John Higgins was alleged, and complainant claimed homestead and dower in the land and prayed that the same might be assigned and set off to her. The personal representative was not made a defendant, and counsel say that the complainant is herself the administratrix; but the personal representative was not a necessary party, since the dower and homestead are not subject to any rights of the administrator. Counsel for appellants say that the supplemental bill was not answered by Margaret Higgins, but the abstract filed by them shows that the bill was answered by all the defendants and that a replication ¹⁴⁸ to the answer was filed. The master reported that the deed was executed and delivered prior to the marriage and prior to the acquaintance of John Higgins with complainant, and he recommended the dismissal of the bill. Objections to the report were filed by the complainant, which were afterward heard as exceptions, and a decree was entered setting aside the deed as against complainant. The court found by the decree that the deed was executed at the time it bore date, prior to the marriage, but that it was executed without consideration and in contemplation of marriage with the complainant, and that it was executed and delivered for the fraudulent purpose of defrauding her of her marital rights. It was ordered that homestead and dower be assigned to her, and commissioners were appointed for that purpose. The defendants appealed from the decree.

The facts proved were, in substance, as follows: John Higgins was a widower with six children and owned a farm of eighty acres near Pontiac, which he occupied as a homestead with his children, except his son Patrick, who lived at Flanagan, about fourteen miles distant, where he kept a harness-

shop. On May 2, 1887, John Higgins made and acknowledged the deed in question, conveying the land to his children and reserving to himself a life estate. He showed the deed to the children who were at home and told them that he was going to Ireland; that he wanted to have things straightened up, so that in case anything should happen to him there would be nothing to worry him, and that Pat could take care of the deed. Shortly afterward he went to Flanagan and gave the deed to the son Patrick, saying that he wanted the son to take care of it and in case anything should happen to him it would protect the interest of the children in the property. He also said that he was going east and might go to Ireland. In fact, he contemplated going to New York to buy a piece of land and he did not intend to go to Ireland. Patrick took the deed and put it in his safe and paid no further attention to it. John Higgins ¹⁴⁹ went to New York and from there went to Lowell, Massachusetts, to visit a sister of his first wife, whom he had never seen. When he arrived at Lowell he found that she lived at Chicopee Falls, Massachusetts, and went there. He was introduced to complainant by his sister in law and within two days thereafter married her. He was near sixty years old and she was about twenty-three and was living with her parents. He told her that he owned one hundred and sixty acres of land and owned personal property and a good home. She accepted his proposal of marriage on account of his representations and for the purpose of bettering her condition. He had owned the eighty acres, but if the deed had been made and delivered his representation was false even as to that. He only stayed at Chicopee Falls a very short time, and immediately after the marriage he and complainant came to the farm near Pontiac. About six months afterward, difficulties having arisen between her and the children, she was informed of the deed. A daughter with whom she had had some words had gone to Flanagan, and at the suggestion of the daughter the deed had been put on record. The complainant claimed that she had been defrauded of her rights and went back to Chicopee Falls to her father and mother. The husband also left the farm and went to Toledo, but after an absence of about two years and a half complainant came back at his solicitation and on his representations that the deed was wrong and that he would have things changed and do right by her. Thereafter they lived on the farm, and it was farmed by the son William, one of the appellants, as a tenant. Four children were born

to the complainant and her husband, and he seems then to have realized the injustice of his arrangement and wanted to make some arrangement so that his young children would not be left entirely destitute. He told complainant that the deed was made after he was married and dated back, and promised to take some proceedings to have it set aside. He evidently felt differently about the condition of things when ¹⁵⁰ he saw the four little children of his second marriage entirely unprovided for while the grown-up children of the first marriage were to take all. He consulted an attorney with a view to having the deed set aside, but nothing was done, and complainant filed the bill, alleging, in accordance with his representations to her, that the deed was made after the marriage.

Appellee has assigned cross-errors on the finding of the court that the deed was made prior to the marriage. The testimony of the grantor, John Higgins, tended to prove that the deed was made after the marriage, but his recollection was very indistinct and his testimony appears quite unreliable. The evidence proves that the deed was made and acknowledged on the day of its date and was given to Patrick Higgins a few days afterward. There is more probability that the deed was only given to Patrick to hold in case anything should happen to the grantor on his journey. Nothing was said about putting it on record, and Patrick did not treat it as he would any ordinary conveyance, by recording it. He put it in his safe and gave it no further attention until his sister came to him to have it recorded. On the other hand, the fact that a life estate was reserved to the grantor would not be consistent with the theory that the deed was only to be effective in case of his death by accident while on his journey. We think the record sustains the findings as to the execution and delivery of the deed.

The evidence justified the conclusion that although John Higgins had never met the complainant, he contemplated a second marriage at that time and the deed was made with a view to that event. The most reasonable explanation of his conduct when he went to Chicopee Falls is, that his visit to his sister in law was in view of marriage. She introduced him to the complainant, whom he immediately solicited in marriage, with the representations already mentioned as to his property. The marriage took place within two days, and ¹⁵¹ there is no reason to suppose that it was a case of a sudden attachment. The statement to the children that he was going

to Ireland appears to have been untrue, and the explanation that he made the deed so that if anything should happen to him it would protect the interest of the children in the property does not look reasonable, in view of the fact that the deed made precisely the same disposition of the property that the law would have made if anything had happened to him. The reservation of the life estate could only have been inserted in the deed with the expectation that he would live to enjoy it, and there was no occasion whatever for making the deed giving the property to his children just as the law would have done, if it was made in view of some casualty to him on his journey. The conclusion drawn by the court is the only one that will fit with all the circumstances.

The conveyance was voluntary and without consideration, and if the intention was to defraud of her marital rights any person whom he should marry, it makes no difference that he had not yet selected the complainant as his spouse. There must be a fraudulent intent, but it need not necessarily be directed against a particular person. With respect to her marital rights the law affords the same protection to a wife as to a creditor, and a voluntary disposition of property made with the specific intent to defraud future creditors is void: *Morrill v. Kilner*, 113 Ill. 318. An intent to defraud by the conveyance of property may be ascertained by inference from the circumstances: *Hughes v. Noyes*, 171 Ill. 575, 49 N. E. 703. The wife is within the protection of the statute against conveyances made with intent to defraud, and if the conveyance is purely voluntary it is not necessary that the grantee shall participate in the intent of the grantor. It is as much a fraud for a man on the eve of his marriage, unknown to his wife, to make a voluntary conveyance of property to defeat the interests which she would acquire in the property by virtue of her marriage, as it is for a debtor ¹⁵² who contemplates contracting a debt to voluntarily dispose of his property in order to defeat the interest of future creditors: 14 Am. & Eng. Ency. of Law, 2d ed., 252. We cannot say that the court was wrong in the conclusions of fact contained in the decree.

It is further contended that the complainant was barred by her own laches from obtaining relief. The circumstances were somewhat peculiar. When she first learned that the deed had been made it does not appear that she was aware of the facts which would enable her to have it set aside or of her rights in relation to it. When she came back it was upon representa-

tions of her husband that the record was wrong and he would have it corrected and do right by her. They were in possession of the property, and she was apparently resting in the belief that he would in some way fulfill his promises to her. When she obtained any further information from her husband it was to the effect that the deed had been executed after the marriage, and as she did not join in it it would be no bar to her right of dower or homestead if she should outlive her husband. Whenever she learned the facts in the case she had a right to institute a suit at once to set aside the conveyance as being in fraud of her marital rights. Although a wife cannot assert an inchoate right of dower in the lifetime of her husband and is not guilty of laches in failing to do so, she may set aside a deed executed in fraud of her marital rights: *Freeman v. Hartman*, 45 Ill. 57, 92 Am. Dec. 193; *Lohmeyer v. Durbin*, 213 Ill. 498, 72 N. E. 1118. She might therefore lose her right to relief by long delay in bringing suit after she knew the material facts, but we cannot say in this case that she was barred by laches.

The tenant, William Higgins, built a house for himself on the premises, but that was not to be taken into account in the assignment of dower. Patrick sold his interest to William, and William loaned five hundred dollars to one of his sisters and took a mortgage on her interest in the property to secure the loan. These transactions were between the grantees in the ¹⁵³ deed, and as William lived on the place it is a fair inference that he knew of the claims made by the complainant and his father with respect to the deed. So far as the mortgage is concerned, there is nothing to show that the interest of the mortgagor will not be sufficient to secure the debt after homestead and dower shall be assigned.

The decree, however, must be reversed for the reason that the bill does not contain allegations of the facts upon which the relief was granted. It is a primary rule, always enforced and sustained by numberless decisions, that the allegations of the bill, the proof and the decree must correspond; that facts disclosed by the evidence which would warrant relief will not sustain a decree where the facts are not alleged in the bill: *Dorn v. Geuder*, 171 Ill. 362, 49 N. E. 492. The bill in this case was framed upon the theory that the deed was executed after the marriage and dated back prior to the marriage for the purpose of defrauding the complainant. It contained no allegation that it was executed on the eve of the

marriage with a fraudulent intent to defraud the future wife. In such case the court will permit the complainant to amend the bill so as to correspond with the proofs; but the bill was not amended, and the court by the decree found a different state of facts from those stated in the bill. The decree must be reversed, but, inasmuch as the reversal is not upon the merits, the parties will pay their own costs of the appeal.

The decree is reversed and the cause is remanded, with leave to the appellee to amend her bill to correspond with the proofs, and if such amendment is made the circuit court is directed to re-enter the decree heretofore entered, and the parties will pay their own costs in this court.

Conveyances by a Man who is contemplating matrimony, which are calculated to defraud his future wife, are considered in the recent monographic note to *Collins v. Collins*, 103 Am. St. Rep. 418-423.

PURINGTON v. HINCHLIFF.

[219 Ill. 159, 76 N. E. 47.]

CONSPIRACY—Boycotting—Damages.—Any person or combination of persons, who unlawfully, by direct or indirect means, obstructs or interferes with another in the conduct of his lawful business, is liable for any loss willfully caused by such interference. (p. 325.)

CONSPIRACY—Boycotting—Liability of Co-conspirators.—All parties to a conspiracy to ruin the business of another, because of his refusal to do some act against his will or judgment, are liable for all overt acts illegally done pursuant to such conspiracy, and for the subsequent loss, whether they were active participants or not. (p. 325.)

CONSPIRACY and Boycott—Liability.—An agreement between persons not to purchase, use or lay brick made by any person who does not subscribe to the rules of a builders' association, made for the purpose of injuring the business of such person is unlawful, and the parties thereto are liable in damages for all acts done in pursuance thereof, to the damage of the boycotted person. (p. 326.)

G. W. Plummer and W. Plummer, for appellants.

E. F. Abbott, for the appellee.

¹⁶³ WILKIN, J. Much space has been taken up by the appellants in their brief and argument in the discussion of the question whether or not the evidence shows that appellants were guilty of an unlawful conspiracy, as charged in the

declaration; whether or not the plaintiff proved by the evidence that he was injured as a manufacturer and dealer in brick; whether or not the verdict is sustained by the evidence, and many other questions which are conclusively settled by the judgment of the appellate court. As is well understood, we have nothing to do with controverted questions of fact, hence our inquiry is limited to but few of the points discussed by counsel for appellants.

At the close of plaintiff's evidence, as well as at the close of all of the testimony offered at the trial, the court was¹⁶⁴ asked to instruct the jury to find for the defendants, which instructions were refused, thus raising the question whether there is any evidence in the record fairly tending to support the allegations of the declaration, and whether or not the allegations of the declaration, under the facts, are sufficient to charge defendants with an unlawful conspiracy to injure the business of appellee.

The appellate court recited the following facts as appearing from the evidence: "The negotiations between the Masons' and Builders' Association which led to the agreement complained of began in December, 1897, with the appointment of a committee by the Brick Manufacturers' Association, which obtained the appointment of a committee of the Masons' and Builders' Association, and the two committees in conference formulated the agreement. This seems to have finally gone into effect prior to October 1, 1898. The resolution of the Masons' and Builders' Association adopted at the time of the appointment of its committee of conference, provided, *inter alia*, that 'whereas, the brick manufacturers now have an organization which takes in all of the brick manufacturers of Cook county and vicinity, and believing that it is established upon a sound and practical basis, and believing the system will control the price of brick in the future,' and that an agreement would 'greatly benefit and advance the interests of the Chicago Masons' and Builders' Association and will strengthen the Brick Manufacturers' Association as well,' therefore the committee be appointed, which was accordingly done; that the substantial provisions of the agreement thus made are, that the members of the Masons' and Builders' Association who sign the agreement agree to buy sewer, hollow and common brick only from such members of the Brick Manufacturers' Association as have signed the agreement and

are in good standing in said association, and the members of the Brick Manufacturers' Association who sign the agreement agree to give to the members of the Masons' and Builders' Association ¹⁶⁵ signing the agreement and in good standing, a trade discount from the trade price of one dollar a thousand brick. On all brick sold to purchasers outside of the Masons' and Builders' Association the brick manufacturers agree to pay into their treasury one dollar a thousand, the fund thus created to be divided every six months equally, one-half to their own members who have signed and are faithful members of the Masons' and Builders' Association. There are provisions for enforcing the terms of the agreement by imposition of fines and penalties, and it was to take effect on and after April 1, 1898, within the limits of Cook county and north of the Joliet branch of the Michigan Central Railroad in Lake county, Indiana; that there is evidence tending to show that the plaintiff was the principal competitor in Cook county of the members of the Brick Manufacturers' Association; that his plant had a capacity of from fifty thousand to sixty thousand bricks a day, or about fifteen million bricks per year; that it was well equipped with machinery and 'the clay was all right.' It appears that plaintiff was at one time a member of the Masons' and Builders' Association, and that he made efforts to secure admission to the Brick Manufacturers' Association without success. These associations and associates, the brick manufacturers, the masons and builders and the Bricklayers' Union, employed business agents and secret service men, whose business it was to see that the rules formulated to make effective the agreement between them were observed by their membership. There is evidence tending to show that after the agreement in question was in active force and operation the plaintiff's business began to be interfered with by these agents and secret service men; that contractors and owners who were purchasing and using plaintiff's brick were compelled to cease using them; that large orders and sales were canceled; that one owner was compelled to pay a fine to the Masons' and Builders' Association before being permitted to complete with plaintiff's brick a building which was under way; that workmen were directed ¹⁶⁶ not to lay plaintiff's brick because he was not in the combination, and there is evidence of particular cases in which such interference occurred. In one case where, as the evidence tends to show, money had to be paid to the Masons' and Builders' As-

sociation for the privilege of using plaintiff's brick to complete a job then under way, in order to get the work completed, the association afterward returned the money when threatened with legal procedure. The plaintiff testifies that the result of the combination and consequent interference with his business was that his brick became 'absolutely worthless. There wasn't hardly a man in Chicago that would handle them. The workmen all belonged to the union, practically, and the hod carriers would not handle them or the bricklayers wouldn't lay them.' He testifies that he was called on by the secretary of the Masons' and Builders' Association, who told plaintiff that the joint committee of the master masons and the brick manufacturers' crowd had just had a joint session in the next room adjoining my office and had directed him to inform me that they requested me to sell no more brick in the city of Chicago or Evanston. I told him they must be wrong—that it was equivalent to asking me to quit the business. He said, 'There is no mistake on my part; the committee have just adjourned and the members are still in the next room.' I said, 'Go back and tell them they are a bigger lot of fools than I thought they were,' and I made a similar request of them."

We think the foregoing finding as to the facts is sustained by the proofs. The question of unlawful conspiracy to injure the business of another, and the necessary elements to constitute it, has been before this court on other occasions. Our reports contain many well-considered cases on the subject. No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any loss willfully caused by such interference will give the party injured a right of action for all damages sustained. All parties to a ¹⁶⁷ conspiracy to ruin the business of another because of his refusal to do some act against his will or judgment are liable for all overt acts illegally done pursuant to such conspiracy and for the subsequent loss, whether they were active participants or not: *Doremus v. Hennessy*, 176 Ill. 608, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 75 N. E. 108; *O'Brien v. People*, 216 Ill. 354, 108 Am. St. Rep. 219. To the same effect see *Smith v. People*, 25 Ill. 9, 17, 76 Am. Dec. 780; *Craft v. McConoughy*, 79 Ill. 346, 22 Am. Rep. 171; *More v. Bennett*, 140 Ill. 69, 33 Am. St. Rep. 216, 29 N. E. 888, 15 L. R. A. 361; *Foss v. Cummings*, 149 Ill. 353, 36 N. E. 553;

American Livestock Commission Co. v. Chicago Livestock Exchange, 143 Ill. 210, 36 Am. St. Rep. 385, 32 N. E. 274, 18 L. R. A. 190; Harding v. American Glucose Co., 182 Ill. 551, 74 Am. St. Rep. 189, 55 N. E. 577, 64 L. R. A. 738; Lasher v. Littell, 202 Ill. 551, 67 N. E. 372; Chicago etc. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770. To the same effect are the decisions of courts in other jurisdictions: See cases cited in Doremus v. Hennessy, 176 Ill. 616.

Under the authorities above cited and in view of the evidence as it appears in the record there is evidence fairly tending to show that appellants were guilty of an unlawful combination and conspiracy to maliciously injure the appellee's business. The court committed no reversible error in refusing to instruct the jury to find for the defendants.

Complaint is also made of the rulings of the court in the admission and exclusion of evidence and in giving and refusing instructions. All of these alleged errors are based upon the theory that the appellants were not guilty of an unlawful combination and conspiracy. In each instance the evidence admitted tended to prove the allegations of the declaration, and was therefore competent. The instructions given announced the law of conspiracy as held in the foregoing decisions and those refused laid down a contrary rule.

We find no reversible error, and the judgment of the appellate court will be affirmed.

Boycotting is the subject of a recent extended note to Gray v. Building Trades Council, 103 Am. St. Rep. 488-503. The question is further discussed, with special reference to conspiracies, in the recent cases of State v. Stockford, 77 Conn. 227, 107 Am. St. Rep. 28; Patch Mfg. Co. v. Protection Lode, 77 Vt. 294, 107 Am. St. Rep. 765.

HOCH v. PEOPLE.

[219 Ill. 265, 76 N. E. 356.]

CRIMINAL LAW—Bigamy—Second Wife as Witness.—If there is an issue as to the fact of the first marriage or its validity, the second wife cannot be admitted as a witness against the husband on trial for crime, until the fact of the first marriage is established by proof. If the first marriage is admitted or proved, the alleged second wife is competent to testify against her alleged husband. (p. 338.)

CRIMINAL LAW—Bigamous Wife as Witness.—When a second wife is offered as a witness against one claimed to be her bigamous husband charged with another crime, the question of her competency is for the court, and, in deciding that question, the court is not only the judge of the law, but also of the questions of fact necessary to be decided. The court must act upon the evidence as presented at the time of the ruling, and if there is evidence of a first marriage, and that that wife is still living and not divorced, the fact that the witness is not the wife of the party to the suit is established, and she must be admitted to testify. (p. 338.)

CRIMINAL LAW—Bigamous Wife as Witness.—Proof that the first wife of a person accused of crime is living and undivorced overcomes all presumptions in favor of a second marriage, as to its validity, including any presumption as to death or divorce of the first wife, and renders the alleged second wife a competent witness against such accused person as to all facts except those relating to the first marriage. (p. 339.)

CRIMINAL LAW—Statements Made by Accused as Evidence. Admitting in evidence statements made by an accused, in explanation of certain of his acts, after being warned that whatever he said might be used against him is not error. (p. 340.)

TRIAL—Remarks by Court.—A statement by the court repeating correctly what a witness has just said, and in aiding a more perfect translation of what a witness has said through the aid of an interpreter, is not error. (p. 341.)

EVIDENCE—Contents of Letter—Conclusion of Court.—The question of fact as to whether a certain letter has been destroyed is for the court, in passing upon the admissibility of secondary evidence of its contents, and he may, therefore, properly state his conclusion as to whether or not the letter has been destroyed. (p. 341.)

CRIMINAL LAW—Corpus Delicti.—The corpus delicti consists of two essential elements, which are, the fact of death, and the criminal agency of some person as to the cause of death. (p. 342.)

CRIMINAL LAW.—The Corpus Delicti must be clearly established, but it may be proved by circumstantial evidence alone. (p. 343.)

CRIMINAL LAW—Sentence—Sufficiency of as Judgment.—If the verdict determines the character of the crime and the penalty, the sentence by the court upon the verdict is a judicial determination of the fact of the defendant's conviction, and is sufficient as a judgment. (p. 345.)

F. D. Comerfield and J. J. Neiger, for the plaintiff in error.

W. H. Stead, attorney general, J. J. Healy, state's attorney, G. B. Gillespie, H. Olson, and T. J. Healy, for the people.

²⁶⁷ CARTWRIGHT, C. J. Johann Hoch, plaintiff in error, was indicted in the criminal court of Cook county for the murder of Marie Walcker Hoch by poisoning with arsenic. He was found guilty by a jury and his punishment was fixed at death. The court overruled motions for a new trial and in arrest of judgment and sentenced him in accordance with the verdict. The record is before us for review upon a writ of error sued out by him, which was made a supersedeas.

There was practically no controversy at the trial as to the facts, and the only disagreement between witnesses was in the opinions of experts as to the cause of death. The questions to be considered by us are, whether errors prejudicial to the defendant were committed upon the trial and whether the facts proved justified the conclusion of guilt.

The facts proved are, in substance, as follows: On October 20, 1904, the defendant was married under the name of John Schmidt, in Philadelphia, to Caroline Streicher. He lived with her eleven days and deserted her on October 31st. On November 8, 1904, he appeared in Chicago at the home of Johanna Reichel, who had known him about nine years and who kept a boarding and rooming house at 458 Milwaukee avenue. The next day, November 9th, he went to a hotel kept by Mrs. Katie Bowers at 674 East Sixty-third street and there registered as J. Hoch, St. Louis, Missouri. He told Mrs. Bowers that he worked at the Pullman shops and was a foreman there but was away on a two weeks' vacation. He remained at the hotel ten days, and during that time, on November 16th, he inquired at the Chicago City Bank, 6225 South Halsted street, for Mr. Vail, the owner ²⁶⁸ of a cottage at 6430 Union avenue, stating that he and his wife had been out house hunting, and as they came down Union avenue they noticed the house for rent. He gave the name of Mr. Hoch to Vail, who was connected with the bank, and was told that the rent was twenty-one dollars and fifty cents a month. Vail said that he did not know anything about him, and he said that he was working for Armour & Co. in the canning department; that he had twenty-five or thirty men in his employ and was getting a salary of one hundred and twenty-five dollars a month; that he was moving from 646

East Sixty-third street, and that Vail could go to Armour & Co. or the place on Sixty-third street to look him up. He then showed his hands to Vail, and as they bore callous marks Vail rented the house to him without further inquiry. A lease was made out, which he signed with the name of Joseph Hoch, and he paid in advance the rent from November 16th to January 1st, following. Mr. Vail went to the cottage a few days afterward, when Hoch met him and told him his wife was in Milwaukee. About November 20th the defendant bought from a house furnishing company a bill of furniture for the cottage, amounting to one hundred and twenty dollars, and told the salesman that he had been living as a widower for four years at 6430 Union avenue; that he owned the cottage and was just contemplating again entering on the sea of matrimony. He paid fifty dollars at that time, fifty dollars more the second day afterward, and twenty dollars when the furniture was delivered at the house. A few days afterward, on December 3d, he published in the "Abend Post," a German evening paper published in Chicago, an advertisement in German, of which the following is a translation:

"*Matrimonial.*—Widow, without children; the end of the thirties; German; own home; wishes acquaintance of a lady; object, matrimony. Address M422, *Abend Post.*"

Marie Walcker was about forty-six years of age and had been divorced from her first husband. She had made her living by washing, house cleaning and doing general work. At the time the advertisement was published she owned a little ²⁰⁰ candy store at No. 12 Willow street. She answered the advertisement by a letter written for her by her sister, Bertha Sohn, a translation of which is as follows:

"*Dear Sir*—In answer to your honorable advertisement, I hereby inform you that I am a lady standing alone. I am forty-five years of age. I have a small business, also a few hundred dollars—a little fortune—a few hundred dollars. If you are in earnest I tell you I shall be. I may be spoken or seen at any time during the day. Address No. 12 Willow street.
MARIE WALCKER."

In response to the letter defendant came to the candy store on Tuesday, December 6th. He stated to Marie Walcker that he was looking for a wife; that his wife died two years previous after a sickness of eighteen years; that he was a

rich man, with eight thousand dollars in money, a nice house and a big lot on Union avenue. She told him if that was true it was all right. There was a bedroom and a kitchen back of the store, and the defendant drank coffee in the kitchen during the afternoon with Marie Walcker and a friend, Mrs. Knipple, and defendant talked about his wealth and asked Marie Walcker if she liked him, and she replied yes, if he liked her. On the next day, Wednesday, he called again at the store and took Mrs. Walcker out to show her his house and lots. They went about 10 o'clock and returned about 4 in the afternoon, leaving Mrs. Knipple in the store. He visited the candy store again on the 8th or 9th and took supper there, and again talked about his property and his wealth, and spoke about having paid five hundred dollars to fix up his house, and that his father, in Germany, was a very old man and he would be an heir of fifteen thousand dollars. On Saturday, December 10th, defendant came to the store to go to the courthouse for a marriage license and to be married. Mrs. Walcker had two hundred and seventy dollars in a savings bank and eighty dollars hid under the mattress in her bed. She told her friend, Mrs. Knipple, to take good care of her money, and Mrs. Knipple said she had better take the money along. She had sold the store that morning for seventy-five dollars, and she gave that money to the defendant, and the eighty dollars she had hid under the mattress, and her bank-book. They then went ²⁷⁰ down town and were married, and went to the bank, where Mrs. Hoch drew the two hundred and seventy dollars and gave it to the defendant. They then went to the home of the sister, Bertha Sohn, at 423 Sedgwick street, and remained until about 11 o'clock. On the following Monday, December 12th, defendant and Mrs. Hoch came to Sohn's about noon and remained until 9 or 10 in the evening. Mrs. Hoch had another sister, Mrs. Amelia Fischer, with whom she had not been on good terms, and on that visit it was stated that Mrs. Fischer had left nine children in Germany with only ten marks and had come to America and brought one child and about one thousand marks with her. Defendant condemned the conduct of Mrs. Fischer, and in the conversation learned that she had money in the same bank as Mrs. Hoch. Mrs. Fischer lived at 372 Wells street, in a flat, where she let rooms. About the same time defendant and Mrs. Hoch went to the house of Ella Held, at 241 Vine street, to learn the address of Mrs. Fischer. It happened that Mrs. Fischer was at the house

when they came and Mrs. Held introduced her to Mr. Hoch. At his request the two sisters shook hands and became friends again. During that week Mrs. Knipple called at 6430 Union avenue with her two daughters and found Mrs. Hoch sitting in a rocking-chair quite sick and pale, with sunken eyes. On Sunday, December 18th, Mrs. Sohn and her family went to defendant's house and found her sister looking very badly, and she had eruptions about her mouth. The next day defendant and Mrs. Hoch came to visit Mrs. Sohn, and Mrs. Hoch had the eruptions about her mouth and looked very yellow, and had to run to the closet very frequently. Mrs. Sohn invited them to spend the holidays there with them, but the defendant would not promise, saying many things might happen. On Tuesday, December 20th, the defendant inquired at a drug store for a doctor, and Dr. Joseph Reese, who had an office there, was recommended. He called Dr. Reese to attend Mrs. Hoch, and the doctor found her complaining of severe pains in the ²⁷¹ lower abdominal or pelvic region, and unable to control the urine and suffering great pain and burning from it. The defendant purchased at the drug store a two-quart fountain syringe and rubber sheeting for the bed. The doctor gave a prescription to relieve the symptoms which manifested themselves, and from that time up to and including January 10th he called on the patient daily and prescribed from time to time. About the commencement of the illness defendant went to a saloon and got a quart bottle of seltzer water, and told the bar-tender to keep plenty of it on hand. He got seltzer water at different times, amounting to four quarts in all, which Mrs. Hoch drank, but the doctor said he did not direct him to give her seltzer water. On Wednesday, December 21st, Mrs. Sohn received a letter from defendant, saying that his wife was sick and that the doctor had ordered injections, and requested Mrs. Sohn to go to Mrs. Knipple and see if she would come to the house. Mrs. Sohn thereupon went to the house and found her sister in bed, appearing to be very ill. She complained of fearful pains in the abdominal region and Mrs. Sohn understood that the urine was suppressed. The defendant said that the doctor had ordered the body to be flushed out with soap and water and salt, and he prepared an enema and produced the syringe with which Mrs. Sohn administered it. After that, frequent enemas were given during the entire illness. The doctor did not prescribe or direct the giving of them, but on one occasion

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when a nurse, who had been told that the doctor prescribed them, spoke to him about it, he assented or said to give her enemas when necessary. Before her marriage Mrs. Hoch had been in uniform good health, and, although not particularly robust in appearance, was healthy and able to do hard physical labor and had not suffered from anything except an occasional headache. Her symptoms continued practically the same until her death. She suffered great pain in the abdomen, with incontinence of urine and a burning sensation from it. She was pale and yellow and vomited frequently, ²⁷² most of the time being unable to retain anything on her stomach. She was very restless and nervous and had a violent thirst. Her tongue was coated and there were eruptions about her mouth, and she had frequent fainting spells and great weakness. Her temperature was normal or below normal, and she had a tingling sensation in the extremities and felt as though ants were crawling through her body. In addition to the seltzer water she drank a great deal of water and iced milk and some coffee and soup, but she usually vomited up whatever she drank.

Two or three days after the first visit of Mrs. Sohn the defendant again wrote her, requesting her to come to the house, saying that no improvement had taken place in his wife's condition; that she must recover if it cost him thousands and thousands of dollars; that he thought he had a healthy wife, and that he had had very much misfortune in his life in that way and now it had happened again. Mrs. Sohn went to the house and found her sister very sick with the same symptoms as before, and in great pain. The defendant told her that the doctor had ordered enemas, and she gave one which was prepared by the defendant. Mrs. Hoch was taking pills, which defendant said were given to induce sleep. Her pains were very severe and she complained of a crawling sensation. She was given coffee by the defendant, and he also made some broth, of which they all partook, but Mrs. Hoch vomited it up. Mrs. Fischer received two letters from the defendant, and after receiving the second one went to see her sister and found her complaining of great pain in the lower part of the stomach, and the defendant then said that she had some kind of kidney disease. Defendant complained that his first wife had been sick eighteen years and that he thought he had now got a healthy woman but was disappointed. After her return home Mrs. Fischer sent her

picture to her sister and the defendant as a New Year's present. Mrs. Fischer then received a letter from the defendant expressing thanks for the picture and saying that he was ²⁷³ going to carry it on his breast, and that she should send another to her sister. The doctor diagnosed the trouble as nephritis, which is another name for inflammation of the kidneys or Bright's disease, and cystitis, which is inflammation of the bladder. He wanted a professional nurse, and one was employed on January 5th, who remained until the night of the 10th. By direction of the doctor she irrigated the bladder by the use of a catheter and gave douches of hot water, and while there she also gave enemas and cared for the patient. On the 6th or 7th of January Mrs. Fischer came again, when the defendant said that he had kept her picture for himself, and she said that the picture was for both of them. Mrs. Hoch was then very thirsty and spoke of the crawling and an itching in the fingers, and complained of pain, and vomited often. On that occasion defendant accompanied Mrs. Fischer to the car, and on the way said that if he had met her four weeks sooner he would have married her. The next day Mrs. Fischer came again and found her sister in the same or a worse condition. She vomited a good deal and could not retain either water or milk. On one of her visits Mrs. Fischer brought a squab for her sister, and it was cooked and the patient ate some of it. A few days after the nurse came Mrs. Hoch wanted to have her discharged on account of the expense, and the defendant saw the doctor about it and she was retained. The defendant was very attentive to his wife during the whole illness, and would kiss her in the morning and call her endearing names, and expressed great anxiety that she should be cared for regardless of expense. Mrs. Fischer was there a number of times and prepared food and did washing and ironing, and about January 10th, before the nurse left, Mrs. Hoch became jealous of her sister and of defendant's attentions to her. The nurse left on the evening of January 10th, but expressed a willingness to come back if she was wanted, provided Mrs. Fischer was not there. After the nurse left, the doctor did not return until the morning of January 12th, after ²⁷⁴ Mrs. Hoch was dead. During the sickness Mrs. Knipple called, and Mrs. Hoch asked the privilege of talking to her alone, but the defendant would not permit it. On the evening of January 11th, the next day after the nurse had

gone, Mrs. Hoch said to the defendant to go and marry Mrs. Fischer—to marry her after she was dead. She called Mrs. Fischer a human sow, and told her that she could take him. Mrs. Fischer was offended and declared that she would never cross the threshold again, but it was finally decided that she should stay there that night, and she went downstairs and laid down on a lounge. She heard high words between the defendant and Mrs. Hoch, who said to him that he could go and take her and marry her if he wanted to and could marry her after she was dead. About 5:30 in the morning of January 12th the defendant came downstairs and told Mrs. Fischer that his wife was worse and that he was going for the doctor. He was gone for a while and telephoned the doctor, and when he returned he went upstairs and told Mrs. Fischer to come up. Mrs. Hoch was lying there dead. On that morning defendant and Mrs. Fischer took out the bedclothes and were straightening things up about the house when the defendant proposed marriage to her. Mrs. Fischer replied that her sister was not buried yet and it was not time to talk about a matter of that kind, but the defendant said that that made no difference—that the dead belonged to the dead and the living to the living. Mrs. Fischer declined to answer at that time. Defendant said that he was a man of means, worth about thirty thousand dollars or forty thousand dollars; that he would rent the house for twenty-five dollars; that the house cost him four thousand dollars, of which he paid three thousand dollars in cash and owed one thousand dollars. He took out a paper and read from it to justify his statement, and marked out a corner lot, claiming that it contained six or eight lots in one, and said that he intended to rent the cottage until Mrs. Fischer's family came back from Germany, and then he would build a three-story brick house on the corner; that they would open a hotel and would run it ²⁷⁵ together, and he hoped they would be able to arrange everything within a week. He said it would be better to keep everything quiet in regard to the marriage and they would go to Germany for a trip. The doctor made a death certificate stating that nephritis and cystitis were the cause of death. The funeral took place on Sunday, January 15th, and the body was buried in Oakwoods cemetery. After the funeral Mrs. Sohn spoke to the defendant about some insurance of seventy-five dollars of the deceased, on which the premium was ten cents a week. He said that he did not be-

lieve the insurance premiums had been paid during the sickness; that he did not want to make any money out of the woman; that if there was any money she could have it; that if he had died his wife would have received about twenty-five thousand dollars, as he had made her his sole heir. The next day, Monday, January 16th, the defendant and Mrs. Fischer agreed to be married, but the defendant said he could not go away until the matter of the house was settled, and that he owed one thousand dollars and could not rent it until he had paid it. Mrs. Fischer said if there was no other way out of it she had a little money. Defendant said that his father lived in Paris and they would go from there to Germany, and he would inherit from fifteen thousand dollars to twenty thousand dollars from his father, who was eighty-one years old. He promised her by all that was holy to repay her money as soon as he got his money from some vacant lots. She had in the bank eight hundred and ninety-three dollars, of which seven hundred and fifty dollars belonged to her and the rest to her daughter. Defendant said that he did not want to receive the money until they were married. They were married at Joliet on Wednesday, January 18th, and the next day they went to the bank and she drew seven hundred and fifty dollars, which she gave to him. He said it would be better if she got the money on that day, as he could pay his bills on the house and get it rented. They then went to 372 Wells street, to Mrs. Fischer's flat. Mrs. Sauerbruch, who occupied one of the flats, opened the door and met them in the hall and told them not to go in there; that Mrs. Sohn was in there and was talking ²⁷⁶ about defendant and said that he poisoned her sister; that he was a swindler, and that she had found out a good deal about him. He was agitated, and Mrs. Fischer Hoch told him if he was not conscious of any wrong he ought to go in, but he said that he would not come in just now—that he was feeling badly and would sit down for a minute. He remained in the parlor and Mrs. Fischer Hoch went into the other room, but returned in a few minutes and found that the defendant had gone. The defendant went to the boarding-house of Johanna Reichel, on Milwaukee avenue, before referred to, and then absconded. He was found at No. 546 West Forty-seventh street, New York City, under the name of Henry Bartells. Among other effects in his possession there was a fountain pen. There was no pen in the holder and it was not used as a pen, but the reservoir contained

fifty-eight grains of arsenic. On January 21st, two days after the scene at the flat, the body of Mrs. Walcker Hoch was exhumed and a post-mortem examination was held, when the stomach, with the contents, kidneys, liver and spleen were removed. There were no more changes in the vital organs than are quite frequent in persons of her age and none of them showed any disease sufficient to cause death. In the stomach arsenic was present in the proportion of seven and six-tenths grains in the entire stomach and one and one-fourth grains in the liver. The body was again exhumed on April 24, 1905, when half of the bladder, a portion of the heart and a large portion of the intestines were removed and afterward examined. Arsenic was found, in the form of a white powder, in the folds of the colon, mingled with blood and mucous. The body had been embalmed with letheform, which does not contain arsenic, and the embalmer had not had or used any embalming fluid which contained arsenic. None of the medicines given or prescribed by the doctor contained arsenic, and the testimony excluded the administration of poison during the entire illness by any other person than the defendant. Two grains of arsenic are sufficient to produce ²⁷⁷ death, and the amount found in the body of the deceased would be certain to cause death.

Defendant stated at different times after his arrest that the arsenic in the fountain pen was tooth-powder, but after he was told that it would be examined he said that it was of no use—that it was arsenic; that he intended to commit suicide when he was informed that he was charged with bigamy, but when he was charged with murder he concluded he would come back and face it. He said that he bought the arsenic and the fountain pen at a certain locality in New York City, but it was proved that fountain pens were not kept at the drug store at that locality and that no arsenic was sold to him at that place. All his statements with regard to his wealth, his employment with the Pullman Company or Armour & Co., his ownership of the cottage or the lot across the street, were false.

Witnesses who qualified as expert pathologists and chemists of long experience and high positions testified on the part of the people, in response to hypothetical questions presenting the symptoms of Mrs. Walcker Hoch during her illness and the existence of arsenic in her body after death, that she died from arsenical poisoning. Dr. Reese, who at-

tended her during her illness, was a witness, and regarded all the symptoms as consistent with and pointing to his diagnosis of nephritis and cystitis, but conceded that his opinion had been formed with no knowledge or suspicion of the presence of arsenic, and his judgment was, that if the arsenic was administered while the patient was living, her death was due to arsenical poisoning. One witness testifying as an expert on the part of the defendant said that, taking into consideration the symptoms and manifestations during the illness, and assuming that the arsenic was given to the deceased during her lifetime, a suspicion would be aroused in his mind that her death was due to the arsenic, but that at most he would have only a suspicion, which would not amount to an opinion. His opinion was that the presence²⁷⁸ of the arsenic did not prove anything and the hypothesis of fact embraced in the question propounded to the experts did not warrant a conclusion as to the cause of death. He could not say of a certainty from the hypothesis of fact that the person did not die of sunstroke, shock due to uremic poisoning, diphtheria, scarlet fever, appendicitis, fright or tuberculosis, and he testified that the arsenic, including that which appeared as a white powder in the folds of the colon, might have been absorbed from the soil of the cemetery, in which other embalmed bodies had been buried. His testimony was contradictory of that given by the other experts, and it seems to have been discredited by the jury upon good grounds.

The first occurrence of the trial which is assigned as error is the ruling of the court that Amelia Fischer Hoch was a competent witness. She was sworn and an objection of the defendant to her competency was overruled and she testified in the case. The wife of a defendant is not a competent witness against him because of the importance to society of preserving the sanctity and harmony of the marriage relation: *Hyman v. Harding*, 162 Ill. 357, 44 N. E. 754. But a bigamous marriage being void, the woman is not a legal wife and is a competent witness against her supposed husband. Where parties enter into the marriage relation the legal presumption is in favor of the innocence of the parties and the validity of the marriage, and Amelia Fischer Hoch having been married to the defendant, she was *prima facie* his lawful wife and incompetent to testify, but when that presumption was overcome by proof that the marriage was bigamous she became competent. Where the relation of husband and

wife has been assumed, the second wife can never be admitted as a witness to prove the first marriage, because that fact must be established before she can testify at all. Where she can be a witness at all she can testify to the second marriage and other facts not including the first marriage: *Lowery v. People*, 172 Ill. 466, 64 Am. St. Rep. 50, 50 N. E. 165; *Miles v. United States*, 103 U. S. ²⁷⁹ 304, 26 L. ed. 481; 30 Am. & Eng. Ency. of Law, 2d ed., 952; 5 Cyc. 699. If there is an issue as to the fact of the first marriage or its validity, the second wife cannot be admitted as a witness until the fact of the first marriage is established by proof. If, however, the first marriage is admitted or is clearly proved, the alleged second wife is competent to testify, with the limitation before stated: *Clark v. People*, 178 Ill. 37; 5 Cyc. 699; 4 Am. & Eng. Ency. of Law, 2d ed., 47. When a second wife is offered as a witness the question of her competency is for the court, and in deciding that question the court is not only the judge of the law, but also of the questions of fact necessary to be decided to determine the question. The court must act upon the evidence as presented at the time of the ruling, and if there is evidence of a first marriage and that the wife is still living and not divorced, the fact that the witness is not the wife of the party to the suit is established and she must be admitted to testify. There may also be a question of fact for the jury as to the existence or validity of the first marriage, and the determination of that issue must in such cases be left to the jury under proper instructions; but as the second wife cannot testify to any fact tending to prove a first marriage, her testimony could have no influence in the decision of that question. If the wife is properly admitted to testify, all questions of fact as to either marriage must be left to the jury under instructions as to the law and with a supervisory power of the court over the verdict. In this case the marriage to Caroline Streicher was proved, and a witness who came from Philadelphia to the trial testified that she was still living; that he saw her just before he left Philadelphia, and that she and the defendant had not been divorced. The defendant had admitted that he had never been divorced, and the testimony of the witness was not contradicted or discredited in any manner.

It is insisted that the courts will often presume, in favor of a second marriage, the death of a prior husband or wife ²⁸⁰ within a much less period than that under which such a presumption ordinarily arises, and that they will often pre-

sume a divorce in order to sustain a second marriage, and both propositions are true: *Cartwright v. McGown*, 121 Ill. 388, 2 Am. St. Rep. 105, 12 N. E. 737; *Schmisseur v. Beatrice*, 147 Ill. 210, 35 N. E. 525. There are many presumptions which practically nullify each other, and under particular circumstances the conflicting presumptions cease to have any force. Where a first marriage is proved there is a presumption in favor of its validity, but where a first wife is living before a second marriage there is a presumption of the continuance of life. The force and effect of such presumptions are not well defined, but depend in great measure upon the facts of a particular case, and in this case any presumptions of the death of Caroline Streicher or of a divorce were clearly overcome.

The court did not err in overruling the objection to the competency of Amelia Fischer Hoch as a witness.

It is also contended that the provision of the constitution that no person shall be compelled, in any criminal case, to give evidence against himself was violated by introducing evidence of defendant's statements. Most of the evidence referred to was not objected to at the trial, and none of the statements testified to were in the nature of admissions or confessions of guilt. When the defendant was taken into custody in New York he was taken to police headquarters, where he was questioned by a police inspector, who stated to him that he was going to ask him some questions; that he need not answer them unless he wanted to, and that anything he might say might be used against him at his trial. He then gave his name as John Joseph Adolph Hoch, stated his age and residence in Chicago, and said that he would answer any questions put to him. He did not confess anything, but said that he gave the name of Henry Bartells in New York because he did not want his sister in law, with whom he had some difficulty about some property in Chicago, to find out where he was. A police officer offered him the fountain pen,²⁸¹ and he reached to take it, but drew back and said he had no pen. He was remanded for forty-eight hours, and going over to court on the morning of February 2d he was told about the white powder in the fountain pen and said it was tooth-powder. These are the material statements made in New York, and when proved on the trial no objection was made. On the train, coming from New York, a police officer told defendant that they would have the contents of the fountain pen analyzed to find out if it was tooth-powder, and the

defendant then said it was no use analyzing it—that it was arsenic. When he was brought to Chicago he was interrogated at the police station by an assistant state's attorney and others, and made statements that he had never been divorced, and told where he bought the arsenic and the fountain pen. He said that he got the arsenic for the purpose of committing suicide, and told the clerk from whom he bought it that he used it as medicine and was going to take a little bit. No objection was made to that evidence. There was a written statement which was objected to and the objection was overruled. It was made by the defendant to the police in Chicago, and in it he narrated some events of his life, such as when he came to America, and his movements, and his marriage with Mrs. Walcker, and her death. Neither in that statement nor any other did he make any confession but only offered explanations. He was cautioned in New York that anything he might say could be used against him, and he was at no time put in fear or offered any inducement to make any statement. There is no ground whatever for saying that the statements were obtained by any improper or unfair methods, and the constitutional right of the defendant was not violated in letter or spirit.

It is also argued that the court made improper remarks in the presence of the jury with regard to the testimony, which were prejudicial to the rights of the defendant. Upon the examination of Mr. Vail, from whom defendant rented the house, he was asked if the defendant said anything else ²⁸² about his wife, and the attorney for defendant objected to leading the witness and apparently was commencing an argument on the subject, to the effect that if the witness was intelligent he could answer without being led, when the court said: "It does not make any difference whether he is intelligent or otherwise." The question was not leading and there was nothing prejudicial to the defendant in what was said, since it did not relate to any fact in the case and could not have influenced the jury. The next two instances of remarks by the court were merely correct statements of what a witness had said. Mrs. Knipple, testifying to the appearance of Mrs. Hoch, said that the color of her face was all gray and yellow—all kinds of color. Counsel for defendant asked this question: "Well, I know, but what was the color of her face?" The court said: "She said all kinds of color." It was a correct statement of what the witness had said and was not an ex-

pression of opinion, but only a statement that the witness said it was all kinds of color. The next remark occurred on the examination of Bertha Sohn. Like a number of other witnesses she spoke German and was examined with the aid of an interpreter. She said that Mrs. Hoch was thirsty, but took a drink and vomited it, and complained of fearful gripping of the fingers. The next question put was, "Fearful what?" The interpreter in reply said: "Gripping, twitching, perhaps gripperlin." The court, who counsel say understood German, said to the interpreter in an interrogative way, "Sort of crawling sensation?" and the interpreter replied, "Crawling sensation." The witness further answered that she did not say it was painful, but it was as though her whole body was full of crawling ants. All that the court did was to aid in a more perfect translation of the answer, and the interpreter admitted the correctness of the translation by the court. There was no error in either case in correctly stating what the witness said. The next remark complained of was about a matter with which the jury had nothing to do. Amelia Fischer ²⁸³ Hoch was being examined with reference to the contents of a letter which she had testified had been destroyed. Counsel for the defendant was objecting, and said to the witness: "You have not yet made a search for the letter; you can find it." The court said: "It was destroyed, if I understand it correctly." Counsel said that she had not stated that she had made any search for it, and the court said: "It was destroyed." The witness said: "I said before, all the letters were destroyed except the ones which were produced." The court was not commenting on any fact to be submitted to the jury, but was passing on the admissibility of secondary evidence of the contents of the letter. The question of fact whether the letter had been destroyed was for the court, and it was entirely proper for him to state his conclusion on that subject. There was no error in any remark of the court.

Objection is made in argument to a hypothetical question propounded to the expert witnesses, on the ground that it was not a true statement of the symptoms of Mrs. Hoch and the facts in the case. It is said that it incorrectly assumed that a woman of previous uniform good health, who had for a long time been able to do washing and ironing and had never had any sickness except an occasional headache, was suddenly taken ill on December 20th, that there was a suppression of urine and that she had no appetite. None of these objections

are valid and the hypothetical question fairly stated the evidence. The only evidence was that Mrs. Hoch had been a healthy woman and had made her living by washing, house cleaning and similar work, and had saved money from her earnings. There was evidence that defendant had stated to the undertaker that she had died of kidney disease; that she had deceived him by saying that she was healthy, and he found out that she had been doctored for that trouble by a doctor on the north side for many years. There was no evidence that any doctor on the north side had ever treated her and no evidence tending to prove ²⁸⁴ that the defendant's statement was true. There was evidence that she told her sister, Mrs. Sohn, that she had the retention or suppression referred to when Mrs. Sohn first came there, although subsequently the opposite condition undoubtedly existed. The hypothetical question covered both of those conditions. As to the question of appetite, there was evidence that she had no appetite but had a consuming thirst. She ate some of the squab and took soups and coffee and drank a great deal of milk and seltzer water, but retained scarcely anything on her stomach. Although the objections now made to the hypothetical question do not seem to have been made at the trial, we find no objection to it.

It is assigned as error that the court refused to give instructions numbered 68, 70, 81 and 85 asked by the defendant. No. 85 was a peremptory instruction to find the defendant not guilty, and the foregoing statement of the evidence shows that it was properly denied. The other instructions related to the degree of proof required to warrant a conviction of a criminal offense upon circumstantial evidence alone. The rules of law contained in those instructions were the same that were given to the jury in instructions numbered 41, 51, 58 and 59, in which the same principles were repeated in varying forms and language. It is not error to refuse the instructions, which were substantially duplicates of those already given.

It is also contended that the evidence being circumstantial the guilt of the defendant was not established by that degree of proof which authorized a conviction. It is insisted that it was not proved beyond a reasonable doubt that Marie Walcker Hoch came to her death by the administration of arsenic through criminal agency, or, in other words, that the corpus delicti was not proved. The corpus delicti is made up of two essential elements: The fact of death, and the criminal agency of some person as the cause of death: *Campbell v. People*,

159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123. The corpus delicti must be clearly established (12 Cyc. 382), but it may be proved by ²⁸⁵ circumstantial evidence: *Campbell v. People*, 159 Ill. 9, 50 Am. St. Rep. 134, 42 N. E. 123. The death of Marie Walcker Hoch was proved by direct evidence, and so, also, was the fact that sufficient quantities of arsenic were found in her body after death to produce death with absolute certainty if administered in her lifetime. The claim of the prosecution was that the arsenic was administered to her in some way or introduced by injections, and probably by both methods, and the fact that it was administered or introduced into the body during life is beyond any reasonable doubt. The proof excluded any theory of contamination of the body after death, and not only was arsenic found in the stomach and liver, but in the folds of the colon it was present in the powdered form, mingled with blood and mucous. The evidence was clear that the condition in the colon was the result of a vital process, or, in other words, that the arsenic was present during life. While nephritis and cystitis produce some of the symptoms manifested, the post-mortem examination showed that there was no such change in the vital organs as could have caused death, and the proof was that the symptoms were the usual ones in cases of arsenical poisoning. It was proved that a person suffering from arsenical poisoning might live as long as Mrs. Hoch did, and her symptoms at the last indicated the administration of a deadly dose at that time. The expert who testified for the defendant that the arsenic may have come from contamination through the soil of the cemetery and the intervening obstacles was contradicted, and in view of facts within the common knowledge his testimony did not raise a reasonable doubt of the criminal administration of the arsenic during life. It was even proved that the arsenic did not come from wallpaper of the room where the deceased died, which was analyzed for the purpose of ascertaining the fact.

There cannot be any reasonable doubt that Marie Walcker Hoch came to her death from arsenic administered through the criminal agency of some person, and all the facts and circumstances pointed directly to the defendant as ²⁸⁶ the criminal agency. Among the facts which convinced the court and jury that he was the criminal agent were his numerous false statements and explanations; the evident absence of any conjugal affection, as shown by his conduct toward Mrs. Fischer and his proposal of marriage immediately upon the death of

his wife; the possession of the arsenic; the motive of gain; the prospect of marrying Mrs. Fischer; his conduct and manner when he became aware of the charge of Mrs. Sohn against him, and all the facts and circumstances proved on the trial. By a system of exclusion it was proved that no other person administered the arsenic; that there was none in the medicines prescribed by the doctor or in the food or liquids prepared by any other person.

The court did not err in overruling the motion for a new trial.

The last point covered by the assignments of error is, that the judgment is insufficient because it fails to show an adjudication by the court that the defendant was guilty of the crime for which he was sentenced. After the court overruled the motion in arrest of judgment and an exception was taken to the ruling, the record is as follows: "And now neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not now be pronounced against him on the verdict of guilty heretofore rendered to the indictment in this cause, therefore the sentence of this court is that you, the said Johann Hoch, otherwise called John Hoch, otherwise called Schmidt, be taken from the bar of this court to the common jail of Cook county, from whence you came, and there be safely and securely kept and confined until the 25th day of June, in the year of our Lord nineteen hundred and five, and on that day, between the hours of ten (10) o'clock in the forenoon and two (2) o'clock in the afternoon, you, the said Johann Hoch, otherwise called John Hoch, otherwise called Schmidt, be by the sheriff of Cook county, according ²⁸⁷ to the law, within the walls of said jail or in a yard or inclosure adjoining the same, be hanged by the neck until you are dead. And the sheriff of said Cook county is further instructed and commanded to carry into full effect and execution the judgment of this court in accordance with the laws of the state of Illinois; and may God have mercy on your soul." The argument is, that in order to make a valid judgment the record must show the *ideo consideratum est*, or, in other words, it must be considered by the court that the defendant is guilty of murder. If that position were correct, the proceedings would only be set aside back to the point where the error was committed and the cause would be remanded for a proper judgment on the verdict: *Harris v. People*, 130 Ill. 457, 22 N. E. 826; *Wallace v. People*, 159 Ill.

446, 42 N. E. 771. But we are of the opinion that the judgment was legal and valid. The whole record is to be considered, and if from the whole record it is apparent that the court found the defendant guilty of the crime and sentenced him to the punishment fixed by the law and the verdict, that is all that is required. It is necessary that the record should show that there was a sentence upon the verdict, but if it was necessary that the court approve the verdict, it was done by overruling the motion for a new trial. In the absence of a statute it is not necessary that the court should before sentence find as its independent judgment, upon the facts, that the accused is guilty: 12 Cyc. 778. If the court states the finding of the jury and pronounces sentence thereon, that is a judicial determination of the fact of defendant's conviction and is all that is required: *Davis v. Utah Territory*, 151 U. S. 262, 14 Sup. Ct. Rep. 328, 38 L. ed. 153. The verdict in this case determines the character of the crime and the penalty, and the sentence upon the verdict is an adjudication by the court and is sufficient as a judgment: *People v. Murphy*, 188 Ill. 144, 58 N. E. 984; *State v. Cook*, 92 Iowa, 483, 61 N. W. 185.

We have considered every question presented by counsel for plaintiff in error, whether objection was made or exception ~~288~~ saved upon the trial or not, and have disregarded any failure to object to any evidence or ruling or to except to any ruling.

There is no error in the record and the judgment is affirmed.

On Husband and Wife as Witnesses for or against each other in criminal prosecutions, including bigamy cases, see the recent monographic note to *State v. Burt*, 106 Am. St. Rep. 763-770.

On Proof of Former Marriage in prosecutions for bigamy, see the monographic notes to *Hiler v. People*, 47 Am. St. Rep. 228; *Pittinger v. Pittinger*, 89 Am. St. Rep. 200.

On Presumptions in Favor of the Validity of Second Marriages, see the monographic note to *Pittinger v. Pittinger*, 89 Am. St. Rep. 198-206.

COMPHER v. BROWNING.

[219 Ill. 429, 76 N. E. 678.]

WILLS—Undue Influence.—If a testatrix of wealth, many business interests, and much property, employs a man, whom she subsequently makes one of her executors, as her agent, giving him full power of attorney to act for her, this alone does not show undue influence on his part, specially when such power of attorney is the only proper way of authorizing such agent to demand possession of her property from her former agents whom he succeeds. (p. 349.)

WILLS—Undue Influence.—The fact that a confidential agent of a testatrix has drawn a will, or procured it to be drawn for her, and has been made executor or trustee thereunder, may be a suspicious circumstance, which will call for additional scrutiny as to the fairness of the transaction, but such fact alone does not invalidate the will, when the other circumstances developed by the evidence show that there was no fraud, or imposition, or attempt to exercise undue influence. (p. 350.)

WILLS—Illiteracy as Ground for Avoiding.—If a testatrix is shown to have had great strength of mind, clearness of intellect, and immense capacity in the matter of looking after her property interests, and to have signed her will, her general illiteracy is not a sufficient circumstance to justify the setting aside of her will. (pp. 350, 351.)

WILLS—Undue Influence.—If a testatrix has been in the habit of employing attorneys living away from the town where she resided, the fact that her confidential agent employs such an attorney to draft her will does not tend to show undue influence on the part of such agent, nor that the will does not express her own wishes and intentions, especially when its terms are in accord with her previously expressed declarations. (p. 351.)

WILLS—Undue Influence—Former Declarations.—If a will is charged to have been executed through undue influence, the declarations of the testator, made before its execution, are admissible by way of rebuttal to show his intention as to the disposition of his property, provided such declarations are in harmony with the provisions of the will as actually made. (p. 352.)

WILLS—Testator's Knowledge of Contents.—If a will is shown to have been prepared at the request of the testator, even under general directions, and is afterward executed in the manner provided by law and signed by the testator, it will not be set aside on the ground that he did not understand what it contained, except upon clear and satisfactory proof of that fact. (pp. 353, 354.)

WILLS—Undue Influence—Burden of Proof.—If the proponents of a will furnish prima facie evidence of the validity of the will, the burden of proof is then upon the contestant to substantiate his accusation that the will was executed under undue influence. (p. 354.)

WILLS—Undue Influence.—Declarations made by a testatrix are not admissible in a proceeding to contest the will as tending to show the mental condition of the testatrix when the contestant has repeatedly admitted in open court that the testatrix was of sound mind and memory. (p. 355.)

WILLS.—Declarations of the Testator made before or after the execution of the will cannot be proven in order to invalidate it. (p. 355.)

WILLS.—Declarations of a testator, made before or after the execution of the will, may be competent to prove mental condition, but not to show undue influence. (p. 355.)

WILLS—Undue Influence—Opinion Evidence.—Proof that the testatrix was a woman easily influenced and open to flattery is not admissible to show the exercise of undue influence in the execution of the will. (p. 355.)

WILLS—Undue Influence.—If a will is admitted to be that of a sane person, it is not sufficient to set it aside that the facts and circumstances proven are consistent with the hypothesis of undue influence, but it must also be shown that such facts and circumstances are inconsistent with a contrary hypothesis. (p. 357.)

WILLS—Undue Influence—Burden of Proof.—If a will is contested for undue influence, the burden of proof is always upon the contestant to show such undue influence and so remains without shifting, until the end of the trial. (p. 358.)

WILLS.—Undue Influence sufficient to invalidate a will must amount to such a degree of restraint and coercion as destroys the free agency of the testator. (p. 359.)

WILLS—Want of Knowledge of Contents.—If one of the grounds for assailing the validity of a will is that the testatrix was illiterate and did not know the contents of the will, the attention of the jury may be called to the questions whether the testatrix, at the time of the execution of the will, knew what it contained or fully understood its provisions, without the charge being open to the objection that it instructs upon isolated facts. (p. 360.)

WILLS—Undue Influence—Conflict of Evidence.—If the evidence is conflicting upon the question whether the execution of a will was brought about by undue influence, a court of review will not disturb the verdict of the jury unless it is clearly against the weight of the evidence. (p. 361.)

APPELLATE PRACTICE.—Release of Errors, though presented in writing, and signed by the parties in whose name a writ of error is sued out, cannot be properly brought to the notice of the appellate court, except by being pleaded. (p. 362.)

Pierson, Pease & De Young, E. E. McKay and F. R. De Young, for the plaintiffs in error.

W. H. A. Renner, F. S. Smith and J. C. Seyster, for the defendants in error.

435 MAGRUDER, J. 1. The first point made by plaintiffs in error in favor of a reversal of the decree below, sustaining the validity of the will of the testatrix, Caroline Mark, deceased, is that the verdict and decree are not sustained by the evidence.

As to the allegation in the bill that the testatrix, at the time of the execution of her will, was not of sound mind and memory, that allegation is not sustained by the proof. On the con-

trary, the overwhelming weight of the testimony shows that, when she made her will, Mrs. Mark was a woman of remarkably strong intellect, and of unusually sound ⁴³⁶ mind and memory. Indeed, no proof was introduced by the contestants for the purpose of showing that she was not of sound mind and memory. But, in the course of the trial, counsel for the contestants admitted that she was a woman of sound mind and memory, and disclaimed any intention of making any insistence to the contrary. If, therefore, the verdict of the jury is not sustained by the evidence, it must be that the verdict is not so sustained, so far as it refers to the question of undue influence. The main inquiry, therefore, so far as the facts are concerned, is whether there was sufficient evidence showing that the will was not obtained by undue influence on the part of Oscar F. McKenney, one of the executors and trustees, to justify the jury in finding the verdict which they returned. The testatrix was some seventy-three or seventy-four years of age when she made her will on March 24, 1894, and lived some six years thereafter, dying at the age of about eighty years. The evidence does not show that during the period of her life, after the execution of her will, she made any complaint in regard to its provisions, or expressed any regret that it had not been made differently.

One of the circumstances insisted upon as showing undue influence is the fact that Mrs. Mark, in the winter or spring of 1893, employed Oscar F. McKenney to act as her agent in the management of her personal property, and executed to him the power of attorney, dated April 7, 1893. The proof tends to show that Oscar F. McKenney was the president or manager of a bank in Mount Carroll, and was a business man of ability and large experience. The testimony shows that he stood high in the community as a man of integrity and business capacity. Mrs. Mark had a large amount of personal property. An inventory of her estate was introduced in evidence, and is in the record. This inventory shows that, at that time, she had notes, mortgages, bonds and other securities, good and collectible, aggregating the ⁴³⁷ sum of \$320,782.06, and other choses in action, good and collectible, amounting to \$385.50; that she had cash on deposit in the Carroll County Bank of Mount Carroll, \$25,096.67; cash at her residence, \$1,104.90; two hundred shares of stock of the First National Bank of Mount Carroll, valued at \$32,000.00; notes, securities and choses in action,

listed as desperate, amounting to \$5,626.28. The inventory also shows that she owned more than two hundred and twenty cattle, about four hundred hogs, more than twenty horses, and a large amount of grain, farming implements, and other personal property. In view of her advanced age, and in view of the amount and character of the personal property thus owned by her, it was natural that she should select some competent business man to manage her affairs for her. The proof shows that, in addition to the personal property in question, she owned, from 1892 to 1896, in the neighborhood of sixteen hundred acres of farming land, exclusive of timber, and other real estate in Mount Carroll, Savanna, and elsewhere. She conducted farming operations on some of these lands during the time in question. She employed McKenney to assist her in handling her loans and moneys, and another agent to help her in looking after her farming operations. In addition to this, the testimony shows that she had, before the appointment of McKenney, employed other agents to assist her in managing her personal and real property. One of these was named Ashway, with whom she appears to have had a litigation. Another was a man named Miles, and still another a man named Bucher. In view of the fact that other agents had been employed to look after her affairs, and would therefore naturally be in the possession or control of much of her property, it was reasonable and natural that she should execute the power of attorney in question to the new agent, McKenney, in order that the latter might use such power of attorney as his authority for demanding the possession of her personal property from the other agents, so far as it was still under the control of the latter.

⁴³⁸ It is to be noted that McKenney was not appointed by the will as the sole executor and trustee thereunder, but that associated with him was Frederick S. Smith. It is also to be noted that no legacy or devise was made to McKenney or to Smith by the terms of the will; and all the pecuniary benefits, which they were entitled to receive from their position as executors and trustees, were such compensation for their services as would be reasonable and just and proper. It is true that the will charges the estate "with the payment of such reasonable compensation to the said Oscar F. McKenney and Frederick S. Smith as they may deem just and proper, according to the time and attention they may severally devote to the affairs" of the estate. But the provision in question would

naturally be construed by any court as authorizing them to receive only such compensation for their services in executing the trust as the law itself would allow or as the court would determine to be reasonable. It seems from the evidence that McKenney himself desired the will to be so drawn as that he would have an associate in the management of the interests of the estate, as he was himself in ill-health, and had business of his own to attend to. It also appears that Mrs. Mark herself was consulted as to the choice of Frederick S. Smith to act as coexecutor and trustee with McKenney. The facts that a confidential agent of a testator or testatrix has drawn the will, or procured it to be drawn, and has been made executor and trustee thereunder, may be suspicious circumstances, which call for additional scrutiny as to the fairness of the transaction; but these facts alone do not invalidate the will where all the other circumstances developed by the evidence show that there was no fraud or imposition, or attempt to exercise undue influence: Schouler on Wills, 2d ed., sec. 245. In Livingston's Appeal, 63 Conn. 68, 26 Atl. 470, it was held that the rule, under which undue influence is inferred from a confidential relation between the testator and the person procuring the will has no application where such person takes nothing ⁴³⁹ under the will; and that, where a lawyer, who has for a long time been the confidential adviser of a testatrix, draws her will, and by it is made executor of the will and a trustee under it, he is not to be regarded as taking beneficially under the will, but only as accepting duties under it which the testatrix imposes. In the case at bar McKenney was only given power "to properly and safely loan and invest" the money and personal property of the testatrix, and had no power to convey real estate or release mortgages; and the proof shows that the testatrix herself executed such releases, whenever it was necessary to do so, up to the time of her death, and that she was consulted about, and informed of, all that took place in the management of her affairs.

We see nothing in the evidence to indicate that any undue influence was exercised over Mrs. Mark, arising out of the fact that McKenney acted as her agent, and that he was appointed executor by the terms of the will.

It is said that the testatrix was ignorant, and could not read. There is testimony tending to show that she could read, and there is also testimony to show that she could not read. It is clearly proven that she could write her signature, and the

witnesses of her will testify that they saw her sign the will. It is undoubtedly true that she was not an educated or cultured woman, and that, if she read at all, she read with difficulty. The testimony shows, however, that when she was a girl she went to school, and one of the witnesses testifies that the latter went to school with her in the city where she lived before she came to Illinois. We do not think that, in view of the overwhelming testimony as to the strength of her mind, and the clearness of her intellect and her capacity in the matter of looking after her property interests, her illiteracy is a sufficient circumstance to justify the setting aside of her will. In *Wombacher v. Barthelme*, 194 Ill. 425, 62 N. E. 800, it was held that testimony that the testator could not read English writing, nor write except to sign his name, had no tendency⁴⁴⁰ to establish either his inability to make a will or his ignorance of the contents of the will which he executed.

It is said, however, that the fact that McKenney went to Savanna in Carroll county, and procured a lawyer there to draw the will, instead of employing a lawyer in Mount Carroll, where the testatrix lived, to do so is a suspicious circumstance, and indicates that the will was rather the production of McKenney than of the testatrix herself. The testimony tends to show that the testatrix preferred to employ lawyers, living away from the town where she resided. She had a litigation with a former agent, named Ashway, and, instead of employing a lawyer in Mount Carroll to try the suit for her, she employed Mr. Sheean, an attorney living in Galena. She had another litigation in Mount Carroll with a man, named Mertz, and she also employed Mr. Sheean of Galena to try the Mertz suit for her. The fact, therefore, that, in the important matter of drawing her will, she employed an attorney living in another town in the same county, and only a short distance from Mount Carroll, is not of itself any indication that the will did not express her own wishes and intentions. It appears, on the contrary, that she was fully consulted as to the provisions of her will, and that the lawyer who drew it was fully informed as to her wishes in the matter. It also appears from the evidence that she was a secretive woman, and unwilling to have her neighbors informed about her private business matters. She said that her former agent, Bucher, had been advising her to have a will drawn, and she was afraid that if it was drawn in Mount Carroll and he knew of it he would annoy her in reference to it. In addition to this, the

evidence shows that the provisions of the will correspond exactly with her declarations in reference to the manner of disposing of her property, which she made to others before the drawing of the will. In *Wombacher v. Barthelme*, it was said:

‘The fact that its provisions corresponded with his declarations as to his intentions is a circumstance going to contradict the theory of ⁴⁴¹ fraud or substitution.’ In the case at bar the testimony shows that the testatrix, Mrs. Mark, had indicated in conversations with others which of her nephews and nieces, or foster children, she intended to provide for, and she did provide in her will for those thus mentioned in her conversations with others. The evidence also shows that she frequently spoke of her intention to found a home for old women, who were poor and dependent on others. The provision of the will in reference to this matter corresponds with her expressed intentions upon that subject. Where a will is charged to have been executed through undue influence, the declarations of a testator made before its execution are admissible by way of rebuttal to show his intention as to the disposition of his property, upon the ground that a will made in conformity with such declarations is more likely to have been executed without undue influence than if its terms are contrary to such declarations. The declarations thus admissible are those which are in harmony with the provisions of the will actually made, and not those which are opposed to such provisions: *Kaenders v. Montague*, 180 Ill. 300, 54 N. E. 321; *Harp v. Parr*, 168 Ill. 459, 48 N. E. 113; *Wombacher v. Barthelme*, 194 Ill. 425, 62 N. E. 800. Some of the questions which counsel for plaintiff in error asked the witnesses, and to which objections by counsel for defendants in error were sustained, sought to prove declarations of the testatrix, which were opposed to the provisions of her will, and not in harmony with it; and, therefore, the action of the court in sustaining such objections was not erroneous. It appears that Mr. Sheean, a lawyer in whom the testatrix had great confidence, had advised her to make a will, and told her that she could waive therein the giving of a bond, and suggested to her that, if she wanted him to make the will, he could take memoranda of what she desired home with him to Galena, and there write the will, and send it to her. She, however, subsequently concluded to employ a lawyer living in Savanna, named Wingert, to draw her will for her. We see nothing in the evidence to indicate that the ⁴⁴² will

thus drawn was not in accordance with her intentions in regard to the disposition of her property.

It is said, however, that there is no evidence in the record showing that she ever read the will, or that the will was read to her. The evidence is clear and conclusive that, when the subscribing witnesses came to her house and witnessed the will, they not only saw her sign it, but she stated to them, in answer to questions, that the document which they were asked to witness was her will. A. G. Jackson, one of the witnesses to the will, and whose testimony is in the record says: "She spoke and shook hands with me, and said she had requested Mr. McKenney to ask Mr. Rinewalt and myself to come for the purpose of witnessing her signature to her will; saw paper or writing on the table; Mrs. Mark, Mr. Rinewalt, Mr. McKenney and myself were there; Mrs. Mark was sitting in a chair; the paper upon the table I afterward signed, she said it was her will; I saw her sign it." The other witness, John M. Rinewalt, says: "Mrs. Mark said she asked us to come up for the purpose of witnessing her will; Mrs. Annie Mark, now Mrs. Tipton, went in and out once or twice; Mrs. Mark took the instrument and wrote her name to the bottom of it; 'Exhibit A' in this case, I believe, is the will that she signed; I saw her sign her name on that date; after she had signed it, I took it and asked Mrs. Mark, 'Do you declare this to be your last will and testament, and desire us to witness it?' and she said she did; when she signed her name, Mr. Jackson and Mr. McKenney and myself were present; I attached my name as a witness."

In *Sheer v. Sheer*, 159 Ill. 591, 43 N. E. 334, we said (p. 594): "The rule of law is, 'where the testator is shown to have executed an instrument as his will, being in his right mind, and there is nothing of fraud or imposition, it will be presumed that he was aware of its contents.' The general rule is, that proof of the testator's signature to the will is prima facie evidence of his having understandingly executed the same." As was said in *Sheer v. Sheer*, "without attempting to review ⁴⁴³ the evidence at length, we are satisfied that it cannot be said that it establishes the fact that the testator was, at the time he executed the instrument and requested its attestation by the witnesses, ignorant of its contents and provisions. Where a will is shown to have been prepared at the request of a testator, even under general directions, and is afterward executed in the manner provided by law, it should

not be set aside on the ground that he did not understand what it contained, except upon clear and satisfactory proof of that fact." Here, there is no such clear and satisfactory proof upon this subject.

In the case at bar there is evidence showing that the testatrix was not unduly influenced by Oscar F. McKenney in the matter of executing her will; and, this being so, the verdict of the jury, who are properly judges of the fact whether there was undue influence or not, will not be disturbed. The proponents of the will upon the trial below furnished prima facie proof of the validity of the will, and therefore the burden of proof was upon the contestants to substantiate the charge that the testatrix, when she executed the will, was under the undue influence of Oscar F. McKenney, as charged in the bill. It was incumbent upon the contestants to overcome the prima facie case, made by the proponents, by a preponderance of the evidence. This they failed to do: *Swearingen v. Inman*, 198 Ill. 255, 65 N. E. 80; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; *Michael v. Marshall*, 201 Ill. 70, 66 N. E. 273.

2. It is claimed by plaintiffs in error that the court below committed error in the admission and exclusion of evidence. It is said that the court erred in sustaining an objection made by defendants in error to certain questions asked by the plaintiffs in error upon the cross-examination of a certain witness produced by the proponents, named Moffett. No error was committed in this regard, because the questions, to which objections were thus sustained, were not proper cross-examination. Moffett was asked, upon direct examination, what the testatrix said to him in regard to ⁴⁴⁴ the trial of the suit with Ashway. The questions asked upon cross-examination were in reference to what she said about her heirs and about making a will. It is clear that the conversations about which the witness was asked on cross-examination were not the same as those about which she was asked upon direct examination. Some of the proponents' witnesses testified as to statements of the testatrix about founding an old ladies' home. The contestants introduced a witness, named Craig, who was asked if, in any of the conversations he had with the testatrix, he heard her say anything about founding an old women's home. This answer was properly stricken out on motion of the proponents because it was not claimed by anybody, nor shown, that Craig was present at any of the conversations which the witness had with the testatrix about an old women's home, and, there-

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fore, the fact that the testimony of him could not be shown to be that she had made a will improperly stated in the statements made to the jury that the object of the testimony of the testatrix was to be that of a person who properly stated the will would be invalid. It is declared in open court that the mind and memory of the testatrix had been impaired by her heirs. That the testimony that declarations of the testatrix frequently to the jury to invalidate the will of Huntington III. 134. 32 and the grantor. The deed made by the grantor. 445 deed made by the grantor, but such a declaration of influence or fraud is not sufficient. 269. In *Beverly v. Huntington* (p. 631): "It was not necessary for the testimony made by the testatrix were in conflict with the will cannot be shown to be invalid. 376. They are unnecessary. *Massey v. Huntington* unnecessary for the testimony conceded on both sides that the testatrix when she made her will conceded that the testimony was of her will, it was unnecessary for the purpose of showing her will. It is claimed that the court error in the band of one of the devisees. It appears from the testimony of the witnesses. It is asked of this witness. The testimony of the witnesses to the court that they were the testimony of Lewis Browning.

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fore, the fact that she never said anything upon that subject to him could not contradict the proponents' witnesses who said that she had talked about it. Again, it is said that the court improperly struck out the testimony of one Libberton as to statements made to him by the testatrix. Counsel stated that the object of these questions was to show the mental condition of the testatrix, but, as her mental condition was admitted to be that of a person of sound mind and memory, the court properly ruled that no more testimony upon that subject would be heard. Counsel for contestants had repeatedly declared in open court that they admitted that she was of sound mind and memory. Certain questions were asked of a witness named Bucher, the object of which was to show that the testatrix had declared that she intended to leave her property to her heirs. These questions were improper upon the ground that declarations of the testatrix, made previously or subsequently to the execution of a will, cannot be proven in order to invalidate the will: *Dickie v. Carter*, 42 Ill. 376; *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269; *Reynolds v. Adams*, 90 Ill. 134, 32 Am. Rep. 15. "The declarations of a testator or grantor, made before or after the execution of a will or ⁴⁴⁵ deed, might be competent evidence to prove mental condition, but such declarations are not competent to show undue influence or fraud": *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269. In *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056, we said (p. 631): "It was not error to exclude her [testatrix's] declarations made before the execution of the will, and which were in conflict with its provisions. Such parol declarations cannot be shown to invalidate a will: *Dickie v. Carter*, 42 Ill. 376. They are sometimes admitted to prove mental condition: *Massey v. Huntington*, 118 Ill. 80, 7 N. E. 269. But they were unnecessary for that purpose here, because it was virtually conceded on both sides that the testatrix was of sound mind when she made her will." So, in the case at bar, as it was conceded that the testatrix was of sound mind when she made her will, it was unnecessary to introduce declarations for the purpose of showing her mental condition. It is furthermore claimed that the court erred in allowing Lewis Browning, husband of one of the devisees, to testify as a witness for proponents. It appears from the record that, after certain questions were asked of this witness, the counsel for the contestants announced to the court that they withdrew their objection to the testimony of Lewis Browning. After the withdrawal of the

objections, he was permitted to testify; and, therefore, no error was committed. It is furthermore said that the court refused to allow Libberton, a witness of plaintiffs in error, to testify that the testatrix was a woman easily influenced or susceptible to flattery. No error was committed in this regard, because in *Michael v. Marshall*, 201 Ill. 70, 66 N. E. 273, it was said (p. 74): "The first thing in the order of events at the trial, which is made the ground for seeking a reversal of the decree, is, that the court erred in sustaining objections to questions calling for the opinions of witnesses. The questions were as to whether the testatrix was a person easily influenced; as to what influence her uncle and aunt exercised over her; to what extent she had been influenced by her uncle, and to what extent she had been influenced by her ⁴⁴⁶ aunt; whether she was afraid of her uncle and other like questions. It is manifest that the court was right in its ruling, since the questions did not call for facts, but for mere opinions and conclusions from facts." So, in the case at bar, the question as to whether the testatrix was easily influenced or was susceptible to flattery called for mere opinions, and conclusions from facts.

3. It is claimed that the court below erred in reference to the giving and refusal of instructions. The first error assigned is, that the court erred in giving for the defendants in error the fourth instruction. That instruction told the jury that the question of the soundness or unsoundness of the mind and memory of the testatrix was not in the case, it being admitted by the contestants that she was of sound mind and memory at the time of executing the instrument introduced in evidence, and purporting to be her last will and testament; and that, unless the jury believed from the evidence that said instrument was the result of undue influence exercised over the mind of the testatrix by Oscar F. McKenney, then they must find by their verdict that it was the will of Caroline Mark. This instruction was not erroneous under the circumstances of this case. It is clearly shown that counsel for the contestants announced to the court that they did not claim, and would not undertake to prove, that the testatrix was insane or of unsound mind. When one of the witnesses was asked whether in his opinion the testatrix was of sound mind and memory at the time of making the will, one of the counsel for plaintiffs in error arose in court and said: "We make no claim as to her unsoundness of mind, only her testamentary capacity. This is simply a waste of

time on the question of sanity. There is no question about that. It is this question of undue influence, to show the party is illiterate, the fiduciary relation, and the fact that she didn't know the contents of this will." It further appears that no witnesses testified that the testatrix was not of sound mind and memory at the time of executing ⁴⁴⁷ the will, and the contestants offered no proof upon that subject. This being so, the instruction was not erroneous. In *Illinois Cent. R. R. Co. v. King*, 179 Ill. 91, 70 Am. St. Rep. 93, 53 N. E. 552. we said: "It is not ground for reversal that an instruction assumes as proven a fact conclusively established by the evidence without contradiction": *Gerke v. Fancher*, 158 Ill. 375, 41 N. E. 982; 11 Ency. of Pl. & Pr. 132. It is said by counsel for plaintiffs in error that some of the defendants below were minors, and, therefore, could not be bound by the admissions of counsel. This is so, but as the testimony showed conclusively that the testatrix was of sound mind, and there was no evidence whatever to contradict it, there was nothing to be submitted to the jury upon this issue, and the court committed no error in so directing them.

It is also claimed that the court erred in giving the thirteenth instruction, which was given for the proponents. That instruction was as follows: "The jury are instructed as a matter of law that it is not sufficient that the circumstances appearing in evidence attending the execution of the instrument in evidence in this case, purporting to be the last will and testament of the said Caroline Mark, are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis. Circumstances which should avail for the proof of fraud are only such as are inconsistent with a contrary view of the transaction."

The language of this instruction is the same as that which appears in section 239 of *Schouler on Wills*, second edition, and in the case of *Boyse v. Rossborough*, 6 H. L. Cas. 6. In *Schouler on Wills*, section 239, it is said: "'In order to set aside the will of a person of sound mind,' observes Lord Cranworth, 'it is not sufficient to show that the circumstances attending its execution are consistent with the hypothesis of its having been obtained by undue influence; it must be shown that they are inconsistent with a contrary hypothesis.'"⁴⁴⁸ And the same holds true where positive fraud or force is the ground of objection. Hence is it that isolated and dis-

connected circumstances are not permitted to outweigh the usual presumption of the law, that a person of intelligence and capacity, who executes a will does so without imposition or undue influence."

In connection with the thirteenth instruction it is claimed, on the part of the plaintiffs in error, that the court below erred in refusing to give instructions 19, 20, 21 and 22 asked by plaintiffs in error, the contestants. The instructions thus refused announced the doctrine, in substance, that, if the jury found that confidential relations existed between the testatrix and Oscar F. McKenney, the burden of proof shifted to the proponents to show that the alleged will was the free and voluntary act of the testatrix. It cannot be said that, after proof was introduced showing the relations which existed between McKenney and the testatrix, the presumption of undue influence was so raised as to shift the burden of proof to the proponents of the will. In *Michael v. Marshall*, 201 Ill. 70, 66 N. E. 273, it was said (p. 76): "As a matter of law, the burden of proof in any case is determined by the issues, and it does not shift, but at the end the party upon whom the burden rests by the pleadings must have sustained his position by a preponderance of evidence." In the case at bar, under the issue made by the pleadings, the burden of proving undue influence was upon the complainants, who filed the bill below: *Roe v. Taylor*, 45 Ill. 485; *Webster v. Yorty*, 194 Ill. 408, 62 N. E. 907; *Michael v. Marshall*, 201 Ill. 70, 66 N. E. 273. This burden of proof remained upon the contestants to the end of the trial. In *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908, where it was said that, when proof of a fiduciary relation between the testator and the beneficiary in a will was made, the presumption arose that undue influence induced the execution of the document, and that there was, therefore, imposed upon the proponent the necessity of showing that the execution of the will was the result of free deliberation on the part of the ⁴⁴⁹ testator, and of the deliberate exercise of his judgment, and not of imposition or wrong practiced by the trusted beneficiary, it was nevertheless at the same time said: "This, however, does not change the general rule which is, that, upon the whole case, the burden of proof is upon the contestants to establish the undue influence." Where it is said that, when such proof of a fiduciary relation is introduced, the burden of proof is shifted, "all that is meant by this is that there is a necessity

of evidence to answer the prima facie case or it will prevail, but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact, which constitutes the issue; and this burden remains throughout the trial": *Chicago Union Traction Co. v. Mee*, 218 Ill. 9, 75 N. E. 800. To have given the instructions asked by the contestants, and which were refused, would have been to tell the jury that the burden of proof was upon the proponents to show that there was no undue influence. It would have been erroneous to give the jury such instructions, and their refusal was not error.

Complaint is also made that the court erred in giving several other instructions for the proponents, upon the alleged grounds that each of such instructions isolated a certain fact, and told the jury that such fact was not sufficient to overthrow the will. It is said that instructions of this character were condemned in *Weston v. Teufel*, 213 Ill. 291, 72 N. E. 908. We do not think that the instructions complained of are justly subject to the criticism made upon them. For instance, one of these instructions sought to define the degree of influence which would vitiate the will upon the ground of undue influence, by stating that it must amount to such a degree of restraint and coercion as to destroy the free agency of the testatrix. This was a correct definition of undue influence under the decisions of this court: *Woodman v. Illinois Trust etc. Bank*, 211 Ill. 578, 71 N. E. 1099; *Johnson v. Farrell*, 215 Ill. 542, 74 N. E. 760. In thus defining the general character of undue influence, there was no statement of an isolated fact which did or did ⁴⁵⁰ not constitute undue influence. Two of the instructions complained of called the attention of the jury to the question whether or not the testatrix, when she signed and executed the will, knew what it contained, and whether or not the testatrix fully understood its provisions. These instructions were not erroneous as calling attention to the ignorance or understanding of the testatrix as an isolated fact, because one of the allegations in the bill was that the testatrix was illiterate, and had no knowledge of the value of her estate, and no understanding of the contents of the will. This allegation as to her ignorance of the contents of the will was additional to the allegations that she was of unsound mind and memory and the victim of undue influence. In *Swearingen v. Inman*, 198 Ill. 255, we said: "It is insisted that there was ground for invalidating the

will in the fact that the testatrix did not know its contents when she signed it. . . . The claim that the testatrix did not know how she disposed of her property is neither the same as, nor consistent with, the averment that she was induced to make a particular disposition of her estate by the undue influence of her husband": See, also, *Sheer v. Sheer*, 159 Ill. 591, 43 N. E. 334; *Wombacher v. Barthelme*, 194 Ill. 425, 62 N. E. 800. The instruction, therefore, was directed to an independent allegation of the bill, set up as an independent reason for setting aside the probate of the will. Two of the instructions objected to related to facts bearing upon the question, whether or not the testatrix was of sound mind and memory, but as the soundness of her mind and memory was not in dispute or controversy, the instructions upon this subject could have done the contestants no harm. On the contrary, the court, at the request of contestants, gave to the jury the following instruction, to wit: "The court instructs the jury that, if you believe from the evidence in this case that Caroline Mark was a person so illiterate that she could not read and understand the instrument offered in evidence, and that at the time she signed the same Oscar F. McKenney was her agent, and that she reposed ⁴⁵¹ special trust and confidence in him, and that said McKenney caused said instrument to be written by an attorney, who was a stranger to Mrs. Mark, and out of her presence, and that said McKenney dictated to said attorney each and every provision of said will, and that said Oscar F. McKenney solicited and procured the attesting witnesses to the said instrument, and that one of said attesting witnesses was his copartner in the banking business, and that the other of said witnesses was very little acquainted with Mrs. Mark, and that Oscar F. McKenney received a beneficial interest in the alleged will, then, in making up your verdict in this case, you have a right to take into consideration all these facts, if proven, together with the testimony of witnesses and all the other facts and circumstances in evidence in this case, in determining whether the instrument in question was procured by undue influence, as explained in these instructions."

This instruction submitted to the jury all the facts and circumstances insisted upon by the contestants as showing undue influence over the testatrix by McKenney. The jury found against the contestants upon the question of undue influence, as thus submitted to them. We have held that, where

the evidence is conflicting, as it is in the case at bar, upon the question whether the execution of a will was brought about by undue influence, a court of review will not disturb the verdict of a jury, which has been approved by a trial court, unless the verdict is clearly against the weight of the evidence: *French v. French*, 215 Ill. 470, 74 N. E. 403; *Johnson v. Farrell*, 215 Ill. 542, 74 N. E. 760; *Piper v. Andricks*, 209 Ill. 564, 71 N. E. 18; *Spencer v. Spruell*, 196 Ill. 119, 63 N. E. 621; *Kinnah v. Kinnah*, 184 Ill. 284, 56 N. E. 376; *Bevelot v. Lestrade*, 153 Ill. 625, 38 N. E. 1056. Here, the verdict of the jury is not, in our opinion, clearly against the weight of the evidence.

4. The defendants in error have filed in this case the record in another proceeding, begun and consummated after the rendition of the final decree, which is here sought to be reviewed. They have also filed an abstract of this additional ⁴⁵² record. The final decree, here sought to be reviewed, was entered on March 25, 1902, and an appeal therefrom was prayed and allowed, but not perfected. Subsequently, in June, 1905, the present writ of error was sued out for the purpose of reviewing the decree, so entered on March 25, 1902. Twenty-one months after the final decree was entered on March 25, 1902, a petition was filed in the court below, to wit, on December 17, 1903, in which a decree was entered on December 18, 1903, relating to a compromise, alleged to have been made of the proceeding for the setting aside of the will of Caroline Mark, deceased, here brought under review. The decree, rendered on December 18, 1903, recites that certain of the petitioners therein who were parties to the suit to set aside the will, and legatees and devisees under the will, had accepted the bequests and devises made to them, and it also recites that a certain agreement had been entered into between the executors and trustees herein and some of the parties to the suit to contest the will, who are minors acting through a next friend, by the terms of which a certain amount of money was to be paid as a compromise or settlement of the litigation, seeking to set aside the will. It is evident that the record and decree in the compromise suit are separate and distinct from the record and decree in the suit to set aside the will. In the suit to set aside the will, begun on July 13, 1901, and in which the final decree was entered on March 25, 1902, there is nothing in relation to this compromise suit, begun on December 17, 1903, and ended by a decree on December 18,

1903. In the certificate of evidence in the suit to set aside the will nothing is said about the compromise suit thus referred to. It is clear that this additional record cannot be considered by us in this case.

If it was the desire of the defendants in error to bring the subject matter of this additional proceeding to the attention of this court, a plea of release of errors should have been filed, but no such plea has been filed in this case.

⁴⁵³ In *Kern v. Zink*, 55 Ill. 449, it was held that a release of errors, although presented in writing, signed by the parties in whose name a writ of error was sued out, cannot properly be brought to the notice of the court, except by being pleaded. And we there said: "A paper purporting to be a release of errors, and to be executed by said Peter and Emma, has been filed with the papers in the case, but as the release has not been pleaded, we cannot notice it." In *Trustees of Schools v. Hihler*, 85 Ill. 409, it was held that, if matters are relied on in this court as a release of errors, they must be pleaded or they will not be regarded; and we there said: "If relied on as operating as a release of errors, counsel should know that, under the well-established practice, it should have been pleaded. Releases, and papers operating as such, to be regarded by the court, must be brought to its attention by a regular plea. This is a court of record, and, as such, matters of this character must be relied on according to the practice in such tribunals." In *Moore v. Williams*, 132 Ill. 591, 24 N. E. 617, we again said (p. 594): "If the reasons of the appellate court for dismissing the appeal were based upon facts outside of the record, and occurring after the decree of the circuit court, from which the appeal was taken, had been rendered, it was improper to consider such facts as operating as a release of errors, unless they had been pleaded as such release. . . . Where a party accepts the benefit of a decree, he cannot afterward prosecute error to reverse it; such acceptance operates as an estoppel and may be treated as a release of errors, but, in an appellate court, matter operating as a release of errors must be set up in a plea to the assignment of errors."

In the case at bar it appears from the decree rendered on December 18, 1903, in the compromise suit, that certain of the parties to the original litigation had accepted the benefit of the decree below by taking the amounts bequeathed to them under the will. Such acceptance, or the decree finding it to

exist, may be regarded as a release of errors, but as such ⁴⁵⁴ it should be pleaded. In the present case, this course has not been pursued, and, therefore, the additional record and the abstract of the same are not before us for consideration: Trapp v. Off, 194 Ill. 287, 62 N. E. 615; Thomas v. Negus, 2 Gilm. 700; Corwin v. Shoup, 76 Ill. 246; Holt v. Reid, 46 Ill. 181; Beardsley v. Smith, 139 Ill. 290, 28 N. E. 1079; and the cost of the same will be taxed against the defendants in error.

For the reasons above stated, we are of the opinion that the decree of the circuit court was correct; and it is accordingly affirmed.

Declarations of a Testator to sustain or overthrow his will are discussed in the recent monographic note to *In re Colbert's Estate*, 31 Mont. 461, 107 Am. St. Rep. 439.

Undue Influence, in order to vitiate a will, must amount to such a degree of restraint or coercion as destroys the free agency of the testator at the time the testamentary act is performed. When the proponents of a will make a prima facie showing of its validity, the burden is upon the contestants to establish by a preponderance of evidence the charge of undue influence: See *Dausman v. Rankin*, 189 Mo. 677, 107 Am. St. Rep. 391, and cases cited in the cross-reference note thereto; notes to *In re Hess' Will*, 31 Am. St. Rep. 670-691; *Richmond's Appeal*, 21 Am. St. Rep. 94-104.

The Evidence of Subscribing Witnesses to Wills, in respect to its competency and effect in supporting or overthrowing the instrument to which they have subscribed, is discussed in the monographic note to *Stevens v. Leonard*, 77 Am. St. Rep. 459-480.

CASES
IN THE
SUPREME COURT
OF
IOWA.

WHINERY v. McLEOD.

[127 Iowa, 11, 102 N. W. 132.]

HOMESTEADS Purchased with Pension Money.—Land purchased with pension money of the husband, but conveyed to his wife, and subsequently occupied by them as a homestead, is not exempt from execution for a debt of the wife, contracted prior to its acquisition or occupation as a homestead. (p. 365.)

C. S. Macomber, for the appellants.

Hastings & Woodward, for the appellee.

¹¹ LADD, J. The defendant, F. L. Whinery, obtained a judgment against Arthur and Lizzie Whinery November 9, 1894, for two hundred and thirty-four dollars and fifteen cents and costs. At that time the judgment defendants were occupying lot 7, block 16, in Ida Grove, as a homestead, and on the seventh day of December following conveyed it to the plaintiff, in consideration of certain evidences of debt held by her. Execution issued on said judgment October 3, 1902, and to enjoin a sale thereunder on the ground that the lot was exempt from said execution as ¹² the homestead of defendants is the object of this suit. That the indebtedness antedated the acquisition of the property was not specifically pleaded in the answer, but the issue as to whether the judgment was a lien was raised not only by an averment in the petition that it was not, but in the answer that it had attached as such to the property. This necessarily involved the question as to when the debt was incurred, and a more specific statement, in the absence of motion therefor, was not essential.

The petition on which the judgment was based, and which was admissible in evidence as part of the record in the case,

shows that the indebtedness was evidenced by three promissory notes of Arthur Whinery, the last of which was executed March 13, 1888, and that, because these were given for family necessities, judgment was also rendered against his wife, Lizzie Whinery. This was none the less her debt because liability was fixed therefor by statute: See Code, sec. 3165. Some time subsequent to the last-mentioned date, Arthur Whinery exchanged a pair of mules, which he had obtained for a span of horses bought with pension money, to one Fouts, for a contract of sale of the lot with the Iowa Railroad Land Company to his wife, Mary E., commonly known as Lizzie Whinery, as all parties understood. She testified that they moved on the premises "in a short time," and on August 30, 1889, she procured a deed from the company. If anything was subsequently paid, it was received by him from the government as a pension, so that there is no doubt but that the property and money invested were exempt to him. But it does not follow that the proceeds thereof in the hands of another continued to be exempt. As both the mules and the money were exempt, he might give them away, or direct that the contract received therefor be assigned to another. This he seems to have done, for there is nothing in the record even tending to indicate a purpose on his part of retaining any interest in the lot. His wife became the owner of it prior to its occupancy as a homestead: ¹⁸ See *Butler v. Nelson*, 72 Iowa, 732, 32 N. W. 399; *Marquardt v. Mason*, 87 Iowa, 136, 54 N. W. 72. It is not perceived on what theory either of them may invoke the aid of section 4010 of the Code, providing that "the homestead of every such pensioner, whether the head of the family or not, purchased and paid for with any such pension money or the proceeds or accumulations thereof, shall also be exempt; and such exemption shall apply to debts of such pensioner contracted prior to the purchase of the homestead." These premises never belonged to the pensioner, and this statute contains no provision shielding them from the antecedent indebtedness of his wife.

Section 2976 of the Code expressly declares the homestead liable for debts of the owner created at any time prior to its occupancy as such, and we are unable to discover any ground for denying the defendants the right to enforce such liability. The temporary writ of injunction should have been dissolved and the petition dismissed.

Reversed.

Pension Money is exempt from legal process: *Falkenburg v. Johnson*, 102 Ky. 543, 80 Am. St. Rep. 369. As to whether property purchased with pension money is also exempt, see *Crow v. Brown*, 81 Iowa, 344, 25 Am. St. Rep. 501; *Holmes v. Tallada*, 125 Pa. St. 133, 11 Am. St. Rep. 880; note to *Rozell v. Rhodes*, 2 Am. St. Rep. 596; and as to whether a bank deposit of pension money is exempt, see *Price v. Society of Savings*, 64 Conn. 362, 42 Am. St. Rep. 198; *Holmes v. Marshall*, 145 Cal. 777, 104 Am. St. Rep. 86.

ALLEN v. NORTH DES MOINES METHODIST EPISCOPAL CHURCH.

[127 Iowa, 96, 102 N. W. 808.]

CORPORATIONS, RELIGIOUS—Dissolution and Reorganization.—The members of an insolvent and dormant church corporation may, in the absence of fraud, incorporate a new organization for the promotion of the same purposes to which the old one was dedicated, without becoming chargeable with its debts and obligations, provided there is a bona fide intention to make a new and independent organization, and not to take over, absorb, or convert to its use the property or assets of the old corporation to the prejudice of its creditors. (p. 368.)

CORPORATIONS—Dissolution and Reorganization—Liability. If a new corporation takes over the property of its insolvent predecessor, it is not, generally speaking, liable to the creditors of the latter, as a debtor, but only as a trustee. (pp. 369, 370.)

CORPORATIONS, RELIGIOUS—Liability of Members.—A creditor of a religious corporation is not a creditor of its individual members, and has no right of action against them as such. (p. 370.)

PLEADING AND PRACTICE—Amendments.—Permission to amend a petition by setting up a new and distinct cause of action, after the introduction of evidence, is entirely within the discretion of the trial court. (p. 372.)

W. M. Wilcoxson and Bowen & Brockett, for the appellant.

E. D. Samson, S. F. Prouty and W. L. Smith, for the appellees.

⁹⁷ **WEAVER, J.** Briefly stated, the plaintiff claims that in the year 1887 the defendant was incorporated for religious purposes under the laws of this state, and assumed the name of Prospect Park Methodist Episcopal Church, and that thereafter, by proper proceedings, the name of the corporation was changed to North Des Moines Methodist Episcopal Church. It is further alleged that prior to the beginning of this action plaintiff obtained a judgment against the corporation in the

district court of Polk county, Iowa, under the name of Prospect Park Methodist Episcopal Church, which judgment is still unpaid, and that since the change in the name of the organization it has become the owner of certain real estate upon which the plaintiff asks to have ⁹⁸ the lien of such judgment established and confirmed. By a second count of her petition the plaintiff alleges that the present church organization is identical with the one against which she obtained judgment, and that the change in its name and designation was a fraudulent scheme or device to hinder and delay its creditors. The defendants admit that the North Des Moines Methodist Episcopal Church is a corporation, and owns the real estate above referred to, but deny that said corporation is identical with the Prospect Park Methodist Episcopal Church, or is in any way responsible for the debts of such church. They deny all allegations of fraud. It is also alleged that the organization known as the Prospect Park Church became indebted beyond its ability to pay, and its church property, which is the property now owned by the defendants, was sold under foreclosure of mortgage, and the title wholly lost; that in such condition it was impossible to obtain contributions for the support of the society, or to purchase or erect a new building, and the corporation and society were disbanded. Under these circumstances it is said the North Des Moines Methodist Episcopal Church was organized, and an incorporation effected as a new and independent body having no connection with or responsibility for the debts of the old organization.

From this outline of the issues it will be readily seen that the one question to be considered is whether the reorganized North Des Moines Church is a mere continuation of the old corporation under a new name, or is a new corporation, which is under no legal liability for the debts of its predecessor. That the members or some of the members of an insolvent or dormant corporation may organize a new corporation for the promotion of the same purposes to which the old one is dedicated without becoming chargeable with its debts or obligations is too well settled for dispute. On the other hand, it is equally well settled that the mere change in the name of a ⁹⁹ corporation has no effect upon its legal status or upon the rights of creditors. Among corporations organized for business purposes it has been, and still is, a matter of most frequent occurrence that in the initial struggle for existence they

become hopelessly insolvent. Under such circumstances the organization of a new corporation to build, if possible, a successful business on the ruins of the old is entirely legitimate, whether considered as a proposition of law or of morals. The fact that the new organization embraces the old membership is immaterial, and in itself affords no reason why it should be held liable for the debts of the old corporation. True, the courts will watch such reorganization with care, that no fraud be accomplished, and to that end will insist that there shall be a bona fide intention to make a new and independent organization, and that it shall not take over, absorb or convert to its use the property or assets of the old corporation to the prejudice of its creditors. There must be something more than a mere succession in business to charge the successor with the debts or delinquencies of the party succeeded: *Hopper v. Moore*, 42 Iowa, 563; *Wyman v. Bank*, 14 Mass. 58, 7 Am. Dec. 194; *National etc. Works v. Oconto City etc. Co.*, 105 Wis. 48, 81 N. W. 125; *Memphis Water Co. v. Magens*, 83 Tenn. 37; *Texas State Fair v. Caruthers*, 8 Tex. Civ. App. 474, 29 S. W. 48. The legal identity of the new corporation with the old ordinarily depends upon the intention of the incorporators: 1 *Thompson on Corporations*, 256; *Miller v. English*, 21 N. J. L. 317; *Church v. Brownell*, 5 Hun, 464; 2 *Morawetz on Private Corporations*, sec. 812.

There can be no doubt in the present case that the incorporators of the North Des Moines Church intended to create a new and independent organization, which should not be chargeable with the debts of the Prospect Park Church. Their legal right to perfect such an organization is also clear. If then, their organization was in regular statutory form, and no fraud was practiced upon the plaintiff ¹⁰⁰ as a creditor of the old corporation, the conclusion of the trial court must be upheld as correct. No question has been raised as to the formal or statutory sufficiency of the methods pursued, and we shall therefore confine our inquiry to the question of fraud. The Prospect Park Church was organized and incorporated in the year 1887, and obtained title to the tract of land mentioned in the pleadings. Encouraged by persons interested in the values of residence property in that neighborhood, and relying upon subscriptions and promises which eventually proved valueless, it erected a church building out of proportion to its financial ability, and incurred expenses beyond its power to meet. The property was heavily mort-

gaged, and this burden, with others incident to the mismanagement or misfortune attending the first years of the society's existence, proved too great to be removed or successfully carried. In the year 1899 the mortgage was foreclosed for something more than five thousand dollars, and, the property having been sold, and not redeemed, the purchaser took a sheriff's deed. The record discloses no fact or circumstance indicating that the foreclosure was a collusive transaction, or that the corporation had any agreement, express or implied, with the mortgagee, for the repurchase of the property. The loss of the title left the society wholly without assets. Corporations of this character issue no stock, and are wholly without power or authority to levy assessments upon or enforce contributions from their members.

As is quite sure to be the case in organizations which depend solely upon voluntary goodwill offerings for income and support, an excessive indebtedness proved an insurmountable obstacle to prosperity and growth. At the end of some thirteen years' effort the society found itself without a church building, and without means or ability to obtain another, or to pay its outstanding obligations. Its assets had been wholly eliminated. It had neither property, money nor franchises which creditors could subject to their claims. There is nothing to indicate that its members had ¹⁰¹ not contributed to the full extent of their ability and duty under the circumstances. Its corporate organization even had ceased to be available for the society's future needs, because the existence of its indebtedness and the discredit attaching to its failures in the past were quite sure to paralyze every effort to enlist the help, support and sympathy which were essential to success.

Under this stress it was determined to disband the old organization, and from its membership, with such others as could be induced to co-operate, endeavor to create a new one. This was done. The new organization was made up largely from the old members, but with a new list of officials, and incorporated as the North Des Moines Methodist Episcopal Church. The owner of the church property under the sheriff's deed, finding it no doubt an undesirable and profitless asset, consented to sell it for less than one-half the mortgage debt for which it had been sold, and the new corporation purchased it, and now holds the title. It is against this property which the plaintiff now seeks to enforce her judgment.

In none of the circumstances of the case do we discover anything on which a charge of fraud may be justly predicated. It is true, we have said the new church is principally made up from the membership of the old; that it is affiliated with the same conference, acknowledges the same ecclesiastical authority, professes the same faith, occupies the same locality, and pursues the same general policy; but these do not constitute corporate identity. Had the North Des Moines Church taken over any property or valuable thing which the plaintiff was entitled in law or equity to subject to her claim, a different question would arise. But even then her remedy would be confined to a subjection of such property to the payment of her judgment. In other words, the new corporation would not ordinarily be chargeable as her debtor, but as a trustee, liable to account for such assets of the old corporation as it may have received: 2 Morawetz on Private Corporations, sec. ¹⁰² 811; *Marshall v. Western etc. R. R. Co.*, 92 N. C. 322; *Bruffett v. Great Western etc. R. R. Co.*, 25 Ill. 353; *Donnelly v. Hearndon*, 41 W. Va. 519, 23 S. E. 646; *Thompson on Corporations*, sec. 263.

Plaintiff is not the creditor of the members. She has not, and never has had, a right of action against them as such. The only duty owed to her by the individual members was the moral duty to use all reasonable effort by their own contributions, and by such assistance as might properly be obtained from others, to maintain the solvency of the corporation. There is nothing before us to show that this full measure of duty was not performed, while the proved fact that the church struggled with its difficulties for so many years before surrendering to the inevitable affords some presumption that its members were not unmindful of their obligations.

It is suggested in argument that some few articles of furniture and miscellaneous supplies belonging to the old church went into the possession of the appellee. It is true the evidence indicates that a portable organ, which was placed in the church before the foreclosure, has remained there, and that the pastor makes use of the original membership roll. As to the first item we only can say that, if such property was liable to seizure and sale upon the plaintiff's judgment, it may still be reached in the hands of the appellee; but no such relief is sought in this proceeding. Of the other matter, it may be said that the pastor is not an officer of the cor-

poration, and it is not bound by his act in the premises. Moreover, it appears that under the rules and regulations of the church a formal dismissal of its members from the old organization and reception into the new one were not essential to a transfer of membership, and under such circumstances the retention and use of the roster is without special significance.

Counsel argue with much earnestness that the new corporation, being devoted to the same purposes and to the same¹⁰³ faith as the first one, should be held to be the same legal entity under another name, and bound by law as well as by the principles of common honesty to pay the debts of its predecessor. They further say that "if a new organization had been effected for the purpose of maintaining the doctrines of the Baptist or any other church, and the membership had allied themselves with it, we should have an entirely different proposition." If, in fact, the membership were legally or morally bound to the plaintiff for the payment of this debt, it is not easy to understand just how a change of denominational lines or a merger into the "Baptist or any other church" would serve to cancel the obligation. Men and women cannot rid themselves of a debt in law or in honor by a change of church relations. Were we to announce otherwise, the tide of interchurch migration might soon reach embarrassing proportions. But the truth is that no such obligation as counsel contends for exists. As already suggested, the member of the church is never under any legal obligation for the payment of its corporate debts, and his only moral obligation is to contribute of his means and of his influence to the extent of his ability to meet the just demands upon that organization so long as he is a member of it. When he has done all which his own enlightened conscience indicates to be his duty, or when, for any reason which satisfies himself, he ceases to be a member and refuses further assistance, neither court, creditor, nor counsel is entitled to arraign him as a recreant. He who gives credit to a church organization knows that the only source to which he is entitled to look for payment is the property or assets of which the corporation is owner, and to the voluntary offerings or gifts of the members and friends who may be moved or persuaded to contribute to that purpose. If the people, for any reason, will not contribute to meet his demand, but will help build up another organization, he suffers no legal wrong. In this instance the

church property had been lost. The membership was under no ¹⁰⁴ obligation to purchase it simply to see it sold on the plaintiff's judgment. They could have abandoned all further effort to maintain a church organization of any kind without incurring any liability or exposing themselves to any just demand on part of plaintiff—a result which doubtless would have followed if the organization of a new church, liable for no obligations except those of its own making, were not allowable.

In short, our conclusion is that the intent to form a new corporation is clearly shown, that in carrying such intent into execution no fraud was committed, and that plaintiff's bill was therefore properly dismissed.

After the introduction of evidence in the court below, the plaintiff asked for and was refused leave to file an amendment to her petition seeking relief on the ground that the old corporation was a mere trustee for the benefit of the membership, and that the new corporation was but the successor in the same trust. Counsel have argued this proposition, but we think the issues are not broad enough to cover it, nor does it seem to have been tried or passed upon by the district court. The granting of leave to amend at that stage of the case, setting up a new and distinct issue, was addressed to the discretion of the court, and the refusal of the request is not an error requiring a reversal.

The conclusion of the district court upon the merits is right, and is affirmed.

LIABILITY OF MEMBER OF RELIGIOUS ASSOCIATION FOR ITS DEBT.

I. Incorporated Associations.

I. Incorporated Associations, 372.

II. Unincorporated Associations, 374.

III. The Parish Doctrine, 375.

The rule of the principal case is the rule of such few cases as exist on the topic of the individual liability of the members of an incorporated religious society for its debts, as it is universally acknowledged that the members of a religious corporation are not individually liable as such to the creditor of the corporation, in the absence of express contract, act or default rendering them thus liable.

The members of an ecclesiastical society, without local limits, formed by voluntary association are not individually liable for the debts of such society, nor are they thus liable on a judgment and execution against the corporation: *Jewett v. Thames Bank*, 16 Conn.

511; Richardson v. Butterfield, 6 Cush. 191. "It has already been remarked, as a general rule relating to corporations, that personal liability does not attach to their members. We perceive no sufficient reason for a distinction, in this respect, between religious corporations, and those for other purposes, whose members are subject to no such liability. They are alike to be governed by the general rule on this subject. They have no element of locality, and nothing in their organization or charter, which would justify us in adopting a distinction, which would subject the members to a heavy individual responsibility, and one for which they might not be able to procure a remuneration, as their comembers might all discharge themselves from contribution, by voluntarily withdrawing from the society. . . . The present case only requires us to consider the case of members of a parish associated under an ordinary act of incorporation, and having no territorial limits. In our opinion, the members of such parish are not personally liable upon a judgment against the parish": Richardson v. Butterfield, 6 Cush. 194.

A religious "corporation constituted in modern times, by voluntary association, under our present laws, is a private, and not a municipal or quasi corporation. . . . Societies like this, unlike towns, cities, or school districts, are not by law compelled to assume duties, incur liabilities, and contract debts. The difference between them and quasi corporations is, in this and many other respects, essential and clear, and, therefore, we cannot, in the absence of all usage, analogy, and authority, apply the remedy given by law to the creditors of towns, etc., so as, in the same manner, to subject the persons or estate of the members of private and voluntary incorporated companies, to responsibility for corporate debts": Jewett v. Thames Bank, 16 Conn. 516.

In Bigelow v. Congregational Society of Middletown, 11 Vt. 283, the court, in speaking of the enforcement of a judgment against a religious society, said: "The individuals composing the society are not personally liable, unless they have made themselves so by some act or default. An execution against the society cannot be levied on the separate property of the individual members. The statute directing the mode of proceeding with executions against corporations applies to public and political corporations which may vote and levy a tax. This association has no such power."

The individuals composing the society may bind themselves by contract to pay a certain sum annually for the support of the preaching of the gospel, and cannot discharge themselves from the obligation by changing their religious sentiments. They can be discharged only by a vote of the society: First Congregational Soc. v. Swan, 2 Vt. 222; and if the individuals forming the membership of the society in their individual capacity raise a fund, by means of giving their notes and obligation, for the support and payment of the services of a minister to preach for them, such fund may be applied to extinguish, so far as it will, a debt due from the corpora-

tion to its minister and arising for his services as such: *Bigelow v. Congregational Society of Middletown*, 11 Vt. 283; 15 Vt. 370.

II. Unincorporated Associations.

The rule governing this branch of the topic is clearly and truly stated in *Clark v. O'Rourke*, 111 Mich. 108, 66 Am. St. Rep. 389, 69 N. W. 147, to be that members of an unincorporated religious society, or church organization, who are actually instrumental in incurring liabilities for it, or who either authorize or ratify its transactions, or those made in its name, are personally and individually liable therefor, while those who in no way participate in such transactions are exempt from liability. The reason given for the rule is that there is no community of interest for business purposes among the members of a voluntary association, and therefore no member as such is liable for debts or other obligations incurred by any other member, or by an officer or committee of the association, although the officers or members of a committee who concur in ordering goods, or who enter into contracts generally for the benefit of the association, are personally liable. Any member, however, of such an association, may become liable on such a contract or indebtedness if he previously assents to it, or subsequently ratifies it. In other words, the question is one of agency, and not of partnership, and the agency must be established by him who relies upon it, and will not be inferred from the mere fact of membership in the association: *Monographic note to Otto v. Journeyman Tailors' etc. Union*, 7 Am. St. Rep. 161, 162. Thus, a member of an unincorporated religious society not founded for the purpose of gain or pecuniary profit is not individually liable for its debts, unless he authorized the incurring of the obligation or subsequently ratified it: *First Nat. Bank v. Rector*, 59 Neb. 77, 80 N. W. 269. The members of an unincorporated congregation are not liable individually for the salary of their pastor, who was employed with full knowledge of the rules and practice that his salary was payable out of the voluntary contributions of the members, although he accepted the employment with the intention of relying on members for his salary, as per their individual apportioned share: *Riffe v. Proctor*, 99 Mo. App. 601, 74 S. W. 409. And if, in such case, the relation between the pastor and the church rests in contract, then each member is liable only for the amount of his subscription or apportionment, as the case may be, and there is no liability for the whole salary resting upon any one member: *Riffe v. Proctor*, 99 Mo. App. 601, 74 S. W. 409. To hold a member of an unincorporated religious society individually liable for its debts, it must be shown that he, in some way, sanctioned or acquiesced in their creation, and such society cannot, by its polity or its rules and regulations, invest or transfer the title to property or impose personal obligations upon its members, in a mode unauthorized by the general laws of the state: *Devoss v. Gray*, 22 Ohio St. 159; *Males v. Murray*, 23 Ohio C. C. 396. Members of an unincorporated re-

religious association, governed in their secular affairs by a priest and trustee having power to incur debts for the association, who, through such agents, stated an account with their priest for money advanced to build a church and for arrears of salary, and who agreed in writing, jointly and severally acting by their trustees and agents, to pay such sum, are individually liable for the indebtedness. This liability does not rest upon the mere fact of membership in the association when the debt was incurred, but upon the ground of approval of, and participation in, the making of the contract through an approved agent: *Sheehy v. Blake*, 72 Wis. 411, 39 N. W. 479; affirmed 77 Wis. 394, 46 N. W. 537, 9 L. R. A. 564. In case of religious or eleemosynary associations, which are unincorporated, only members and managing committees who incur liability, assent to it, or subsequently ratify it, become personally liable: *Burton v. Grand Rapids etc. Co.*, 10 Tex. Civ. App. 270, 31 S. W. 91. A member of an unincorporated church cannot maintain an action at law against the other members of the society, on a written acknowledgment of indebtedness to him, as his remedy is by bill in equity against the property of the society: *Roman Catholic Church v. Kan*, 6 Ohio Dec. 1028.

In Georgia it has been held, contrary to the great weight of authority, that the members of an unincorporated religious society are liable on the contracts made by the society, as joint promisors or partners: *Wilkins v. Wardens of St. Mark's Church*, 52 Ga. 351; *Thurmond v. Cedar Spring Baptist Church*, 110 Ga. 816, 36 S. E. 221.

III. The Parish Doctrine.

In some of the New England states, at an early date, the individual members of religious societies were liable for their debts, but this liability was the result of the peculiar character of such associations, arising from what was known as the parish system, and the peculiar relation of the members thereto. The parish system has become obsolete. Hence the early cases which declare this individual liability of parish members have no value aside from their historical interest. In a case in Massachusetts—*Richardson v. Butterfield*, 6 Cush. 191—repudiating as being no longer applicable the rule which arose under the parish system, holding the members of a religious parish personally liable for its debts, the court said: "So, too, it has been held that members of territorial parishes were personally liable to have their goods and property seized, on an execution against the parish of which they were members at the time of such seizure. . . . It may be that the entire change which has been introduced as to membership of territorial parishes may be held to take individual members of such parishes out of the rule of that personal liability which attaches to inhabitants of towns or school districts. Formerly such parishes substantially embraced all persons residing within their territorial limits. No act was required to constitute membership of a territorial parish, but it followed the residence within the limits of such parish as a matter

of course, liable to be defeated only by the individual members attaching themselves to some other parish, and filing the proper certificate thereof. The entire residents within the limits of such parish were almost all members of the parish, and, to a very considerable extent even, the organization of the town and parish was one and the same. It was this strong resemblance between towns and parishes, as to the locality of members and general features of their organization that probably led to the application of a similar rule, as to the personal liability of individual members of territorial parishes, with that which had been previously held as to inhabitants of towns': *Richardson v. Butterfield*, 6 Cush. 195.

The parish doctrine was also repudiated in *Jewett v. Thames Bank*, 16 Conn. 511, where the court said: "During the early history of the state and before the adoption of our present constitution, all ecclesiastical societies having territorial limits were considered to be, and in fact were, municipal and public corporations. Indeed they were originally coextensive and identical with the several towns, and, when, in many instances, they became separate communities, they still retained their public and political character. To support and maintain religious worship and instruction through the agencies of these societies was a public duty, enjoined by law, as much so as to promote education by means of common schools, or to support the poor and maintain roads and bridges, through the agencies of towns, and every individual residing within the limits of any such society was considered by the law as much a member of it as each resident of a town was deemed its inhabitant, except only in cases where individuals, by special legal indulgence, were excused from taxation for the religious objects of the society. In later times and since the constitution of the state has been adopted, a different state of things in this respect has existed. The law now makes no compulsory provision for the support of ecclesiastical institutions. . . . And of course no person can now become a member of a religious society until by his voluntary act he has united with it. How far these constitutional principles break in upon the former located ecclesiastical societies, existing under the old institutions, we need not determine. But certain it is, that a corporation, constituted in modern times by voluntary association, under our present laws, is a private, and not a municipal or quasi corporation. . . . The difference between them and quasi corporations is in many respects essential and clear, and therefore we cannot, in the absence of all usage, analogy and authority, apply the remedy given by the law to the creditors of towns, etc., so as, in the same manner, to subject the persons or estate of the members of private and voluntary incorporated companies, to responsibility for corporate debts': *Jewett v. Thames Bank*, 16 Conn. 516. Among the early cases which maintained that the property of an individual member of a territorial religious parish might be taken to satisfy an execution against the parish, were: *Atwater v. Inhabitants of Woodbridge*, 6 Conn. 223, 16 Am. Dec. 46; *McLeod v. Selby*, 10

Conn. 390, 27 Am. Dec. 689; Beardsley v. Smith, 16 Conn. 368, 41 Am. Dec. 148; Fernald v. Lewis, 6 Me. 264; Chase v. Merrimack Bank, 19 Pick. 564, 31 Am. Dec. 163. In Fernald v. Lewis, 6 Me. 264, it was said that "at common law corporators are not liable in their persons or their private property for the debts or liabilities of the corporation. But by the usage and practice—for it does not seem to have any other foundation—of Massachusetts and Maine, the case of towns and parishes forms an exception to this principle." So far as this early, but now obsolete, rule is concerned Connecticut may be added to the states which maintained it, but have now repudiated as unsound. This is shown by the cases cited above and Jewett v. Thames Bank, 16 Conn. 511.

AGA v. HARBACH.

[127 Iowa, 144, 102 N. W. 833.]

MASTER AND SERVANT—Employment of and Rights of Substitute Servant.—If some unforeseen contingency arises rendering it necessary in the master's interest that a servant have temporary assistance, such servant has implied authority to engage such temporary service; and the substitute or assistant servant is entitled to the same measure of protection as is the servant or agent upon whose request he rendered the assistance. (p. 379.)

MASTER AND SERVANT—Substitute Servant—Rights of.—A substitute servant or helper employed and paid by a regular servant with the knowledge or acquiescence of the master, is not a trespasser or mere volunteer, and, while engaged in the work of the master, the latter is bound to exercise reasonable care for his safety. (p. 379.)

MASTER AND SERVANT—Substitute Servants.—One who in good faith enters upon the master's work at the request of a regular servant in apparent charge thereof is not a trespasser, but assumes for the time being the relation of servant occupying the same relation and becoming subject to the same rule, including the operation of the fellow-servant rule, as do those who are directly employed by the master, even though such substitute servant may not be entitled to recover wages. (p. 379.)

MASTER AND SERVANT—Substitute Servants—Authority to Employ.—Authority on the part of a regular servant to employ substitute servants may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the master by the servant for so long a time that knowledge and consent may be inferred. It is not necessary that a formal or express employment in behalf of the master should exist, or that compensation should be paid by or expected from him. (pp. 380, 381.)

Healey Brothers and Kelleher, Carr, Hewitt, Parker & Wright, for the appellant.

Ryan, Ryan & Ryan, for the appellee.

¹⁴⁴ **WEAVER, J.** The defendant is a manufacturer of furniture in the city of Des Moines, Iowa. One of the shops in which this business is carried on is several stories in height, and in the basement of the building is a boiler and engine, which supply the power for operating the machinery upon ¹⁴⁵ the several floors above. The evidence shows without dispute that on December 11, 1899, the plaintiff, who is an engineer, was in actual charge of the engine and engine-room, and that while so engaged he attempted to adjust an incandescent electric lamp by which the room was lighted, and, on taking hold of the lamp socket for that purpose, received an electric shock, resulting in his serious injury. There was also sufficient evidence to justify the finding that the lamp, or the wiring with which it was connected, was and had been for a considerable period of time in a defective and unsafe condition, that defendant was chargeable with negligence in respect thereto, and that plaintiff was exercising reasonable care at the time of the accident. Plaintiff's claim for damages is based on the theory that at the time of the injury he was in the defendant's service, and the defendant owed him the duty of providing a safe place for work. At the close of the testimony on plaintiff's behalf the court directed a verdict in favor of the defendant on the sole ground that the evidence was insufficient to show the relation of master and servant between the parties, and that defendant was therefore under no obligation to exercise care for the plaintiff's safety. This is the controlling question presented by the appeal. It is the defendant's theory that plaintiff was never employed in his service, and that at the time of the accident he was operating the engine and caring for the engine-room as a mere volunteer, without defendant's knowledge or authority. It is not denied that one Boehler was the engineer regularly employed to have charge of the engine. It further appears that Boehler, being sick, invited or requested plaintiff to take his place for a few days, until he should be able to resume the work, and that plaintiff was thus engaged at the time of his injury. This statement at once suggests an inquiry into the nature and extent of Boehler's authority in the premises.

It may be conceded that, generally speaking, a servant who is engaged to perform a given labor is not authorized to ¹⁴⁶ bind his master by the employment of a substitute or assistant. The relation of the master to a servant is one involving both responsibility and risk, and is not to be imposed

by the act of another without authority or consent, express or implied. But in most lines of business the master cannot always remain, in person or by vice-principal, in immediate supervision of the servant; and it not infrequently happens that some unforeseen contingency arises, rendering it necessary, in the master's interest, that the servant have temporary assistance. In many such cases it has been held that the servant has implied authority to engage such temporary service, and that the substitute or assistant, if not in the law the employé of the master, is at least entitled to the same measure of protection as is the servant or agent upon whose request he rendered the assistance: *Johnson v. Ashland etc. Co.*, 71 Wis. 553, 5 Am. St. Rep. 243, 37 N. W. 823; *East Line etc. R. Co. v. Scott*, 71 Tex. 703, 10 Am. St. Rep. 804, 10 S. W. 298; *Goff v. Toledo etc. R. Co.*, 28 Ill. App. 529; *Sloan v. Central Iowa Ry. Co.*, 62 Iowa, 728, 16 N. W. 331; *Barstow v. Old Colony R. R.*, 143 Mass. 535, 10 N. E. 255; *Marks v. Rochester R. R.*, 146 N. Y. 181, 40 N. E. 782; *Cleveland v. Spicer*, 16 Com. B., N. S., 399.

It is also held that the substitute or helper employed and paid by the servant with the knowledge or acquiescence of the master is not a trespasser or mere volunteer, and, while engaged in the work of the master, the latter is bound to exercise reasonable care for his safety: *Rummell v. Dilworth*, 111 Pa. St. 343, 2 Atl. 355, 363; *Anderson v. Guineau*, 9 Wash. 304, 37 Pac. 449.

While the master owes no duty to the intermeddler who officiously interferes and undertakes to perform services without request or employment, and while some courts are inclined to put in the same category those who perform services at the request or order of a servant having no general authority to employ or discharge assistants, the general consensus of opinion seems to be that one who in good faith¹⁴⁷ enters upon the master's work at the request of a servant in apparent charge of such work is not a trespasser, but assumes for the time being the relation of a servant. As such servant, he occupies the same relation, and becomes subject to the same rules, including the operation of the fellow-servant rule, as do those who are directly employed by the master, even though he may not be entitled to recover wages: See cases already cited; also *Mayton v. Texas etc. R. R.*, 63 Tex. 77, 51 Am. Rep. 637; *Eason v. S. & E. T. R. R.*, 65 Tex. 577, 57 Am. Rep. 606; *Osborne v. Knox etc. R. R.*, 68 Me.

49, 28 Am. Rep. 16. Stated from another standpoint, the master has quite often been held liable to third persons for injuries occasioned by the negligence of persons performing his work at the request or employment of a servant to whom such work was intrusted: *Booth v. Wister*, 7 Car. & P. 66; *Haluptzok v. Great Northern Ry. Co.*, 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739; *Althorf v. Wolfe*, 22 N. Y. 355.

If there be any doubt as to the soundness of the doctrine laid down in any of the cited cases, it wholly disappears when the acquiescence or consent of the master in the act of his servant may be inferred from proved circumstances. If, for instance, the servant has been in the habit of exercising such authority from time to time without objection from the master, or has made use of an assistant or substitute so frequently or for such a period that the fact may fairly be presumed to have come to the knowledge of those in authority over him, and such practice has not been forbidden, then such acts on the part of the servant may properly be held to have been ratified, and ratification is equivalent to original authority. Directly in point, see *Haluptzok v. Great Northern Ry. Co.*, 55 Minn. 446, 57 N. W. 144, 26 L. R. A. 739; *East Line etc. R. R. Co. v. Scott*, 71 Tex. 703, 10 Am. St. Rep. 804, 10 S. W. 298; *Bradley v. New York etc. R. R. Co.*, 62 N. Y. 99.

In very many of the cases arising for judicial consideration the authority of the agent or servant in a given case arises less from the use of express language or the giving of express directions than from the general conduct of the ¹⁴⁸ parties in relation to the business: 1 Am. & Eng. Ency. of Law, 2d ed., 959. Such authority may be implied from a single transaction: *Story on Agency*, 7th ed., 959. But such inference is more readily and more surely drawn from a series of acts or a course of conduct. By ratification of past acts, others of a similar nature may be binding upon the principal or master on the ground of implied authority: *Story on Agency*, 7th ed., sec. 55. In the *Haluptzok* case the court says: "Such authority may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the master by the servant for so long a time that knowledge and consent of the master may be inferred. It is not necessary that a formal or express employment in behalf of the master should exist, or that compensation should be paid by or expected from him."

In the light of these well-established rules of law, let us look at the case before us. The organization of the defendant's factory work is not clearly shown by the record. That part of the business carried on in this particular building seems to have been under the superintendence of one Rost, and in his absence the authority usually exercised by him was in the hands of one Clark. Defendant gave the work no personal supervision. At the time of the injury to plaintiff Rost was sick, and Clark was the active superintendent. The plaintiff and other of the employes testify that Rost (and, in his absence, Clark) was the superintendent; that the hands employed in the building worked under the directions and orders of this superintendent. Boehler was himself employed by one Vogland, who, we may infer, had some sort of general supervision of the engines used in the various buildings owned by defendant. His office or headquarters was in a building at some distance from the factory, which he seldom visited; and the extent of his duty, so far as disclosed by the testimony, would seem to have been to keep ¹⁴⁹ the engines and power in working order, and to employ engineers whenever it became necessary to do so, though there was nothing to show that his authority in this respect was exclusive. Indeed, the only evidence of his authority in this respect is Boehler's statement that Vogland employed him, and that he had seen him employ other engineers; while plaintiff offered, but, for some reason was not permitted to show, that on other occasions such authority had been exercised by the superintendent. The actual, every-day operation of the engine was clearly under the control of Rost or Clark, according as either happened to be in the actual superintendence of the shop. He gave the orders when to start and when to stop the machinery, and when to increase or diminish the steam, and all such orders or directions as might be necessary for the proper and efficient utilization of the power for the use of the factory. The superintendent was the one representative of the company coming into daily and hourly contact with the engineer. He kept the engineer's time, and through him all the employes in the building, including the engineers, were regularly paid their wages.

At the time of the plaintiff's injury Boehler had been engineer for about a year and a half. Soon after entering upon this work Boehler, being obliged to leave for a few days, applied to Vogland to furnish a substitute during his absence.

Vogland replied: "No, sir; when you want to get off for any cause, you will have to get a man to work in your place." Acting upon this authority, Boehler did then employ a substitute, who served several days. From time to time thereafter, when sick or for other reasons he desired to temporarily absent himself, he employed other substitutes. He enumerates at least three such occasions prior to the employment of the plaintiff. On such occasions he consulted the superintendent, Rost or Clark, and obtained consent to his absence, and to the substitution of the person employed by him in the engine-room. The superintendent knew of the service being rendered by the substitute, and gave him ¹⁵⁰ the usual and necessary orders about the operation of the power. The persons thus employed served from one or two to sixteen days at a time. They do not appear to have been entered upon the regular payroll, but their time was credited to Boehler. On payday the money for each person on the payroll of the factory was inclosed in a separate envelope and sent by the defendant to the superintendent, who delivered it to the person for whom it was intended. On some of the occasions when Boehler had employed a substitute, Rost or Clark opened Boehler's envelope before delivering it, and divided the money between him and the substitute according to the service rendered by them, respectively. At other times the envelope and contents were delivered to Boehler, with directions to him to see that his assistant received his share of the money.

On December 8, 1899, Boehler, being sick, reported the fact to Clark, and informed him of his desire to put the plaintiff in his place for a few days. To this Clark assented, and on the following morning plaintiff took charge of the engine. Clark gave him orders in regard to his work. During the day he broke a fire iron, and took it to the superintendent, who had it repaired and returned to the engine-room. On Monday, December 11th, he resumed the work, and continued until about 4 o'clock in the afternoon, when he was injured. During all of this time the superintendent of the factory knew of his presence, and accepted his services in forwarding the work of the factory. If these circumstances are not sufficient to go to the jury upon the question of express or implied authority of Boehler to employ a substitute, as well as upon the ratification of his acts in that behalf, it would be very difficult indeed to imagine a case strong enough to avoid a directed verdict.

The question whether plaintiff was employed and paid by Boehler in his individual capacity, or whether his employment is to be considered, in the law, as an employment by defendant, is not material, if the act of Boehler in bringing ¹⁵¹ him into the building and setting him to work was with the defendant's express or implied consent, and of this there was ample evidence for the consideration of the jury. Upon this point the Rummell case, above cited, decided by the Pennsylvania court, affords instructive reading. There the plaintiff was injured in the defendants' spikemill. He was not employed or paid by the defendants, but the "roller boss" of the mills, who was paid according to the product turned out by the machine in his charge, employed and paid him as his assistant. This was known to defendants, or was a practice of such long standing that their knowledge might be inferred. While thus engaged, plaintiff was injured by negligence chargeable to the defendants, and brought suit for damages. To the plea that the relation of master and servant did not exist between the parties, and that the defendants owed the plaintiff no duty by reason of such relation, the court replies: "He was employed by the roller boss, and paid by him; but whether he was directly in the defendants' employ, or indirectly, as the assistant of Richards, he may be treated as their employé. He was engaged in the work of the defendants, and the defendants were themselves operating the mill. . . . The plaintiff was in the rightful discharge of the duties of a valid employment, and the relation of master and servant is fairly inferable from the proof, and defendants are therefore bound to the performance of all the duties and entitled to all the protection which that relation affords."

In Sloan v. Central Iowa R. R. Co., 62 Iowa, 728, 16 N. W. 331, decided by this court, a railroad brakeman, desiring to be absent from his post of duty for several days, obtained the consent of Sloan to take the place until his return. There was no employment or consent thereto on the part of the company, except such as might be inferred from the fact that the plaintiff took up the work as a brakeman, and continued therein for a week, with the knowledge and acquiescence of the train conductor, who had no general authority to employ brakemen. In executing an ¹⁵² order given by the conductor, he was injured; and this court upheld his right to recover damages, saying: "An intermeddler is a person who officiously intrudes into a business to which he has no right.

The distinction between an intermeddler and a trespasser is not, in any case, very great. Under the circumstances of this case, if the plaintiff was an intermeddler, he was a trespasser. But as he was on the train, and discharged the duties of brakeman, for six days, with the knowledge or consent of the conductor, he was not either. The train, when passing between stations and distant from any officer, is in charge of the conductor, and he has authority to eject such persons therefrom. So far from so doing, the conductor availed himself of the services of the plaintiff, and required him to perform duties which were necessary and essential to the safe operation of the train. The regular brakeman was absent, and it is immaterial whether with or without cause. The conductor consented that the plaintiff should perform his duties."

The defendant exercised no personal supervision over the factory when plaintiff was injured. His superintendent in charge, laying out the work, directing its execution, controlling the operation of the power and machinery, keeping the time of the employés, paying their wages, was his alter ego, whose knowledge was his knowledge, whose consent was his consent. He is held, therefore, to have known that men employed by Boehler were in charge of the engine-room for days and weeks at a time, and that such men were executing orders and performing services in his business, and under the direction and control of his foreman and superintendent. It would be grossly unjust to permit him to thus tacitly consent to such transactions, and reap the benefit of labor so performed, and then say: "I owe these persons no duty of care for their safety, and, if they see fit to thus serve my interest, they must take their chances of all concealed traps and dangers created by my negligence."

In our judgment, the plaintiff was entitled to have the case made by him submitted to the jury, and in directing a ¹⁵³ verdict against him there was error. The judgment of the district court is therefore reversed.

One Voluntarily Undertaking to Perform Services for another who assents thereto stands in the relation of servant to the latter while so engaged: See the note to *Brown v. Smith*, 22 Am. St. Rep. 463. A servant, though a mere volunteer, and not expecting compensation for the work done, is, if engaged at the request of the man in charge of the work, for the time being, the servant of the master, and entitled to the same protection as his other servants: *Johnson v. Ashland etc. Co.*, 71 Wis. 553, 5 Am. St. Rep. 243. See, too, *East Line etc. R. R. Co. v. Scott*, 71 Tex. 703, 10 Am. St. Rep. 804. It

has been held, however, that a master owes no contract obligation to one voluntarily assisting his servants, and that such volunteer assumes all the risks incident to the situation: *Evarts v. St. Paul etc. Ry. Co.*, 56 Minn. 141, 45 Am. St. Rep. 460. As to whether the relation of fellow-servant exists as between employes and a third person who volunteers to assist them, see *Railroad v. Ward*, 98 Tenn. 123, 60 Am. St. Rep. 848; *Bonner v. Bryant*, 79 Tex. 540, 23 Am. St. Rep. 361; *Rhodes v. Georgia R. R. Co.*, 84 Ga. 320, 20 Am. St. Rep. 362; note to *Fox v. Sanford*, 67 Am. Dec. 597.

BEH v. BAY.

[127 Iowa, 246, 103 N. W. 119.]

JUDGMENT Against Principal—Effect on Surety.—A judgment, in an action by the holder of a secured note against the principal therein alone, that the note has not been paid is *res judicata* and binding on the surety on such note, in a subsequent action against him by the holder thereof, in which the same defense of payment is set up as was interposed to the former action. (pp. 386, 387.)

Cullison & Robinson, for the appellant.

Byers, Lockwood & Byers, for the appellee.

247 SHERWOOD, C. J. H. Ramsay Bay, as principal, and J. O. Ramsay, the appellant, as surety, executed and delivered to the plaintiff the note in suit. After it became due, and before this suit was brought, H. Ramsay Bay sued the plaintiff herein for the possession of the note, alleging that he had paid the same in full. Issue was duly joined and tried to a jury, which found that the note had not been paid, and there was a judgment against Bay for costs. In his answer to this suit, the appellant, J. O. Ramsay, admitted the execution of the note, alleged his relation thereto, and that it had been paid by his principal. The plaintiff then pleaded the judgment in the former action as an adjudication of the question of payment. There was a demurrer to this plea, which was overruled, and, the appellant electing to stand on his demurrer, judgment was rendered against him.

It was admitted that the payment pleaded by the appellant Ramsay was the same payment relied on by H. Ramsay in his suit for the possession of the note. The only question for determination, then, is whether the former adjudication that the principal had not paid the note is conclusive **248** on the surety. A judgment of a court of compe-

tent jurisdiction is conclusive between the parties to the action, either as a plea in bar or as evidence in estoppel, not only as to every question actually in issue and decided, but every question within the issues which might have been presented and decided. And it is further true that a judgment is as effective on privies as on parties. The appellant was not a party to the action between his codefendant and the plaintiff here, and, if the judgment in that case is a bar in this, it must be because of his privity with Bay. It is the general rule that the relation of surety and principal does not create privity, in the sense in which the law of estoppel is applied: *Bigelow on Estoppel*, 4th ed., 138, and cases cited; *McConnell v. Poor*, 113 Iowa, 133, 84 N. W. 968, 52 L. R. A. 312; *Gorman v. Williams*, 117 Iowa, 560, 91 N. W. 819; *McDonald v. Gregory*, 41 Iowa, 513. Privity relates to persons in their relation to property, and means only a mutual succession or relation to the same right of property: *McDonald v. Gregory*, 41 Iowa, 513. See, also, 24 Am. & Eng. Ency. of Law, 746, and cases cited. In the former litigation, however, but one question was determined, and that was whether the note had been paid by Bay. Had it been determined that it was so paid, he would have been entitled to the possession thereof, and the appellant would have been released from liability as surety, because nothing was due from his principal. The judgment determined a property right, because the action related to a valuable right and interest. The appellant did not claim that he had paid the note, but based his plea of payment on the identical transaction presented in the former suit. Hence the right upon which he relied depended upon the right of Bay, and involved the same property right litigated therein. Furthermore, it appears that he was a witness for Bay, and such fact alone has been held an estoppel by courts of great ability.

Ordinarily, a surety may avail himself of any defense or setoff which is available to the principal, and the right to do so, with the consent of the principal, is expressly given ²⁴⁹ by section 3572 of the Code; and it is undoubtedly true that an adjudication of the principal's right to a setoff or counterclaim would be conclusive on the surety afterward seeking the benefit thereof, and we see no valid reason why the same rule should not be applied in this case. The precise question was determined by the supreme court of Wisconsin in *Bank of New London v. Ketchum*, 66 Wis. 428, 29

N. W. 216, and the same conclusion was reached. See, also, Knoxville Nat. Bank v. Hanirick, 67 Iowa, 583, 25 N. W. 816. The cases of McConnell v. Poor, 113 Iowa, 133, 84 N. W. 968, 52 L. R. A. 312, and Gorman v. Williams, 117 Iowa, 560, 91 N. W. 819, are distinguishable from this because of the difference in the facts.

We think the demurrer was properly sustained, and the judgment is affirmed.

Judgments Against Principals as evidence against their sureties are discussed at length in the monographic note to Charles v. Hoskins, 83 Am. Dec. 380-390. In the absence of notice and opportunity to defend, or of assumed responsibility for the result of an action, a judgment against the principal therein is not conclusive against his surety, but can be introduced only as evidence of its own existence, and not as evidence of any of the facts upon which its recovery rests: Grommes v. St. Paul Trust Co., 147 Ill. 634, 37 Am. St. Rep. 248. See, too, State v. Goggin, 191 Mo. 482, post, 826.

WISCONSIN LUMBER COMPANY v. GREENE AND WESTERN TELEPHONE COMPANY.

[127 Iowa, 350, 101 N. W. 742.]

PLEADING AND PRACTICE.—Motion to Strike out an amended answer is not waived by having filed a demurrer to the original answer. (p. 390.)

PLEADING AND PRACTICE.—A demurrer to an original pleading may be amended after an amendment to the pleading. (p. 390.)

PLEADING AND PRACTICE.—Waiver of Error.—If a pleading is styled a "motion to strike," but is treated by all parties as an amendment to a demurrer, any error in regard the name given to the pleading is waived. (p. 390.)

CORPORATIONS.—Estoppel.—A corporation cannot accept and ratify contracts in so far as they are beneficial to it, and repudiate them in so far as they impose any liability on it, on the ground of want of authority in its officers to make such contracts. (p. 390.)

CORPORATIONS.—Contracts.—Presumption.—If an executed contract is under the seal and bears the signature of the corporation and its officers, it will be presumed not only that the contract was in fact made and executed by the corporation, but also that its officers had power to make it. (pp. 390, 391.)

CORPORATIONS.—Power to Repurchase Stock.—A corporation has power, in the absence of charter restrictions, to make valid contracts for the repurchase of its own stock. (p. 391.)

CORPORATIONS.—Contracts.—Ultra Vires.—A contract between a corporation and certain of its stockholders to pay dividends in passes, and in case of sale of its franchise to repurchase their stock is not ultra vires and void as against public policy, where the corporation is not insolvent and no fraud is shown. (p. 394.)

CORPORATIONS—Ultra Vires Contracts.—The plea of ultra vires is not favored, and when a corporation has received the benefits growing out of a contract, it will be enforced against the corporation unless entered into through fraud, or there are persuasive considerations of public policy involved. (p. 395.)

Cliggett, Rule & Keeler and J. J. Clark, for the appellant.

A. A. Adams, for the appellee.

352 **DEEMER, C. J.** The cases were not tried together, nor were they submitted in this court as one, but, as the questions arising are common to each case, they will be disposed of in one opinion.

Each of the plaintiffs purchased and paid for certain shares of stock in the defendant telephone company, upon the express agreement that each should receive for every share of stock one stockholder's pass, good over all the lines and free exchanges of the defendant, as and for a dividend on each share. It was further stipulated that in the event plaintiffs ceased using these passes, or assigned or transferred any of their stock, the plaintiffs or their assignees should thereupon and thereafter be entitled to dividends on their stock, the same as any other shareholder. As a part of the same transaction it was expressly agreed by the defendant company that in the event it sold, assigned or transferred any of its connections, franchises or business in the state of Minnesota, it would, upon demand, repurchase from plaintiffs, at the par value thereof, any of the shares of stock then held by them; and plaintiffs on their part agreed to accept in payment therefor the par value aforesaid. These contracts were each made in the name of the defendant company, under its corporate seal, by its secretary and president. It is alleged in the petitions that the defendant sold its Minnesota lines, connections, franchises and business to one Averill, or to the United Telephone and Telegraph Company; and it is also alleged that from and after August 21, 1901, the transferee of this Minnesota business refused to recognize plaintiffs' passes, and denies them the right to use the lines and free exchange connections purchased by it. Plaintiffs thereupon demanded of defendant that it repurchase the stock as agreed, and tendered the same to it. Defendant refused **353** to repurchase, and thereupon these actions were commenced to recover the agreed par value, with interest, according to the terms of the contracts.

The answers, which are identical, are long, and made up of many divisions and paragraphs. We shall not set them out in extenso, but content ourselves with stating the substance thereof, in connection with the claims now made by the defendant regarding the sufficiency thereof.

Aside from a point of practice which we shall hereafter note, defendant's contentions are: 1. That the agreements to repurchase and for free passes were unauthorized by the defendant, and that its officers who made the agreements had no authority to do so; 2. That there was no consideration for the agreements to repurchase; and 3. That as there were a number of other persons who held stock in the defendant company, who had no right to free passes, and no such agreements for repurchase, and who purchased their stock without notice or knowledge of the agreements with plaintiffs, and as these agreements operated to diminish the value of the earnings and the assets of the company, to the prejudice of these other stockholders and the creditors of the company, said promise of free passes and of repurchase were an undue and unjust discrimination in the plaintiff's favor, to the prejudice of other stockholders and the general public, and therefore void as against public policy. The second matter of defense was withdrawn by the defendant, and it elected to rely upon the first and third. After the submission of the demurrers plaintiffs filed amendments to their petitions, to meet the second point made by the defendant, and to this defendant filed a general denial as a part of its answers. Thereupon plaintiffs filed motions to strike the first and third divisions of the answers, because they contained irrelevant and immaterial matter, did not state any defensive or issuable facts, and for the further reason that these divisions each showed completed transactions of which the defendant had had the benefit, and that it was now estopped from repudiating ³⁵⁴ the same. The motions to strike were sustained, but no specific rulings seem to have been made upon the demurrers.

The practice point made by the defendant is that the plaintiffs waived their right to file motions by demurring to the answers, and that a motion to strike is an improper method of testing the sufficiency of matters pleaded in defense. Conceding the correctness of both propositions—and that they are technically correct none will deny—still this court has never been very insistent upon technical accuracy in the use

of names given to such pleadings as are here involved: *Chase v. Kaynor*, 78 Iowa, 449, 43 N. W. 269; *Seiffert Co. v. Hartwell*, 94 Iowa, 576, 58 Am. St. Rep. 413, 63 N. W. 339; *Rhoadabeck v. Blair Co.*, 62 Iowa, 368, 17 N. W. 582. As to the alleged waiver by the filing of the demurrers, it appears that, after the demurrers had been submitted, plaintiffs filed amendments to their petitions, and to these defendant filed amendments to its answers. This being true, the right to move was not waived. But even if it were, plaintiffs had the right to amend these demurrers, which is practically what they did in filing what they denominated motions to strike. No objection seems to have been taken at the time to the manner in which the questions were sought to be raised. The motions were treated by all parties as, in effect, amendments to the demurrers, in so far as they related to divisions 1 and 3 of the answer; and while undoubtedly misnamed, this will not constitute reversible error: See authorities hitherto cited.

2. The first divisions of the answers pleaded want of authority in the officers of the corporation to execute the contracts referred to and relied upon in the petitions, and want of power or legal authority to make the same. There is no denial of the execution of the contracts by the president and secretary in the name of the corporation and under its corporate seal, and this must be taken as a conceded fact, but it is claimed that the answers raise an issue as to the authority and power of the agents and of the corporation to make such ³⁵⁵ contracts. We take it that the pleader intended to raise two questions thereby: 1. Want of authority in fact; and 2. Want of legal power in law.

As to the first proposition, it clearly appears, from the implied color which the answer must give in order that the defense may be considered at all, that these officers did in fact make the contracts as alleged in the petition, under the seal of the corporation, and that the defendant corporation has had and enjoyed the benefits of such contracts. This being true, the corporation cannot accept and ratify the contracts in so far as they were beneficial to it, and repudiate them in so far as they imposed any liability on its part. It accepted plaintiff's money on the strength of these contracts, and cannot, while retaining the same, be heard to say that its officers had no authority to make the contracts under which it was received. This is hornbook law, and we need only cite in its support *Field v. Eastern Bldg. etc. Assn.*, 117 Iowa, 185,

90 N. W. 717; Moore v. M. E. Church, 117 Iowa, 33, 90 N. W. 492; Melledge v. Boston Iron Co., 5 Cush. 158, 51 Am. Dec. 59; Philadelphia etc. R. Co. v. Howard, 13 How. 307, 14 L. ed. 157.

The contract being under the seal of the corporation, and the signature of the corporation and its officers being undenied, it will, of course, be presumed not only that the contract was in fact executed, but that its officers had power to make it: Blackshire v. Iowa Homestead Co., 39 Iowa, 624. This point as to actual authority or adoption by ratification assumes, of course, that the contracts were such as the officers might have been authorized to perform.

The next proposition, as to legal power or authority, raises incidentally the question of ultra vires; that is to say, defendant pleaded want of legal authority in its officers to make the contract in question. As pleaded in the answer, this is largely a legal conclusion of the pleader, and might well be disregarded upon this ground; but, treating the point as properly raised, we have ³⁵⁶ this state of facts: There is no showing as to the charter rights of the defendant; that is, there is nothing appearing therein which expressly prohibits the making of such contracts as are here involved. We have to deal, then, with its implied powers. The contracts made between the parties provide for two things: 1. The payment of what is in the nature of guaranteed dividends; and 2. The repurchase of the stock by the corporation under certain conditions. With the first we now have nothing to do, as plaintiffs are not asking for dividends or their equivalent, nor are they in any manner relying upon that provision of the contracts. In so far as this record shows, they have received all the dividends to which they are entitled. At any rate, they are not asking any here. They seek in these actions to enforce the agreement as to the repurchase of their stock. This agreement is entirely distinct from the agreement to pay dividends. In this connection it is entirely immaterial whether they received any of the promised dividends or not, or as to whether or not that part of the agreement is of any validity. The contracts for dividends and for repurchase of the stock are divisible in so far as the point now under consideration is concerned; that is to say, want of legal power to make the contracts to repurchase the stock. As to that point, it is well settled in this jurisdiction that, in the absence of charter restrictions, a corporation has power to make valid contracts

for the repurchase of its own stock: *Iowa Lumber Co. v. Foster*, 49 Iowa, 25, 31 Am. Rep. 140; *West v. Averill Grocery Co.*, 109 Iowa, 488, 80 N. W. 555; *Rollins v. Shaver Co.*, 80 Iowa, 380, 20 Am. St. Rep. 427, 45 N. W. 1037. See, also, *City Bank v. Bruce*, 17 N. Y. 507; *Commissioners v. Thayer*, 94 U. S. 631, 24 L. ed. 133. So that, in so far as legal power and authority is concerned, the first division of the answers tenders no defense.

3. The second division of the answers, pleading want of consideration, was withdrawn, and to it we give no further attention.

4. In the third division the point is made not only ³⁵⁷ that the officers had no authority, but that the entire scheme was and is ultra vires, contrary to public policy, and void. It is claimed that the agreement to repurchase the stock at par, and to pay dividends in passes, constituted a fraud upon, and an unjust discrimination in favor of these plaintiffs against the other stockholders, and that such contracts were beyond the power of the corporation.

This defense, as will be noticed, is made by the corporation itself, which has received all of the benefits of the transaction on its part. The agreement for free passes and to pay dividends is out of the case, save as it may bear on the question of fraud in the transaction, for, as already stated, that part of the contract has, so far as this case is concerned, been fully executed, and is functus officio. But it is contended that the agreement to repurchase, which is as yet executory in character, cannot be enforced, for that, if it be recognized and sustained, it may and will diminish the earnings and assets of the company, to the prejudice of other stockholders and creditors. This is, in our judgment, the only debatable question in the case. There is no claim of any actual fraud in the transaction, and no suggestion of any secrecy with reference to the agreement. Moreover, there is no statement either in pleadings or argument that the stock is not worth what the defendant agreed to repurchase it for. Reliance is placed solely on statements to the effect that the other stockholders had no such privileges or agreements, and that said agreements to repurchase diminished the value of the earnings and the assets of the company, to the prejudice of other stockholders and creditors. It goes without saying that the enforcement of these contracts will take the amount paid for the repurchase of the stock out of the earn-

ings and assets of the company. But this is true in every case where a corporation is permitted to repurchase its own stock. However, its stockholders' liability is reduced by that amount, and, in the absence of fraud or a plea of insolvency on the part of the corporation, we do not see how³⁵⁸ either the stockholders or creditors are prejudiced, unless it appears that the corporation agreed to pay more for the stock than it was worth. No claim of this kind is made in the defendant's answer, save by way of a general statement of a legal conclusion that the earnings and assets will be diminished to the prejudice of defendant's stockholders and creditors. No facts are pleaded, however, which will justify any such inference. No actual fraud or secrecy is pleaded, but it is argued that such a transaction is contrary to public policy.

The cases differ in many respects from most of those cited by counsel for the defendant company. In most of them the subscriber for stock was endeavoring to escape liability on his contract by reason of a contract or an understanding that he was not to be liable thereon, or that his liability was contingent or for only a part of the amount of the subscription price. This case involves no such question. Here the defendant corporation is endeavoring to escape liability on a contract for repurchase, of which it had the full benefit, because of some actual or implied fraud, or because the contract is void as being against public policy. We fail to see that any question of public policy is involved. A corporation may guarantee dividends upon its stock if it is so minded. To hold otherwise would be to set aside many contracts of the kind, which no one heretofore has thought of questioning. The free use of its lines was given as and for dividends, and the plaintiffs had the right at any time to renounce that part of the agreement and to accept regular dividends. It is not contrary to public policy for a corporation to repurchase its own stock. This has many times been held, not only by this court, but in other jurisdictions as well. Of course, fraud will defeat any contract; but no actual fraud is pleaded, nor is there any attempt to plead facts from which fraud might be inferred. At best, there is a mere suggestion or inference of fraud, but no sufficient facts are pleaded from which such inference may legitimately³⁵⁹ be drawn. There is, as we have said, no showing that the corporation is insolvent, and no attempt to plead or show that

the stock is not worth what defendant agreed to give for it. True, other stockholders were not given the rights accorded to these plaintiffs, but this in itself is no reason for not enforcing the contracts against the corporation itself, for there is no showing of any prejudice to other stockholders. It may be that their stock is worth more than par. As to this we are not advised. But in the absence of direct averment, we cannot presume anything in defendant's favor in order to defeat these contracts, that it may escape from what appear on their face to be valid obligations. Having received the benefits of these contracts, it does not lie in defendant's mouth to plead the invalidity thereof because *ultra vires*: *Field v. Eastern Bldg. etc. Assn.*, 117 Iowa, 185, 90 N. W. 717. See, also, *Fremont C. M. Co. v. Thomsen*, 65 Neb. 370, 91 N. W. 376; *Watts v. Equitable Mut. Life Assn.*, 111 Iowa, 90, 82 N. W. 441.

The defendant is not a mutual company; it is purely a stock concern; and we know of no reason of public policy or of sound morals which inhibits it from making such contracts as are here sought to be enforced, in the absence of some showing of fraud or *mala fides*. The public has no interest in such matters. Perhaps a case might be made where other stockholders or creditors could intervene, or in which creditors could enforce some liability against the plaintiffs, or object to the enforcement of the contracts, but no such questions are presented by this record. Plaintiffs paid full value for their stock when they purchased it, and were induced to purchase through the promises and agreements of the defendant, its officers and agents. To now allow the defendant to repudiate its agreements would be offering a premium upon wrongdoing. The plea of *ultra vires* is not looked upon with favor, and, when a corporation has received the benefits growing out of a contract, such contract will be enforced against it, unless it be entered into through fraud, or there be persuasive considerations of public policy³⁶⁰ involved. Neither of these appears in the defendant's answer. As fully sustaining our conclusions on this point, see *Field v. Eastern Bldg. etc. Assn.*, 117 Iowa, 185, 90 N. W. 717; *Wright v. Pipe Line Co.*, 101 Pa. St. 204, 47 Am. Rep. 701; *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128; *Manchester R. Co. v. Concord R. R.*, 66 N. H. 100, 49 Am. St. Rep. 582, 20 Atl. 383, 9 L. R. A. 689; *Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188.

In order to recover in this case, plaintiffs are not required to reply upon an illegal contract. The agreement to repurchase the stock was neither ultra vires, illegal, nor immoral. There was no actual fraud, and no facts are stated from which fraud may legitimately be inferred. Stockholders may, in equity, sometimes set aside ultra vires acts done by a corporation, which the corporation itself may not take advantage of: *Railroad Co. v. Ellerman*, 105 U. S. 166, 26 L. ed. 1015; 4 Thompson on Corporations, sec. 4483 et seq. But in such cases it must be shown that the conduct of the officers or directors works a substantial injury. However, speculation on this point is unnecessary, for the questions are not here at issue. We reach the conclusion that the third division of the answer presents no defense.

5. Lastly, it is argued that the court erred in rendering judgments against the defendant for the reason that the plaintiffs did not tender and bring their shares of stock into court at the time the judgments were rendered. This point does not seem to have been made in the lower court, and, of course, cannot be taken advantage of here. But we find that plaintiffs did make a written tender; that they, in their petitions, renewed these tenders, but that defendant refused to receive back the stock; and that on the trial plaintiffs produced the shares of stock in court, and filed them with the clerk. These facts are sufficient to justify the judgment, although the first written tender was not kept good as required by statute: Code, sec. 3061; *Williams v. Triplett*, 3 Iowa, 518.

There is no prejudicial error in the record, and the judgments are each and all affirmed.

A Corporation may Purchase Its Own Stock, under ordinary circumstances: See the monographic note to *Commercial Nat. Bank v. Burch*, 33 Am. St. Rep. 339-347. The rule on this question is stated in a recent case as follows: A private corporation may purchase its own stock if the transaction is fair and in good faith, provided the company is not insolvent or in process of dissolution, and the rights of its creditors are in no way affected thereby: *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, but see the cases cited in the cross-reference note thereto.

The Doctrine of Ultra Vires as applied to contracts for private corporations is the subject of an extended note to *In re Assignment of Mut. etc. Ins. Co.*, 70 Am. St. Rep. 156-180. Generally speaking, a person dealing with a corporation having limited and delegated powers is chargeable with notice of those powers and their limitations, and cannot plead his ignorance of their existence: *Steele v. Fraternal Tribunes*, 215 Ill. 190, 106 Am. St. Rep. 160. However, where a corporation has entered into a contract not immoral in itself and not forbidden by any statute, which has been in good faith performed by the other party, the corporation cannot be heard on a plea of ultra vires: *White v. Commercial etc. Bank*, 66 S. C. 491, 97 Am. St. Rep. 803, and see the cases cited in the cross-reference note thereto.

KLEIS v. McGRATH.

[127 Iowa, 459, 103 N. W. 371.]

LIMITATION OF ACTIONS—New Promise.—The making and delivery of a second note given for unpaid interest on a prior note after the latter is barred by limitation is not such a written admission of the debt evidenced by the first note as will operate to revive the right of action thereon, and prevent the interposition of the statute of limitations. (p. 401.)

MORTGAGES—Note to Secure Interest.—A mortgage given to secure payment of a debt secures, and may be enforced for the payment of, the interest accruing thereon under the principal note, although the debtor has given the mortgagee another note for the payment of such interest. (p. 401.)

MORTGAGES—Collection of Interest—Joinder of Actions.—A mortgagee may enforce payment of the principal mortgage note, and another given for interest thereon, in the same action. (p. 402.)

Hurd, Lenehan & Kiesel, for the appellant.

McCarthy, Kenline & Roedell, for the appellees.

460 WEAVER, J. The petition, which was filed December 9, 1903, declares upon two promissory notes, and seeks the foreclosure of a mortgage, and is stated in two counts. In the first count it is alleged that on June 29, 1888, the defendant, James McGrath, made and delivered to plaintiff's assignor his promissory note for two thousand two hundred and fifty dollars, payable five years after date, with interest at seven per cent per annum, which note is now owned by the plaintiff, and is due and unpaid. In the same count plaintiff further alleges that on June 30, 1902, the defendant, James McGrath, made and delivered to plaintiff another promissory note in writing for twenty-eight dollars and seventy-five cents, which note it is further alleged was given for interest accrued on the note first described, and the instrument is set out in said first count for the purpose of showing an admission in writing that the principal debt was then unpaid, thus avoiding the plea of the statute of limitations thereon. The second count declares solely upon the note of twenty-eight dollars and seventy-five cents above mentioned. Judgment is asked for the unpaid balance on both notes, and foreclosure is prayed of a mortgage alleged to have been given by James McGrath and his wife, Ann McGrath, at the date of the first note, to secure its payment. The defendants demurred to each count of the petition on the ground that the allegations thereof

show the debt sued upon to be barred by the statute of limitations, and for the further reason that the pleading shows a misjoinder of causes of action and of parties, and because the two counts are inconsistent and contradictory. The district court sustained the demurrer to the first count of the petition, and overruled ⁴⁶¹ it as to the second count. Both parties having elected to stand upon the record thus made without further pleading the court dismissed plaintiff's action upon the first-mentioned promissory note and entered judgment in his favor for the amount of the smaller note and for a foreclosure of the mortgage. Both parties appeal, but the plaintiffs, being first to serve notice, will be herein denominated the appellant.

The one question presented is whether the making and delivering of the second note, when aided by parol evidence that it was given for unpaid interest on the first note, is such a written admission of the debt evidenced by the latter as will operate to revive the right of action thereon and prevent the interposition of the statute of limitations. The suit was confessedly begun more than ten years after a right of action had accrued upon the first note, and it is therefore barred unless we give the second note the effect claimed for it by the appellant. Code, section 3456, reads as follows: "Causes of action founded on contract are revived by an admission in writing signed by the party to be charged that the debt is unpaid, or a like new promise to pay the same." It is manifest that the note for twenty-eight dollars and seventy-five cents described in the petition is not a promise in writing, signed by the defendant, to pay the note for two thousand two hundred and fifty dollars. Can it be construed as a written admission of the continued existence of the debt represented by the larger note? Counsel for appellant have called our attention to several cases decided in other states which give some color of support to their contention that this question must be answered in the affirmative. There is a wide variance, however, among the courts of the several states in the strictness with which statutes as to the revivor of causes of action by written promises or acknowledgments are interpreted and applied. Some cases, especially those of an earlier date, seem to proceed upon the theory that the defense of the statute of limitations is not meritorious, and that all doubts are to be solved in favor of the creditor; others have adopted the view that the ⁴⁶² statute is one of repose, and that the cause of action once barred ought not to be revived unless the

plaintiff bring this case within the letter and spirit of the provisions permitting such revivor. Moreover, the statutes of the states creating a time limit upon the right to sue, and providing for the revival under some circumstances of a right once barred, are by no means uniform, and the decisions based thereon are ordinarily without decisive value as authority outside of the jurisdiction in which they have been announced. Referring to this statute, this court has already said: "We have found no statute like ours, and the cases in other states therefore give but little aid": *Parsons v. Carey*, 28 Iowa, 431. The prevailing tendency seems to be to permit a revivor by acknowledgment of the debt only where the writing relied upon is clear, explicit, and unequivocal in its terms. Says the supreme court of the United States: "If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. . . . Any other course would open all the mischiefs which the statute was intended to guard innocent persons against, and expose them to dangers of being entrapped in careless conversations and betrayed by perjuries": See, also, *Bell v. Morrison*, 26 U. S. 351, 7 L. ed. 174; *Smith v. Fly*, 24 Tex. 345, 76 Am. Dec. 109; *Shepherd v. Thompson*, 122 U. S. 231, 7 Sup. Ct. Rep. 1229, 30 L. ed. 1156; *Kensington Bank v. Patton*, 14 Pa. St. 479, 53 Am. Dec. 564; *Macrum v. Marshall*, 129 Pa. St. 506, 15 Am. St. Rep. 730, 18 Atl. 640; *Pierce v. Merrill*, 128 Cal. 473, 79 Am. St. Rep. 63, 61 Pac. 67.

It is an accepted doctrine that an acknowledgment of the existence of a debt is allowed to remove the bar of the statute, because such acknowledgment or admission carries with it an implied promise to pay. For that reason the acknowledgment must be express, clear and direct, for it will ⁴⁶³ not do to infer or imply the acknowledgment, and therefrom imply the promise to pay; thus piling implication upon implication. But this is just what must be done in order to sustain the position taken by the appellant. Moreover, the implication which he asks the court to indulge in cannot be drawn from the writing alone, but from the writing and other alleged facts which he proposes to establish by parol. The note itself contains not a word or suggestion recognizing the existence of any other obligation from the maker to the

payee, and this gap it is proposed to bridge by parol proof that the consideration of the written promise was interest earned or accrued on the debt represented by the other note. But when all this has been done the acknowledgment relied upon is still a matter of implication, and is in no sense of the word an acknowledgment in writing of the existence of any debt save the sum of twenty-eight dollars and seventy-five cents, which he promises to pay. If the defendant, in addition to his written promise to pay said sum, had added thereto by way of explanation the words "interest on my note now held by said payee," this would have been an acknowledgment that appellant held an unpaid note against him and parol testimony would have been competent to point out and identify the note to which reference was made: *Penley v. Waterhouse*, 3 Iowa, 418. By so doing we simply identify the subject matter to which the acknowledgment or promise applied. We add nothing whatever to enlarge or extend the clear meaning and import of the writing which the defendant has subscribed. But, as we have already noted, the writing before us in this case is a simple, unequivocal promise to pay to the plaintiff the sum of money therein mentioned. There is no ambiguity or uncertainty requiring the aid of parol testimony for an explanation of the defendant's meaning or to identify the subject matter of his promise. Such being the case, if we open the door for parol proof of facts and circumstances in no manner suggested by the writing, and from such facts and circumstances find an implied acknowledgment of an existing indebtedness ⁴⁶⁴ upon another and different instrument, we shall, in effect, by judicial construction abolish the statute by which there can be no revivor of a demand against which the limitation has run except by a written promise or acknowledgment subscribed by the party to be charged.

None of the cases cited by the appellant from this court go further in recognizing the competency of parol testimony than we have above indicated. In *Miller v. Beardsley*, 81 Iowa, 720, 45 N. W. 756, the defendant wrote to the plaintiff stating that he had paid plaintiff's agent the interest on nine thousand dollars, and referred to interest not yet due and to a note or notes which he "had not yet paid." In *McConaughy v. Wilsey*, 115 Iowa, 589, 88 N. W. 1101, the defendant wrote, making express reference to a note, and promising to "try and pay it this fall." The acknowledgment relied upon in *Campbell v. Campbell*, 118 Iowa, 131, 91 N. W. 894, was con-

tained in a letter containing a remittance, of which the writer says, "I think it pays the interest on my note to February, 1892," a date then in the future. In *First Nat. Bank v. Woodman*, 93 Iowa, 668, 57 Am. St. Rep. 287, 62 N. W. 28, the writing was also contained in letters remitting money to "pay interest on notes," and other letters stating that the writer hoped to be "able soon to pay the interest, . . . and, if possible, to pay the principal." In each of these cases it will be readily seen there is a clear and express reference by the defendant, in writing, to the existence of an unpaid indebtedness, the obligation of which is acknowledged by him; and in each case parol evidence was held admissible to identify the particular note or other form of indebtedness thus acknowledged. Beyond this well-established rule, we have never gone, nor can we do so without disregarding the statute. In *Wise v. Adair*, 50 Iowa, 104, we said with reference to an alleged written acknowledgment, "We should not extend the defendant's liability beyond what he admitted in writing." In other words, it is not competent to add by parol anything or any amount to the liability there admitted. In *Nelson v. Hanson*, 92 Iowa, 356, 54 Am. St. Rep. 568, 60 N. W. 655, we reviewed our earlier ⁴⁶⁵ cases permitting the identification of the debt by parol evidence, and said: "But in all the cases the language used by the debtor was an unqualified admission of indebtedness either in words or in legal effect." The position of this court is also clearly indicated in *First Nat. Bank v. Woodman*, 93 Iowa, 668, 57 Am. St. Rep. 287, 62 N. W. 28, where referring to language contained in certain writing or letters as an acknowledgment of the debt, we said: "While the letters relied on as containing the requisite admission and promises to revive the cause of action are mostly those of remittances, it is not the fact of payment that is relied on, but the statements in the letters signed by the party": See, also, *Stout v. Marshall*, 75 Iowa, 498, 39 N. W. 808; *Hale v. Wilson*, 70 Iowa, 311, 30 N. W. 739. As bearing to some extent upon the same general proposition here discussed, see, also, *Lehman v. Mahier's Estate*, 34 La. Ann. 319; *Trainer v. Seymour*, 10 Tex. Civ. App. 674, 32 S. W. 154; *Boothby v. Bennett*, 73 Me. 117; *Eckford v. Evans*, 56 Miss. 18; *Wells v. Hill*, 118 N. C. 900, 24 S. E. 771; *Trustees v. Gilman*, 55 Miss. 148; *Gartrell v. Linn*, 79 Ga. 700, 4 S. E. 918; *Leonard v. Hughlett*, 41 Md. 380; *Davis v. Davis*, 98 Me. 135, 56 Atl. 588. Under our statute the common-law rule by which

the partial payment of a claim operates to set the period of limitation running anew has been abrogated, and this court has never been inclined to indulge in over-refined construction to defeat the legislative will thus expressed: *Parsons v. Carey*, 28 Iowa, 431; *Harrencourt v. Merritt*, 29 Iowa, 71; *Roberts v. Hammon*, 29 Iowa, 128; *Hale v. Wilson*, 70 Iowa, 311, 30 N. W. 739.

If, then, a partial payment is to be no longer construed as an acknowledgment of the debt or promise to pay it, it is difficult to frame the statement of any good reason for giving such effect to a mere promise to make a partial payment. The *Hale* case, last above cited, differs but little in principle from the one before us. There the defendant, the maker of a promissory note, made a payment to the holder, and himself wrote and signed an indorsement thereof⁴⁰⁸ upon the note as follows: "Paid on the within note forty dollars, John Wilson." This we held not to be an acknowledgment of the debt which would prevent or avoid the defense of the statute of limitations. We said: "The mere payment of an amount of money upon a note is not an admission that no other payments have been made, nor that any other or further sum than that paid was due. The rule for which plaintiff contends obtained at a time when it was competent to prove by parol that the payment was but a part of what was admitted to be due. By our statute the rights of the parties are fixed by the writing, and unless by its terms a further sum is admitted to be due, or a new promise is made, the operation of the statute is not arrested. The law does not authorize the construction of a writing stating the mere fact of the payment of a sum of money on a note to be, in effect, a statement that more is due and unpaid." This principle is clearly applicable to the controversy now under consideration. The demurrer to the first count of the petition was rightfully sustained.

2. There is, in our judgment, no merit in the defendants' appeal. The note there set out was not barred by the statute of limitations. The demurrer admits that it was given for interest earned on the earlier note which was secured by the mortgage. If this be true, the note thus made was secured by the mortgage, and plaintiff was entitled to a foreclosure to enforce its payment. A mortgage given to secure payment of a debt secures also the payment of the interest accruing thereon, and the mere fact that the debtor has given the mort-

gagee his note for such interest has no effect as a waiver or release of the lien: *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. 1.

There was no misjoinder of the parties or causes of action. The defendant, James McGrath, was the sole maker of both notes. They were both secured by the same mortgage, and it is needless to say that ⁴⁶⁷ it was entirely proper to make his wife a party to the proceeding.

The judgment of the district court is upon both appeals affirmed.

Acknowledgments and New Promises to suspend the running or remove the bar of the statute of limitations are discussed at length in the monographic note to *Warren v. Cleveland*, 102 Am. St. Rep. 751-777.

STATE v. SMITH.

[127 Iowa, 534, 103 N. W. 944.]

MURDER—Arrest—Preventing Escape from Arrest.—An officer is not justified in killing a mere misdemeanant, to effectuate his arrest, or to prevent his escape after arrest. (p. 404.)

MURDER—Arrest of Felon.—An officer in seeking to arrest a felon may oppose force to force, and if there is no other reasonably apparent method for effecting the arrest or preventing the escape of the felon, the officer may, if he has performed his duty in other respects, take the life of the offender. This rule applies not only to the felon himself, out also to those who are seeking to rescue the prisoner. (pp. 404, 405.)

MURDER—Arrest—Aiding Escape.—It being a felony to aid the escape of a prisoner in the custody of an officer, the officer is justified in killing the person aiding in such escape, if that is the only reasonably apparent method of preventing such escape. (p. 406.)

Mitchell, Tomlinson & Price, for the appellant.

C. W. Mullan, attorney general, and L. De Graff, assistant attorney general, for the state.

⁵³⁴ DEEMER, J. Defendant shot and killed one William ⁵³⁵ G. Sarver. At the time of the homicide the defendant was a policeman in the city of Albia, and had arrested without a warrant S. D. Sarver, father of William G., for the crime of drunkenness. William G. interfered in the matter, and as a result of the altercation received a pistol shot, from the effects of which he almost immediately died. Defendant contended that the killing was justifiable on two grounds: 1. Be-

cause in defense of his person; and 2. Because it was necessary to prevent a felony, and to secure an arrest of the deceased, or to prevent his escape.

The trial court gave the following among other instructions: "23. When a peace officer, in making an arrest for a misdemeanor, is resisted by violence and force in making such arrest, then such officer has the right to resist force by force; and when the resistance is violent and determined, such officer is not bound to make nice calculations as to the degree of force necessary to accomplish the purpose, but may use such a reasonable degree of physical force in overcoming such resistance and effecting such arrest as may reasonably appear necessary therefor, and to prevent the escape of the party whom he is arresting; but he has no right to take the life of such person, or inflict on him a great bodily harm, for the purpose of making such arrest, except when the officer has a reasonable apprehension of peril to his own life or of suffering great bodily harm.

"24. If you find that the defendant had arrested S. D. Sarver, and W. G. Sarver, with knowledge thereof, appeared, and undertook by violence upon the defendant to effect the release of S. D. Sarver from such arrest, then it was the defendant's duty to arrest him, and his duty to submit thereto; and if the said W. G. Sarver, by violence upon or against the defendant, resisted such arrest, and attempted to escape therefrom, then the defendant had the right to resist by force, and was not bound to make nice calculations as to the degree of force necessary to accomplish the arrest, but he had the right to use such a reasonable degree of physical force in overcoming such resistance and effecting such arrest and preventing an escape as appeared reasonably necessary therefor, but he had no right to take the life of said Sarver, ⁵³⁶ or inflict upon him a great bodily injury, simply to effect the arrest, unless he had reasonable apprehension of peril to his own life, or of suffering great bodily harm."

The defendant asked the following, which were refused, to wit: "1. If you find that S. D. Sarver and Wid Sarver were in a condition of intoxication, and were therefor placed under arrest by the defendant, then you are instructed that it was their duty to submit to such arrest, and they had no right, by violence or otherwise, to resist such arrest; and if they attempted to escape from the arrest it was defendant's duty to resist and prevent the escape. And if you find that

they did, by violence upon the defendant or otherwise, endeavor to escape from such arrest, then it was the duty of the defendant to do his utmost to prevent such escape, and in preventing it he had the right to use all the force and violence that, under all the circumstances and conditions then surrounding him at the time, seemed to him in good faith, as an ordinarily reasonable man, necessary to prevent such attempted escape, even to the use of a deadly weapon, if it so seemed to him necessary to use it."

"3. If you find that the defendant had arrested S. D. Sarver, and that Wid Sarver, the deceased, appeared, and undertook by violence upon the defendant to effect the release of S. D. Sarver from such arrest, then it was defendant's duty to also arrest the said Wid Sarver, and it was said Sarver's duty to submit to such arrest; and if the said Wid Sarver, by violence upon or against the defendant, resisted such arrest, and attempted to escape therefrom, the defendant had the right to use all the force and violence that to him, in good faith as an ordinarily reasonable man under all the surrounding circumstances and conditions seemed to him necessary to prevent the escape."

Of the instructions given and of the refusal to give those asked defendant complains. Taking up the ones given in the order quoted, we are of opinion that the first was correct. While the authorities are not in harmony upon the proposition involved, the better rule seems to be that an officer is not justified in killing ⁵³⁷ a mere misdemeanant in order to effectuate his arrest, or to prevent his escape after arrest. In such cases it is better, and more in consonance with modern notions regarding the sanctity of human life, that the offender escape than that his life be taken, in a case where the extreme penalty would be a trifling fine or a few days' imprisonment in jail: *Reneau v. State*, 2 Lea, 720, 31 Am. Rep. 626; *Skidmore v. State*, 2 Tex. App. 20; *United States v. Clark* (C. C.), 31 Fed. 710; *Head v. Martin*, 85 Ky. 480, 3 S. W. 622; *Smith v. State*, 59 Ark. 132, 43 Am. St. Rep. 20, 26 S. W. 712; *State v. Moore*, 39 Conn. 244; *Dilger v. Commonwealth*, 88 Ky. 550, 11 S. W. 651. To this rule there are some exceptions, as in cases of riot, mob violence, etc. None of the exceptions apply to this case, however. The general rule does not, according to the great weight of authority, apply to felonies. Here an officer may oppose force to force, and if there be no other reasonably apparent method for effecting the arrest

or preventing the escape of the felon, the officer may, if he has performed his duties in other respects, take the life of the offender. This rule not only applies to the felon himself, but also to those who are seeking to rescue the prisoner: *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380, 10 S. W. 168; *State v. Garrett*, 60 N. C. 144, 84 Am. Dec. 359; *Clements v. State*, 50 Ala. 117; *Lynn v. People*, 170 Ill. 527, 48 N. E. 964; *Jackson v. State*, 76 Ga. 473; *State v. Bland*, 97 N. C. 438, 2 S. E. 460. Even in such cases the officer is not the arbitrary judge as to whether the necessity exists for taking life. That question is ultimately for the jury under proper instructions: *State v. Bland*, 97 N. C. 438, 2 S. E. 460. But it is erroneous in such cases for a court to instruct as a matter of law that an officer is not justified in taking the life of a felon: 1 East's Pleas of the Crown, 298. The authorities on this subject are collated in an excellent note found in *Hawkins v. Commonwealth*, 61 Am. Dec. 151-164. The reasons for these rules are apparent. An officer, in the performance of his duty as such, stands on an entirely different footing from an individual. He is a minister ⁵³⁸ of justice and entitled to the peculiar protection of the law. Without submission to his authority there is no security, and anarchy reigns supreme. He must, of necessity, be the aggressor, and the law affords him special protection. In his capacity as an individual he may take advantage of the "first law of nature," and defend himself against assault; as an officer he has an affirmative duty to perform, and in the performance thereof he should, so long as he keeps within due bounds, be protected. Sentimentalism should not go so far as to obstruct the due administration of law, and brute force should not be permitted to obstruct the wheels of justice.

Now, in the present case there was evidence tending to show that after the defendant had placed S. D. Sarver under arrest for drunkenness, and was endeavoring to take him to jail, he (Sarver) was attempting to escape from such arrest, and that W. G. Sarver made an assault upon the officer for the purpose of aiding his father to escape; that the defendant then attempted to arrest W. G. Sarver, who resisted the same, and continued his assault upon the policeman; and that finally defendant shot W. G. Sarver, inflicting wounds from which he (Sarver) died. To meet this feature of the case the trial court gave the twenty-fourth instruction, which, in effect, announces the rule that under no circumstances was

the officer justified in taking the life of W. G. Sarver. In this, we think, there was manifest error. There was evidence tending to show that both before and after the arrest of W. G. Sarver he (Sarver) was resisting and assaulting the officer, not only to effectuate his own escape, but also to secure the release of his father, S. D. Sarver. Section 4896 of the Code provides that: "Every person who aids or assists any prisoner in escaping or attempting to escape from the custody of any sheriff, deputy sheriff, marshal, constable, or other officer, or person who has the lawful charge, with or without a warrant, of such prisoner, upon any criminal charge, shall be fined not exceeding one thousand dollars, and imprisoned in the penitentiary not exceeding ⁵³⁹ five years." The penalty provided for the prohibited acts makes the crime a felony, and the law as to the duties, obligations, powers and rights of an officer in making arrests and preventing escapes of those engaged in the commission of a felony clearly applies: *State v. Turlington*, 102 Mo. 642, 15 S. W. 141.

The third instruction asked by the defendant, or something like it, should have been given. The killing must, of course, be apparently necessary, for one is not justified in taking human life if there be any other effective way of effecting the arrest; but this is a question of fact for a jury, and not of law for the court. The attorney general contends that there is no evidence in the case which called for an instruction on this subject. The trial court thought differently, and submitted the matter to a jury under an erroneous instruction. Such being the record, prejudice will be presumed, and the case must be reversed, unless it affirmatively appears that the error was without prejudice. The defendant's testimony—which we shall not set out at this time—was such as to call for a proper instruction on the subject, for it tended to show that W. G. Sarver was engaged in the commission of a felony, to wit, of attempting to secure the escape of a prisoner in the custody of a policeman, when the fatal shots were fired. If the jury believed the defendant's statements, it might have found that W. G. Sarver made an assault upon the defendant, a policeman, after he had lawfully arrested S. D. Sarver, for the purpose of securing the escape of S. D. Sarver. In so doing he was engaged in the commission of a felony, and defendant, as an officer, had the undoubted right to use a weapon to prevent this felony, if that were the only rea-

sonably apparent method of accomplishing the result: State v. Moore, 31 Conn. 479, 83 Am. Dec. 159; Pond v. People, 8 Mich. 150; Ruloff v. People, 45 N. Y. 215; People v. Angeles, 61 Cal. 188. A killing under such circumstances, however, must be for the honest and non-negligent purpose of ⁵⁴⁰ preventing the felony, and not for some other reason: People v. Burt, 51 Mich. 199, 16 N. W. 378.

The trial court was in error in giving its twenty-fourth instruction, and the judgment must therefore be reversed.

The Right of an Officer to take the life of a misdemeanant or felon who resists arrest is discussed in the monographic note to State v. Evans, 84 Am. St. Rep. 679-703. As to the force which an officer may use as against one who aids a felon whom the officer is attempting to arrest, see State v. Dierberger, 96 Mo. 666, 9 Am. St. Rep. 380.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

CONNELL v. MOORE.

[70 Kan. 88, 78 Pac. 164.]

GUARDIANS—Jurisdiction to Appoint.—The probate court, in the county of a minor's domicile, is the only court having jurisdiction to appoint a guardian of the person or estate of such minor. (p. 412.)

GUARDIAN'S Sale—Want of Jurisdiction.—If the probate court of one county appoints a guardian of the person and estate of a minor domiciled in another county, and directs a sale of his land situated in the former county, such proceedings and sale are without jurisdiction and void. (pp. 412, 413.)

R. H. Nichols, for the plaintiff in error.

T. J. Hudson, for the defendants in error.

89 ATKINSON, J. This is suit in partition by W. F. Connell, as guardian of Midget Connell, minor heir of D. W. McKey and Sarah McKey, deceased, against Isaac Moore and others. Plaintiff claimed for his ward an undivided one-fourteenth of a two hundred acre tract in Elk county. There was judgment for defendants quieting title against the claims of plaintiff.

In February, 1901, D. W. McKey died intestate, leaving as his only heirs a widow, Sarah McKey, six adult children, and two grandchildren—the issue of a deceased daughter, Elizabeth J. Connell, one of them being the minor, Midget Connell. Within a week after the death of D. W. McKey his widow, Sarah McKey, died intestate, leaving the six children and two grandchildren as her only heirs. D. W. McKey, at the time of his death, was the owner of a tract of two hundred acres

of land in Elk county, upon which he, with his wife, Sarah McKey, were residing at the time of his death. There was no administration upon the estates of said D. W. McKey or Sarah McKey, deceased. W. F. Connell is the father of Midget Connell, and the surviving husband of Elizabeth J. Connell. He, with the members of his family, including the minor, Midget Connell, continuously resided in Greenwood county.

On the thirtieth day of April, 1901, W. F. Connell was by the probate court of Elk county appointed guardian of the person and estate of Midget Connell. In the ⁹⁰ letters of guardianship, and in all proceedings in the probate court of that county, Midget Connell was designated as the minor heir of Elizabeth J. Connell. On the same day said guardian, by petition, made application to the probate court of Elk county to sell the minor's interest in the two hundred acre tract, which was designated as an undivided one twenty-eighth of the tract. In these proceedings no reference was made to the minor's interests having been inherited through the grandparents, D. W. McKey and Sarah McKey. After approved notice on the minor and a hearing by the court, it was ordered sold at private sale, for cash, at not less than three-fourths of its appraised value. The one twenty-eighth interest was appraised at one hundred and twenty-nine dollars and ten cents. The guardian, on May 24, 1901, reported to the probate court the private sale of it to L. S. Trusler, for one hundred and twenty-nine dollars and ten cents, cash in hand.

This sale was by the probate court approved and the guardian ordered to execute and deliver to the purchaser a deed for the lands and tenements sold. Pursuant to said order the guardian executed to L. S. Trusler a deed conveying "all the right, title and interest of said minor in and to" the two hundred acre tract. Thereafter the grantee obtained the possession of the deed from the guardian, to be used in establishing title to the premises for the purpose of procuring a loan to pay the purchase price thereof, he having theretofore purchased the interests of the other heirs.

It appears that through Trusler, or the parties interested in making the loan, the guardian's deed was placed on record without the knowledge or consent of the guardian. The probate judge about this time discovered that Elizabeth J. Connell, the mother of the minor, had died prior to the death of her parents, D. W. McKey and Sarah McKey, and that the minor's interest in the premises was an undivided one-four-

teenth ⁹¹ instead of an undivided one twenty-eighth, the basis upon which the guardian's sale had been conducted and approved by the probate court. It had been theretofore considered by the probate court, and by the parties interested, that W. F. Connell, the surviving husband of Elizabeth J. Connell, deceased, had inherited and owned one-half of the interest which his deceased wife inherited through her parents. Trusler was ready and willing to pay the guardian for an undivided one-fourteenth interest in the premises, on the basis of three thousand six hundred dollars as the purchase price for the two hundred acre tract, but insisted that he first obtain through the guardian good title for a one-fourteenth interest. In that condition the matter dragged along. In the meantime defendant, Isaac Moore, purchased of Trusler the two hundred acre tract, taking from Trusler a warranty deed therefor, and has since been in the occupancy of said premises.

On the nineteenth day of March, 1902, W. F. Connell, believing that the probate court of Elk county was without jurisdiction to appoint him guardian, and that all proceedings in that court were void, made application to the probate court of Greenwood county, the county of the minor's domicile, and was appointed guardian of the person and estate of Midget Connell, minor heir of D. W. McKey and Sarah McKey, deceased, and as such guardian commenced this suit in partition.

It is claimed by defendant Moore that he bought the land of Trusler relying upon the record title, and was in possession under the purchase; that he had no knowledge that the deed had not been delivered by the guardian to Trusler, or that the purchase price remained unpaid. While the deed recites that it conveys all the interest of the minor in the two hundred acre tract, it discloses that the probate proceedings were ⁹² before the probate court of Elk county. The proceedings in the Elk county probate court, of which Moore was bound to take notice, disclose that the minor was a resident of Greenwood county. The application to sell the minor's interest in the premises, and the order made thereon, referred to a one twenty-eighth, instead of a one-fourteenth, interest.

The testimony of defendant Moore disclosed that he was acquainted with the family of D. W. McKey and Sarah McKey; that he knew the minor, Midget Connell, inherited her interest in the premises from her grandparents; that the grandparents survived Elizabeth J. Connell, mother of the

minor, and that he also knew that the minor resided in Greenwood county.

It cannot, then, well be said that defendant Moore purchased the premises relying upon, and was misled by, the records. While he may have been without knowledge that the guardian's deed had not been delivered to Trusler, and that the purchase price had not been by Trusler paid to the guardian, the sufficiency of his title does not depend upon these facts. Nor is the question to be determined, as suggested, whether the proceedings of the Elk county probate court, and the guardian's deed based thereon, conveyed an undivided one twenty-eighth, or an undivided one-fourteenth, interest in the two hundred acre tract.

The real question to be determined is, Did the probate court of Elk county acquire jurisdiction to appoint such guardian and make its order directing a sale of the minor's interest in the premises? If, because it was not the county of the domicile of the minor, the probate court of Elk county was without jurisdiction, then the proceedings in that court and the guardian's deed were void, the guardian's deed ^{as} passed no title, and the district court erred in rendering judgment for defendants.

In the preparation of the civil and criminal codes (Gen. Stats. 1901, cc. 80, 82), care was exercised to designate specifically what district court in the several counties of the state should acquire jurisdiction of civil and criminal cases. Equal care appears to have been exercised in the executors' and administrators' act (Gen. Stats. 1901, c. 37) to designate specifically what probate court in the several counties of the state should acquire jurisdiction to administer upon the estates of deceased persons. A like degree of care is not shown to have been exercised, in the act relating to guardians and wards (Gen. Stats. 1901, c. 46), to designate specifically what probate court in the several counties of the state should acquire jurisdiction for the appointment of a guardian to administer upon the estates of minors residing in the state and having property necessitating the appointment of a guardian.

Section 1 of said chapter 46 declares the father and mother to be the natural guardians of the persons of their minor children. Section 4 provides that, where the minor child has property not derived from either of the parents, "a guardian must be appointed by the probate court to manage such property." Section 5 provides that the father, or, in case of

his death, absence, or incapacity, the mother, may be appointed guardian to take charge of the property of the minor, if by the court deemed a suitable person. If there be no testamentary guardian, and both parents be dead, or disqualified to act as guardian, it is provided by section 2 that "the probate court may appoint one"; but it is not specifically stated what probate court shall have jurisdiction. The clear and reasonable inference to be ⁹⁴ drawn from the provisions of the act, and from the language used, is that the court having jurisdiction to appoint a guardian for the estate of a minor is the probate court of the county of the minor's domicile.

It appears that the precise question has never been determined by this court. In *Modern Woodmen v. Hester*, 66 Kan. 129, 71 Pac. 279, following the declaration that after the death of the father the domicile of the mother determines the domicile of the minor children, it was impliedly said that the probate court of the county of the minor's domicile was the court having jurisdiction to appoint a guardian. The court of appeals of Missouri, in construing an act quite similar to our own, relating to guardians and wards, held that the jurisdiction to appoint a guardian for a minor rests alone with the probate court of the county where the minor has his domicile: *De Jarnett v. Harper*, 45 Mo. App. 415.

It is the policy of the law to give to the individual a near-by and convenient court. Save in exceptional cases, hardships have not been visited upon the citizen by requiring him, at the expense of time and means, to respond over long distances to the process of the courts. The jurisdiction of tribunals having judicial powers has wisely been limited in that particular. In pursuance of this policy of the law there has been established by the legislature a probate court in each county of the state. The undoubted purpose of the legislature in so doing was to give the inhabitants of each county a near-by and convenient tribunal having jurisdiction of probate matters. It will hardly be urged that an exception to these favors in the law was intended by the legislature to be made against the resident minors. Because of their tender years and lack of experience, minors are favorites of the law. It is not uncommon to find exceptions in the law particularly ⁹⁵ favorable to them. For the reasons stated, to permit a probate court other than that of the county of the minor's domicile to take jurisdiction of his person and estate would be legislation discriminating against him.

The mere fact that the legislature failed to designate specifically, in the act relating to guardians and wards, what probate court should acquire jurisdiction of the persons and estates of minors will not be presumed to have been intended to operate against the minor; nor should it be construed to his disadvantage, if equally susceptible of two constructions. If, as in the case at bar, the county adjoining that of the minor's domicile had jurisdiction of the person and estate of the minor, as was sought to be exercised by the probate court of Elk county, then any county in the state, no matter how remote, especially where there chanced to be property belonging to his estate, would have, or could acquire, jurisdiction. This might not only result in much inconvenience, and be also used to the minor's disadvantage in administering the affairs of the estate, but the distance would necessitate added and unnecessary expense.

The judgment of the district court will be reversed, with direction to proceed in accordance with the views herein expressed.

All the justices concurring.

A Proceeding in a Probate Court for the sale of a ward's property is a proceeding in rem, and the jurisdiction of the court attaches when the application for an order of sale, made by the proper party, and disclosing a statutory ground for the sale, is presented to the court: *Daughtry v. Thweatt*, 105 Ala. 615, 53 Am. St. Rep. 146. If the probate court of the county in which a minor resides takes jurisdiction of his estate and appoints a guardian, and, after the minor's removal to another county, the probate court thereof takes jurisdiction of him and his estate and orders his real property sold, the sale cannot be attacked collaterally on the ground of the exclusive jurisdiction of the first court, when nothing appears on the face of the record of the second court showing that the minor was a nonresident of that county or that the court acted without jurisdiction: *Cox v. Boyce*, 152 Mo. 576, 75 Am. St. Rep. 483.

The Power to Appoint a Guardian for an incompetent depends on the statute, and cannot be exercised unless the conditions prescribed by statute exist: *In re Streiff*, 119 Wis. 566, 100 Am. St. Rep. 903. If proceedings for the appointment show upon their face that the court acted without jurisdiction, the order making the appointment is subject to collateral attack: *McGee v. Hayes*, 127 Cal. 336, 78 Am. St. Rep. 57. See, too, *Providence County Sav. Bank v. Hughes*, 26 R. I. 73, 106 Am. St. Rep. 682.

BALDWIN v. OHIO TOWNSHIP.

[70 Kan. 102, 78 Pac. 424.]

SURFACE WATERS—Drainage into Natural Watercourse.—

The owner of lands through which a natural watercourse flows may accumulate and cast into such watercourse, in a body, the surface water falling upon lands adjacent thereto, without becoming liable to the lower riparian owner for damages if the natural capacity of the watercourse is not exceeded and overflow caused thereby. (p. 417.)

SURFACE WATERS—Drainage into Natural Watercourse.—

An upper riparian proprietor cannot gather and divert surface water from its natural course of flowage and cast it into the natural watercourse flowing through his land, to the serious damage of the owner of the lower estate by overflow, but in order for the latter to recover damages, even for overflow or to have their continuance enjoined, they must be of a serious and sensible nature. (pp. 418, 419.)

SURFACE WATERS—Drainage into Natural Watercourse.—

An upper riparian owner may divert at least incidentally, for a proper purpose and in good faith, such as for the purpose of agriculture, road making, or other proper betterments, the flow of the surface water from its natural course, especially when it is cast into a natural watercourse, where but little damage is occasioned to the lower riparian owner. (p. 419.)

SURFACE WATERS—Drainage into Natural Watercourse to Improve Highway.—Merely increasing the flow of water in a natural watercourse by draining surface water into it does not give a right of action, and riparian owners cannot complain when such increase is due to the building or improving of a public highway in good faith, and fairly within territory drained by such watercourse, and when its capacity is not exceeded and overflow caused thereby. (p. 420.)

Gamble & Costigan, for the plaintiffs in error.

Deford & Deford, for the defendants in error.

¹⁰² CUNNINGHAM, J. Plaintiffs' action was for the purpose of obtaining damages for injuries suffered by the alleged illegal diversion of surface water thrown upon ¹⁰³ their land by defendants, and for a mandatory injunction restraining the further continuance of such injuries.

The case is before us upon a transcript containing only the pleadings, the findings of fact made by the trial judge, the conclusions of law, and the judgment. As to the facts we have no light, except what is disclosed by these findings. From them we ascertain that the plaintiffs were, and had been for several years prior to the commission of the wrongs of which they complained, the owners of certain land, which they used and occupied as their homestead, lying south of a public highway extending east and west along its north bound-

ary. During this time there was a natural watercourse entering the plaintiffs' land on its north side and extending in a southerly direction nearly the full length of the land. This natural watercourse is spoken of as the "west draw," and drains an area of about thirty-eight acres on the north side of the highway. About thirty-five rods east of the point where this west draw crosses the highway is a surface water drain, and about twenty-seven rods still farther east is another surface water drain. These two drain an area of forty-eight acres, and are known as the "middle" and "east" draws, respectively.

At the time the plaintiffs became the owners of the land occupied by them as aforesaid, and for some time prior thereto, culverts were maintained across the middle and east draws at the point where the highway intersected them. These culverts were of small dimensions, being eight by twelve inches on the inside. There was also a bridge across the highway at the point where the west draw intersected it. We presume that ordinarily the surface waters coming down the middle and east draws passed through their respective ¹⁰⁴ culverts and over and upon the plaintiffs' lands to the south in no defined channels, except that their general course was south and east. These waters finally flowed into what is spoken of as Middle creek. The natural watercourse known as the west draw fell into Middle creek some distance west of the point where the middle and east draws joined it.

In 1895 one John Blocklinger, who was then the duly elected, qualified and acting road overseer of the road district in which this highway was located, for the purpose of improving the same, caused it to be graded up and a ditch dug along its entire north side, emptying into the west draw at its west end. He also removed the culverts which had theretofore intersected the highway at the middle and east draws. The effect of this was to collect all of the surface water which had theretofore passed down through these draws into this ditch, by means of which the water was carried westward and emptied into the west draw, thereby increasing the volume of water therein. It is of this increase of volume and the damage caused to them thereby that the plaintiffs complain.

The court specifically found that "the digging of said ditch, the closing up and removal of said culverts and the grading of said highway were a substantial improvement to the highway, and were done in good faith, with no other

intention than to improve it," and further, that "the water carried along said ditch on the north side of said highway and emptied into said west draw flows in and upon the plaintiffs' farm, to their injury." The court also found that "had said ditch along the north side of said highway not been constructed, the waters accumulating in said middle and east draws could not have gotten into said west draw nor onto the land of plaintiffs, ¹⁰⁵ and this would be true even though the culverts at the intersection of said middle and east draws with the highway were removed"; that "the plaintiffs have suffered damages to their said farm by reason of the said surface waters being collected from said middle and east draws into said ditch and cast in a body upon their said farm"; and that "they will continue so to suffer damages from said cause so long as said ditch is permitted to remain as it was when said action was begun and as it now is."

As a conclusion of law, the court held as follows: "The surface water having been accumulated in an artificial ditch, and cast in a body upon the land of Mr. Baldwin, the defendants would be enjoined were it not for the fact that it was cast upon the farm of the plaintiffs by means of a natural watercourse."

Thereupon judgment was rendered against plaintiffs for costs, and to reverse that judgment plaintiffs appeal to this court.

Several reasons other than the one given by the court are urged by defendants in error for the affirmation of this judgment. We prefer, however, not to give these reasons attention, but to discuss the matter entirely from the standpoint taken by the court below. We shall assume that the party responsible for the making of the ditch and the improvement of the highway, whether such party was the township, township officers, or the road overseer, occupied the same relation to the plaintiffs as would a private owner, and that they had a right to dispose of surface water coming upon the highway in the same manner, and to the same extent, as would the private owner of a dominant adjoining estate. In *Young v. Commissioners of Highways*, 134 Ill. 569, 25 N. E. 689, the court said: "The commissioners of highways, where they undertake to drain a public highway, possess the same ¹⁰⁶ rights and are governed by the same rules as adjoining land owners who may undertake to drain their own lands, except where

they may be proceeding under the eminent domain laws of the state.”

The common-law rules regulating the rights and duties of adjoining owners of lands relative to surface water obtain in this state: *Atchison etc. R. R. Co. v. Hammer*, 22 Kan. 763, 31 Am. Rep. 216; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241. Under those rules it is well settled that the owner of the upper estate may not gather surface water falling or accumulating thereon, and by means of artificial channels divert it from its natural course and discharge it upon the lower estate, to the damage of the owner thereof. This rule, however, goes hand in hand with the equally well-settled doctrine that, as to such waters, either owner may stand upon the defensive.

The owner of lands through which a natural watercourse flows may, however, accumulate and cast into such watercourse in a body the surface water falling upon lands adjacent thereto. Such streams are the drains provided by nature for the discharge of surface water gathered by natural forces and the general contour of the lands. The rule is thus stated in *Farnham on Waters and Water Rights*, section 186: “The force of gravity which causes all waters flowing on the earth to seek the lowest level creates natural drainage, and provides for the distribution of all water, whether surface water or otherwise. This natural drainage is necessary to render the land fit for the use of man. The streams are the great natural sewers through which the surface water escapes to the sea, and the depressions in the land are the drains leading to the streams. These natural drains are ordained by nature to be used, and so long as they are used without exceeding their natural capacity the owner of land through which they run cannot complain ¹⁰⁷ that the water is made to flow in them faster than it does in a state of nature. Among the steps which are taken for the improvement of property, one of the first is to remove the water from it as rapidly as possible. The right to drain upon and over lower lands without making compensation for such privilege is the same whether the higher land is the farm of an individual owner or is a public highway; and highway commissioners have the right to have the surface water, falling or coming naturally upon the highway, drain through the natural and usual channel upon and over lower lands; and have the right to construct ditches or drains for the purpose of conducting such surface

water, even though it is accumulated in ponds, into such natural and usual channels, although the effect may be to increase the volume of water thus carried upon lower lands. In accordance with this principle the flow of the water into the natural streams may be hastened so long as the water is not caused to overflow the banks of the stream to the injury of the land through which it flows.”

In Gould on Waters, section 274, the same rule is stated as follows: “The owner of land has a right to discharge the natural drainage of his land, and the surface water accumulating thereon, into a watercourse, whereby it becomes a part thereof, and in so doing he may change or concentrate its flow in artificial channels, thus accelerating the flow and increasing the volume of water in the stream, provided its natural capacity is not exceeded, and those whose supply is rendered more variable cannot complain.”

It is said at page 733 of volume 85 of the American State Reports, in a note to the case of Mizell v. McGowan, 129 N. C. 93, 39 S. E. 729: “We have just noticed the difference between merely draining onto another’s land and draining into a natural channel or watercourse which flows across such land. So far as streams or natural watercourses ¹⁰⁸ are concerned, there can be no doubt that one may drain into them, and thereby increase their volume, without subjecting himself to liability for any damage suffered by a lower owner”: Miller v. Laubach, 47 Pa. St. 154, 86 Am. Dec. 521; Cairo etc. R. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Treat v. Bates, 27 Mich. 390; Jackman v. Arlington Mills, 137 Mass. 277; Waffle v. New York Central R. R. Co., 52 N. Y. 11, 13 Am. Rep. 467; McCormick v. Horan, 81 N. Y. 86, 37 Am. Rep. 479; Jenkins v. Wilmington etc. R. R., 110 N. C. 438, 15 S. E. 193; Peck v. Harrington, 109 Ill. 611, 50 Am. Rep. 627; Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 57 Am. Rep. 447, 6 Atl. 453; Rath v. Zembleman, 49 Neb. 351, 68 N. W. 488.

From a careful study of these and other cases we are not disposed to indorse the board doctrine announced in the text of the note, or to hold that in no case may the lower riparian proprietor recover damages for injuries inflicted by diverting surface water into a natural watercourse by an upper riparian owner; but we are disposed to hold that such owner may not gather and divert surface water from its natural course of flowage and cast it into a natural watercourse, to

the serious damage of the owner of the lower estate by overflow. In order that there may be a recovery for such damages, or their continuance enjoined, they must, however, be of a serious and sensible nature. It is quite obvious that the rule, as against the dominant proprietor, cannot be enforced in its minutest detail and for its minutest infraction. To say that no surface water may be diverted and cast into a natural stream is practically to prohibit the removal or shifting of any of the soil from its natural condition. Such a strict application would result in preventing the processes of agriculture and of other necessary improvement.

¹⁰⁹ In speaking upon another phase of this question, but with equal applicability to this, this court, in *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241, said (at page 216): "If the right to run in its natural channels was annexed to surface water as a legal incident, the difficulties would be infinite indeed. Unless the land should be left idle, it would be impossible to enforce the right in its rigor; for it is obvious every house that is built, and every furrow that is made in a field, is a disturbance of such right. If such a doctrine prevailed, every acclivity would be and remain a watershed, and most low ground become reservoirs. It is certain that any other doctrine but that which the law has adopted would be altogether impracticable."

So the law must, and does, recognize the right of the dominant owner to divert, at least incidentally, for a proper purpose and in good faith, the flow of surface water from its natural course, especially when it is cast into a natural watercourse, and where but little damage is occasioned. Were this not so, improvements of the land for the purposes of agriculture, road-making and other betterments would be seriously hampered and impeded. Again, it clearly appears from the authorities that not all damages suffered by the owner of the lower estate may be recovered, or the continuance thereof enjoined, but only such damages as result from the overflowing of the stream because its natural capacity has been exceeded. The fact that the flow has been accelerated, or deepened, or that the banks of the stream have been washed away in places and sandbars created at other points, is something for which it is not within the purview of the law to grant relief.

Upon this point it is said, in *Farnham on Waters and Water Rights*, section 488: "Drainage, being necessary to fit the land for successful ¹¹⁰ occupation and the streams being

the natural channels of drainage, the flow of the surface water may be hastened into the streams so far as it can be done without flooding lower property." See, also, cases cited above, and *Drake v. Hamilton Woolen Co.*, 99 Mass. 574; *Hayes v. Waldron*, 44 N. H. 580, 84 Am. Dec. 105; *Rutherford v. Village of Holley*, 105 N. Y. 632, 11 N. E. 818.

In *Kemper v. The Widows' Home*, 6 Ohio Dec. 1049 [reprint, 9 Am. Law Rec. 732] it was said: "Merely increasing the flow of water in a natural watercourse does not, like increasing the flow of surface water, give a right of action. Riparian owners cannot complain when such increase is due to the building or change of grade of streets and the improvement of lots fairly within territory drained by such watercourse, when its capacity is not exceeded."

The plaintiffs have argued this case as though the finding of the court was that the damage suffered by them was occasioned by the flooding of their lands caused by the overflow of this natural watercourse. Such, however, is not the case. While the court found that the plaintiffs were damaged, it did not find that such damage was consequent upon the overflow of this natural watercourse; and, as it found that they were not entitled to recover, we must presume that the damage suffered was such, and only such, as they could not recover for under the law.

Because it here affirmatively appears that the improvements that were made upon the highway were of a substantial character, and made in good faith, and because it does not appear that the diversion of the surface water occasioned thereby from the middle and east draws was more than a mere incident to the making of such substantial improvements. and because it does not appear that the damage suffered by the ¹¹¹ plaintiffs was occasioned by the overflow of the natural watercourse into which such surface water was turned, or that such damage was other than what was occasioned by the hastening or increasing of the flow, we conclude that the same was *damnum absque injuria*, and hence no recovery can be allowed.

The judgment of the lower court is affirmed.

All the justices concurring.

A Land Owner may Drain Surface Water into a stream or natural watercourse and thereby increase its volume without subjecting himself to liability for damages suffered by lower proprietors: See the monographic note to Mizell v. McGowan, 85 Am. St. Rep. 733.

QUEEN INSURANCE COMPANY v. STRAUGHAN.

[70 Kan. 186, 78 Pac. 447.]

INSURANCE, FIRE—Vacancy—Waiver by Agent.—If a policy of fire insurance contains a clause making the policy void if the building insured be or become vacant or unoccupied and so remain for a period of ten days, unless otherwise provided by agreement indorsed thereon, and such policy is issued by an agent having authority to issue policies and consummate contracts of insurance, and he has knowledge at the time of issuing the policy that the building is vacant and unoccupied, and within ten days therefrom, agrees to indorse a vacancy permit on the policy, but fails to do so, the insurance company must be deemed to have waived the condition, and is liable for a loss occurring while the building remained vacant and unoccupied. (p. 422.)

INSURANCE, FIRE—Waiver of Notice and Proof of Loss.—An insurance company may waive its right to notice and proof of loss, and such waiver may be made by its agent. (p. 423.)

Reed, Yates, Mastin & Howell and C. T. Atkinson, for the plaintiff in error.

L. C. Brown, for the defendant in error.

¹⁸⁶ **ATKINSON, J.** This action was brought by C. C. Straughan against the Queen Insurance Company of America to recover a loss by fire on a policy for seventeen hundred dollars issued to plaintiff by defendant. The trial was before the court and a jury, resulting in a verdict and judgment for plaintiff in the sum of fifteen hundred dollars.

The policy of insurance sued upon was issued to plaintiff on the twenty-sixth day of February, 1901, through ¹⁸⁷ P. L. Snyder, defendant's local agent at Arkansas City, where the property was situated. The policy insured plaintiff against loss by fire, on his dwelling in the sum of twelve hundred dollars, and on walks, fences and trees in the sum of five hundred dollars. Concurrent insurance was permitted on the dwelling. At the time of the loss by fire—March 12, 1901—there was upon the dwelling concurrent insurance in the sum of thirteen hundred dollars in the Providence Washington Insurance Company, placed thereon February 26, 1901, by said P. L. Snyder, who was also the local agent of said company at Arkansas City.

The dwelling was vacant at the time the fire occurred. The policy sued upon contained a clause providing, in substance, that the policy should be void if the building insured thereby

be or become vacant or unoccupied and so remain for a period of ten days, unless otherwise provided by agreement indorsed on the policy. On the part of plaintiff it was claimed that this provision of the policy had been waived by defendant, through its agent, Snyder, who had actual knowledge at the time the policy was issued that the house was vacant; that on the seventh day of March, less than ten days from the date of the issuing of the policy, plaintiff had requested the agent, Snyder, to indorse upon the policy a permit to make repairs, and also a permit for thirty days' vacancy of the building; that the agent, Snyder, stated at the time that he would place such indorsements upon the policy; that he did on said day place an indorsement upon the policy giving to plaintiff the right to make repairs, but omitted to add the vacancy clause, of which omission plaintiff had no knowledge until after the fire, and that defendant, through its agent, Snyder, had thereby waived the placing of an indorsement of a vacancy clause upon the policy. Defendant denied a ¹⁸⁸ waiver, and denied the authority of the agent, Snyder, to make such waiver, there being a clause in the policy to the effect that no agent or officer of the company could waive any of the provisions of the policy otherwise than in writing indorsed thereon.

Snyder was the agent of defendant, with authority to issue and countersign policies of insurance and collect premiums, and occasionally he adjusted losses. Such an agent may waive the conditions of a policy otherwise than in writing indorsed thereon: *American Cent. Ins. Co. v. McLanathan*, 11 Kan. 533; *National Fire Ins. Co. v. Barnes*, 41 Kan. 161, 2 Pac. 165; *German Ins. Co. v. Gray*, 43 Kan. 497, 23 Pac. 637; *Hartford Fire Ins. Co. v. McCarthy*, 69 Kan. 555, 77 Pac. 90.

Upon the trial plaintiff, with reference to the vacancy of the dwelling, testified to the state of facts claimed by him as a waiver. Snyder, the former agent of defendant, testified to the same facts, and gave as his reason for not indorsing a vacancy clause upon the policy that he did not think it necessary to do so, because he knew the premises were vacant at the time the policy was issued and at the time the indorsement was requested by plaintiff. This knowledge of the agent was knowledge of the company *Capitol Ins. Co. v. Bank of Pleasanton*, 50 Kan. 449, 31 Pac. 1069. The verdict of the jury was a finding that the insurance company had waived the indorsement of a vacancy clause upon the policy, and we think there was sufficient evidence to justify this finding.

Plaintiff in error cites *German Ins. Co. v. Russell*, 65 Kan. 373, 69 Pac. 345, 58 L. R. A. 234, and contends that it denies the right of defendant in error to recover. That case is not in point. There the policy contained a provision that it should be void if the buildings be or become vacant. The buildings ¹⁸⁹ insured became vacant and unoccupied, and continued so for a period of twelve days, without the knowledge or consent of the insurance company, but were reoccupied before the loss occurred. The question of waiver did not arise, and the point decided was that a policy of insurance containing such a provision became forfeited immediately upon the vacancy of the buildings without the knowledge and consent of the company, and that the reoccupancy of the buildings did not operate to revive the policy.

The next objection of the insurance company is that the proof of loss did not conform to the requirements of the policy. The plaintiff contends that the proof of loss had been waived by the agent of the insurance company. It is well settled that an insurance company may waive its right to notice and proof of loss, and that such a waiver may be made by its agent: *Phenix Ins. Co. v. Munger*, 49 Kan. 178, 33 Am. St. Rep. 360, 30 Pac. 120. If the proof of loss was insufficient, there was evidence before the jury that its sufficiency had been waived by the agent of the insurance company, and the verdict of the jury renders further consideration of this matter unnecessary.

The contention of the insurance company that there had been no arbitration to ascertain the amount of the loss before the commencement of this action is also concluded by the verdict of the jury. There is much evidence in the record tending to show that the loss was a total one within the rule announced in *Liverpool etc. Ins. Co. v. Heckman*, 64 Kan. 388, 67 Pac. 879, in which event there was nothing to arbitrate, and there is also evidence that, if the insurance company ever demanded arbitration, it was subsequently waived by the company through its agent, Snyder.

The instructions given by the court fairly state the ¹⁹⁰ law applicable to the case, and no error was committed in refusing to give the instructions requested by the defendant. Nor do we find any prejudicial error in the rulings on evidence.

The judgment is affirmed.

All the justices concurring.

The Waiver of Stipulations that Conditions and forfeitures in insurance policies shall not be waived or shall be waived in writing only, is the subject of a recent extended note to Johnson v. Aetna Ins. Co., 107 Am. St. Rep. 99-149.

GREER v. NEWLAND.

[70 Kan. 310, 77 Pac. 98, 78 Pac. 835.]

CHATTEL MORTGAGES—Sale of Mortgaged Property by Commission Merchant—Notice.—A commission merchant, who receives mortgaged personal property sent to him for sale, without the knowledge or consent of the mortgagee, and in violation of the terms of the mortgage, and who sells it and pays the proceeds, less his commission, to the consignor without actual notice of the mortgage, does not receive such a benefit from the transaction as to authorize the mortgagee to waive the tort and recover in an action upon an implied contract. (pp. 427, 428.)

CHATTEL MORTGAGES—Record of as Notice.—The recording of a chattel mortgage does not impart constructive notice to a commission merchant to whom the mortgaged property is sent for sale, and who sells it, and pays the proceeds, less his commission, to the consignor. (p. 429.)

Muckle, Hayward & McLane, for the plaintiffs in error.

Botsford, Deatherage & Young, and McFadden & Morris, for the defendants in error.

³¹⁰ MASON, J. The owner of certain cattle in Wilson county executed chattel mortgages on them, securing two notes. The mortgages were properly recorded. ³¹¹ Afterward the mortgagor turned the cattle over to another person who, without the consent of the mortgagee, and in violation of the terms of the mortgage, shipped them to Greer, Mills & Co., commission merchants at East St. Louis, for sale. The commission merchants sold the cattle and remitted the proceeds, less charges and expenses, as directed by the consignor, without actual notice of the mortgages. The notes and mortgages remained unpaid and were transferred to J. W. Newland and D. R. Newland, who sued the commission merchants, not for damages resulting from the conversion of the cattle, but upon the allegation of an implied promise by them to pay to plaintiffs their net proceeds, the tort being expressly waived. Plaintiffs recovered a judgment which defendants seek to reverse.

Upon the facts stated it is clear that defendants would have been liable in an action for conversion, and the fact that they had no actual notice of the claim of the mortgagees would have constituted no defense: *Brown v. Campbell*, 44 Kan. 237, 21 Am. St. Rep. 274, 24 Pac. 492. But defendants claim that they were not liable in an action upon contract for the reason that in the transaction they acted only as the agents of the real wrongdoer, the person who shipped the cattle to them, and that their own estate was not intended to be benefited, and was not in fact benefited, by the sale—that they never acquired or claimed the beneficial title to the cattle or their proceeds. It is true that the rule is well established that “if no benefit accrues to the tort-feasor by reason of the tort committed, assumpsit will not lie. He cannot be charged as on an implied contract unless some benefit has actually accrued to him”: 15 Am. & Eng. Ency. of Law, 2d ed., 1115. See, also, Keen. Quasi-contr., c. 2; ³¹² *Fanson v. Linsley*, 20 Kan. 235, and cases cited. It is also true that the title of property consigned by the owner to a commission merchant for sale, and of its proceeds, is in the consignor, and no title vests in the factor except as trustee: 12 Am. & Eng. Ency. of Law, 2d ed., 695, 696.

In considering whether these principles protect the defendants from an action upon an implied contract to pay the mortgagee the price of the cattle, it must be borne in mind that no distinction is to be made between an actual knowledge by the consignee that goods sent to him belong to another than the shipper and the constructive knowledge of that fact given him by the public records. The effect of the notice imparted by the record does not depend upon the form of action. In the case cited it was held equivalent to actual notice in an action for conversion; it is so in an action upon an implied contract. The case must therefore be treated as though defendant had had actual notice of the existence of the mortgages.

If a factor, while still holding the proceeds of goods sold by him, knows they were stolen, he cannot assert, as a protection against the claims of the real owner, what is untrue in fact, that the title is in the one who has stolen them; and, having in his hands money belonging to another, in the absence of a reason to justify his holding it himself or making some other disposition of it, he is liable to the owner upon an implied contract to pay it to him.

“Where the defendant is proved to have in his hands the money of the plaintiff, which, *ex æquo et bono*, he ought to refund, the law conclusively presumes that he has promised so to do. . . . The count for money had and received, which in its spirit and objects has been likened to a bill in equity, may, in general, be proved by any legal evidence showing that the ³¹³ defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff. . . . And where the defendant has tortiously taken the plaintiff's property and sold it, or being lawfully possessed of it, has wrongfully sold it, the owner may, ordinarily, waive the tort, and recover the proceeds of the sale under this count. So if the money of the plaintiff has in any other manner come to the defendant's hands, for which he would be chargeable in tort, the plaintiff may waive the tort, and bring *assumpsit* upon the common counts”: 2 Greenleaf on Evidence, secs. 102, 117, 120.

“Where money has been paid to a factor for the use of the principal, to which the latter is discovered afterward not to be entitled, the factor will be liable to an action at the suit of the person from which he received such money, as for money had and received to his use, unless he has, before action brought, actually paid over the money to his principal”: *Weld v. Shaw*, 2 La. Ann. 559.

He who holds money that he knows belongs to one person cannot voluntarily pay it to another and claim exemption from contractual liability on the ground that he acted merely as an agent and derived no personal benefit from the transaction. When he knows who is entitled to receive the money in his hands he owes that person a duty from which the law implies a contract to pay it to him, and he can no more escape that liability, or alter the character of it, by a payment to the person from whom he received it than by making any other disposition of it. The case of *Hindmarch v. Hoffman*, 127 Pa. St. 284, 14 Am. St. Rep. 842, 18 Atl. 14, 4 L. R. A. 368, was an action of *assumpsit*, and it was there said: “As found by the learned judge, the money sued for as money had and received by defendant to the use of plaintiff never belonged to Savanack, nor ³¹⁴ could he have legally recovered any part of it. On the contrary, it was plaintiff's money, stolen from him by Savanack, and by the latter left with the defendant. While it was thus in his custody and under his control, he was fully informed of the theft, and also that plain-

tiff, as owner of the money, claimed it. Under these circumstances it was clearly his duty to hold it for plaintiff, and, upon satisfactory proof of ownership, to pay it over to him. From the existence of that duty the law raised an implied promise by defendant to do so, but, in disregard of his duty in the premises, he paid it over, on the order of the thief, to parties who had no right whatever to receive it. Justice demands that he should now be compelled to pay the amount to the rightful owner, and there is no good reason why it should not be recovered in the present form of action."

"Where a factor is notified that cotton consigned to him by a third person was made on plaintiffs' plantation and belongs to them, and is directed not to pay over the proceeds without their consent, the notice will render the factor liable for any subsequent payment made to the consignor, not depending on a superior right": *Ledoux v. Anderson*, 2 La. Ann. 558.

The situation is substantially the same as though cattle belonging to plaintiffs had been stolen and shipped to defendants for sale, and defendants had sold them and paid the proceeds to the consignor after learning of the theft. In such a case the defendants could say with as much force as they do now that they derived no personal benefit from the transaction—that their estate was not benefited by it; but under such circumstances this statement would not be a sufficient answer to plaintiffs' claim upon the implied contract to pay the money to the real owner; nor is it here.

The judgment is affirmed.

All the justices concurring.

A rehearing was subsequently granted, and thereafter an opinion was written by the same judge, in direct opposition to his first opinion, which second opinion is as follows:

315 MASON, J. This case involves the question whether commission merchants who receive mortgaged personal property sent to them for sale without the knowledge or consent of the mortgagee, and in violation of the terms of the mortgage, and who sell it and pay the proceeds, less their commission, to the consignor, without actual notice of the mortgage, which is properly of record, are liable to the mortgagee in an action upon an implied contract, the tort being waived. Upon a former hearing it was held that they derived no such benefit

from the act of conversion as to make them liable in assumpsit by reason thereof, but that, under the authority of *Brown v. Campbell*, 44 Kan. 237, 21 Am. St. Rep. 274, 24 Pac. 492, the record operated to give them constructive notice of the mortgage, and that this had the same effect as actual notice, and rendered them liable as upon contract for their failure to pay the proceeds of the property to the real owner. A grave doubt as to the ³¹⁶ correctness of this view of the effect of the record led to the granting of a rehearing.

Upon fuller consideration, we are convinced that all that is said in the case cited regarding the notice imparted by the record of the mortgage is dictum. The action was for conversion, the facts being substantially the same as in this case. There, as here, the consignor was an apparent stranger, whose possession was not clearly accounted for. It was held: "As the mortgage was properly on file in the office of the register of deeds, and valid, the commission merchant or broker was bound to take notice of the same and of the rights of the mortgagee, and that by selling and delivering the property to others he had made himself liable to the mortgagee as for a conversion of the property."

The weight of authority sustains the statement made in volume 4 of the *Cyclopedia of Law and Procedure*, at page 1055, which applies to a factor: "An auctioneer who sells property for one who has no title and pays over to his principal the proceeds is liable to the real owner for the conversion, even though such auctioneer acts in good faith, and without knowledge of the defect of title." See, also, 3 Am. & Eng. Ency. of Law, 2d ed., 497, and cases cited; *Flannery v. Harley*, 117 Ga. 483, 43 S. E. 765; *Miller v. Wilson*, 98 Ga. 567, 58 Am. St. Rep. 319, 25 S. E. 578; *Johnson v. Martin*, 87 Minn. 370, 94 Am. St. Rep. 706, 92 N. W. 221, 59 L. R. A. 733; *Dolliff v. Robbins*, 83 Minn. 498, 85 Am. St. Rep. 466, 86 N. W. 772; *Moore v. Hill* (C. C.), 38 Fed. 330. To the contrary, see 12 Am. & Eng. Ency. of Law, 2d ed., 691.

In most of the cases cited in support of this proposition, but not in all, the property involved came by theft, or some other wrong, into the hands of the person ³¹⁷ who delivered it to the factor, and a distinction is sometimes sought to be drawn based upon this consideration. But no reason is apparent why the rights of the owner should be affected by the character of the possession of the consignor, so long as he has no right to sell, and the owner is not estopped to deny such right.

The decision in *Brown v. Campbell*, 44 Kan. 237, 21 Am. St. Rep. 274, 24 Pac. 492, must therefore have been the same even if the mortgage had not been of record, unless the failure to record it would have made it void as to the defendant. Indeed, what was said in the opinion with reference to the notice imparted by the record was chiefly in response to the contention that the mortgage was void, and in effect was merely an argument that it was not invalid for want of notice.

Whether a factor to whom mortgaged property is consigned for sale, who sells it and accounts to the consignor for the proceeds, is charged with notice of the record of the mortgage depends wholly upon the statute. In the absence of a statute the recording of a chattel mortgage would be notice to no one, but the mortgage would be good as to every one with notice. It has been enacted, however (Gen. Stats. 1901, sec. 4244), that an unrecorded mortgage "shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith." The factor is neither a creditor of the mortgagor nor a subsequent purchaser or mortgagee, and, therefore, is not within the protection of the statute. As to him the mortgage is equally effective, whether of record or not: *Drumm-Flato C. Co. v. First Nat. Bank*, 65 Kan. 746, 70 Pac. 874. It follows that he is not affected with notice of the filing of the mortgage, for "the record imparts constructive notice to such persons only as would have been entitled to protection against ³¹⁸ the conveyance in case it had not been recorded": 24 Am. & Eng. Ency. of Law, 2d ed., 146.

It is strongly urged in behalf of plaintiffs in error (the commission merchants) that, even conceding that the record charged them with constructive notice of the mortgage, this would not render them liable as upon contract; that only actual notice would have that effect. As we hold that the record did not impart notice, it is unnecessary to decide this question now, but that it may be left open for a full inquiry and determination as it may hereafter arise, the statement in the original opinion that no distinction is to be made in this regard between actual and constructive notice is withdrawn.

As the estate of the plaintiffs in error was not benefited by their tort, and as they paid over the proceeds of the sale of the property without notice of the rights of the real owner, they could not be held liable in an action upon contract.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

All the justices concurring.

WHEN MORTGAGEES MAY MAINTAIN AN ACTION AGAINST THIRD PERSONS FOR AN INVASION OF THEIR RIGHTS.

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I. Scope of Note.

In this note we shall exclude the consideration of contests between senior and junior mortgagees; those questions which depend strictly upon the question of notice, actual or constructive; those questions which depend upon whether property removed by a third person from mortgaged premises was a fixture covered by the mortgage; and those questions which affect only matters of procedure and which do not go to the substantive right of maintaining an action against a third person invading the rights of the mortgagee. Nor shall we consider such phases of the subject as have been covered by recent monographic notes except from the time when such notes were written. In connection with this general subject, see, also, the following monographic notes: Note on the rights and remedies of a mortgagee when the property is by a judicial sale or other proceeding transferred so that he no longer has any remedy by foreclosure or suit for possession, attached to Cummins v. Christie, 88 Am. St. Rep. 359; the note on actions for compensation for injuries resulting from the removal of fixtures constituting part of the mortgaged property, attached to Lavenson v. Standard Soap Co., 13 Am. St. Rep. 153; note on the rights and remedies of the mortgagee against impairment of the value of his security, attached to Webber v. Ramsey, 43 Am. St. Rep. 432; note on the title and rights of the holder of a chattel mortgage after condition broken, attached to St. Mary's etc. Co. v. National etc. Co., 96 Am. St. Rep. 682; note on the right of a mortgagee to take possession when he deems himself unsafe or insecure, attached to Barrett v. Hart, 51 Am. Rep. 805; note on whether the lien of a chattel mortgage on growing crops continues after severance from the land, attached to Gillilan v. Kendall, 18 Am. St. Rep. 770; note on the removal of mortgaged property into another state, attached to Kanaga v. Taylor, 70 Am. Dec. 67, and Handley v. Harris, 30 Am. St. Rep. 324; and the note on mortgages with provisions allowing the mortgagor to sell the property, attached to Peabody v. Landon, 15 Am. St. Rep. 912.

II. General Nature of Acts Invading Rights of Mortgagees.

The majority of the cases respecting the invasion of the rights of mortgagees arise with respect to personal property. Though the question whether a chattel mortgagee is entitled to the possession of the mortgaged property prior or subsequent to condition broken is foreign to this note, still it will be observed from the cases hereafter discussed that the question whether the mortgagee is entitled to such possession is generally considered an important feature in such cases.

In Kiser v. Blanton, 123 N. C. 400, 31 S. E. 878, it was urged that the court presided over by the justice of the peace had no jurisdiction of the action to recover possession of the mortgaged property because the action was one to foreclose the mortgage, but the court said: "It is true that a magistrate has no equitable jurisdiction

(Daugherty v. Sprinkle, 88 N. C. 300; Cotton Mills v. Randleman Cotton Mills, 116 N. C. 647, 21 S. E. 431), but it is not true that this is an action to foreclose the mortgage. It is a legal action for the possession of property, and is what would have been an action of replevin under the old practice. It would have been a common-law action of detinue if the plaintiff had not taken out claim and delivery proceedings." And it is also held that the mortgagee may maintain an action against one who wrongfully converts the mortgaged property, regardless of whether the security is impaired or not: Schaling v. First Nat. Bank (Tex Civ. App.), 87 S. W. 715.

But a mortgagee may recover damages from third persons who by any tortious act, which impairs the value of the security afforded by the mortgage, such as wrongfully cutting timber standing on the mortgaged premises: Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425; James v. Worcester, 141 Mass. 361, 5 N. E. 826; Webber v. Ramsey, 100 Mich. 58, 43 Am. St. Rep. 429, 58 N. W. 625; Atkinson v. Hewett, 63 Wis. 396, 23 N. W. 889.

And with respect to real property the question whether the mortgagee may recover from third person fixtures or other parts of the property which have been removed by the mortgagor and thereafter sold sometimes arises. Thus in Searle v. Sawyer, 127 Mass. 491, 34 Am. Rep. 425, it was said: "Upon the question whether, if a mortgagor commits waste by removing buildings, wood, timber, fixtures or other parts of the realty, the mortgagee out of possession can follow the property after it has been severed, and recover it or its value, there have been conflicting decisions in different jurisdictions. In New York and Connecticut, it has been held that a mortgagee out of possession cannot maintain an action at law for waste committed by the mortgagor; and that he has no property in wood or timber cut and removed, so as to enable him to maintain trover for its conversion: Peterson v. Clark, 15 Johns. 205; Cooper v. Davis, 15 Conn. 556. On the other hand, it has been held in Maine, New Hampshire, Vermont, and Rhode Island, that timber, if wrongfully cut and removed by the mortgagor, remains the property of the mortgagee out of possession, and he may recover its value of the mortgagor or a purchaser from him: Gore v. Jenness, 19 Me. 53; Frothingham v. McKusick, 24 Me. 403; Smith v. Moore, 11 N. H. 55; Langdon v. Paul, 22 Vt. 205; Waterman v. Matteson, 4 R. I. 539."

But in order to render a junior mortgagee liable to the senior mortgagee for destroying or impairing his security, it must in Georgia appear that the junior mortgagee had actual knowledge of the prior lien and that he wrongfully and fraudulently disposed of the property for the purpose of defeating the senior mortgagee: De Vaughn v. Harris, 103 Ga. 102, 29 S. E. 613.

III. Right of Mortgagee to Waive the Tortious Character of the Act.

In the principal case (Greer v. Newland, 70 Kan. 315, ante, p. 424, 78 Pac. 835), it was held that a commission merchant, who, receiving mortgaged cattle for sale, sold them without knowledge or con-

sent of the mortgagee, and without notice of the mortgage, paid the proceeds, less his commission, to the mortgagor, does not derive such a benefit from the transaction as to authorize the mortgagee to waive the tort and recover in an action on an implied contract. But where the mortgagor, without the knowledge or consent of the mortgagee, sells the mortgaged property and the purchase price remains unpaid, the mortgagee may waive the tort and sue the purchaser for the purchase money: *Chittenden v. Pratt*, 89 Cal. 178, 26 Pac. 626; *McArthur v. Murphy*, 74 Minn. 53, 76 N. W. 955.

IV. General Right to Maintain Action Against Third Persons.

a. In General.

1. **Right to Maintain Replevin or Detinue.**—In most jurisdictions the mortgagee of a chattel mortgage is considered as the owner of the mortgaged chattels, though in some jurisdictions it is held that the mortgagee has merely a lien until the foreclosure of his mortgage: Monographic note to *St. Mary's Machine Co. v. National Supply Co.*, 96 Am. St. Rep. 683. Hence, where the mortgagee has the right to the possession of the mortgaged chattels, he may maintain replevin: Monographic note to *St. Mary's Machine Co. v. National Supply Co.*, 96 Am. St. Rep. 690. But replevin does not lie before forfeiture or maturity of the debt: *Buck v. Payne*, 52 Miss. 271. Though, on the other hand, it has also been held that replevin may be maintained by the mortgagee against a stranger who had obtained the possession under an adverse claim, even though as between the mortgagee and mortgagor, the mortgagor would be entitled to the possession: *McLeod v. Bernhold*, 32 Ark. 671. And it has also been stated that the rights of the mortgagee as against anyone unlawfully converting the chattels are just as perfect as though he was the absolute owner, the only difference being, that as against persons claiming under the mortgagor, his right to damages would be limited to the amount due on his mortgage: *Klinkert v. Fulton etc. Co.*, 113 Wis. 493, 89 N. W. 507.

And, likewise, the mortgagee after default may maintain detinue for the mortgaged chattels: *Spaulding v. Scanland*, 4 B. Mon. 365. In *Mervine v. White*, 50 Ala. 388, which was an action by the mortgagee against the mortgagor in the nature of detinue, the court observed: "The legal title to personal property, and the right to the immediate possession thereof, are sufficient to support the action of detinue."

2. **Right to Maintain Trover, Trespass, or Assumpsit.**—The general rule is that a mortgagee may maintain an action against a third person in the nature of trover for the conversion by such person of the mortgaged chattels: *Moore v. Murdock*, 26 Cal. 514; *Camponico v. Oregon Improvement Co.*, 87 Cal. 566, 25 Pac. 763; *Burchinell v. Koon*, 25 Colo. 59, 52 Pac. 1100; *Canfield v. Gould*, 115 Mich. 461, 73 N. W. 550; *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452; *J. I. Case etc. Co. v. Campbell*, 14 Or. 460, 13 Pac.

324; *Williams v. Beasley*, 5 Tex. Civ. App. 408, 25 S. W. 321; *Park v. Parsons*, 10 Utah, 330, 37 Pac. 570; *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

But the mortgagee suing for conversion must show some property interest in the mortgaged chattels, either general or special, and have either an actual possession or be entitled to the possession: *Harrington v. Stromberg-Mullins Co.*, 29 Mont. 157, 74 Pac. 413. Hence, after condition broken, the mortgagee, being then entitled to the possession, may maintain an action in the nature of trover for the conversion of the mortgaged chattels: *Close v. Hodges*, 44 Minn. 204, 46 N. W. 335; *Montgomery v. Kerr*, 1 Hill (S. C.), 291. But in some cases a mortgagee may maintain trover against any person interfering with his right to the possession of the mortgaged goods even before condition broken: *Wright v. Starks*, 77 Mich. 221, 43 N. W. 868. And it was held in Maine that the title of the mortgagee is sufficient to maintain trover against all persons not setting up any claim under the right to redeem: *Hotchkiss v. Hunt*, 49 Me. 213. And where the mortgagee is entitled to the possession, he may sue a third person in trover without first having obtained a judgment against the mortgagor: *Howard v. Burns*, 44 Kan. 543, 24 Pac. 981; *Howard v. First Nat. Bank*, 44 Kan. 549, 24 Pac. 983, 10 L. R. A. 537.

And where the mortgagee is entitled to the possession of the mortgaged chattels, he may maintain trespass against a stranger who removes or destroys the chattels: *Woodruff v. Halsey*, 8 Pick. 333, 10 Am. Dec. 329. In *Elson v. Barrier*, 56 Miss. 394, it was held that the grantee in a deed of trust of cotton could maintain assumpsit against one who purchased the cotton, with notice, after condition broken. But in *Randall v. Higbee*, 37 Mich. 40, it was held that one who has only a mortgage lien on goods could not maintain assumpsit for their value, the court observing: "If defendant, with knowledge of their lien, has wrongfully done anything to injure plaintiffs' security, they might have an action on the case against him; but there is no ground for an action of assumpsit. To warrant such an action, they should have been in position to claim the goods as owners; but that, as already stated, was not their right."

3. **Right of Mortgagee to Intervene.**—A mortgagee of personal property, who is entitled by the terms of his mortgage to immediate possession, may intervene in an action by a third person against the mortgagor to recover the property: *Martin v. Thompson*, 63 Cal. 3; *McArthur v. Murphy*, 74 Minn. 53, 76 N. W. 955.

4. **Right of Mortgagee to Injunctive Relief.**—A mortgagee has such an interest in the mortgaged property as entitles him to restrain a threatened injury thereto by third persons: *Consolidated Water Co. v. City of San Diego*, 84 Fed. 369; *Benson v. City of San Diego*, 100 Fed. 158. Hence, a mortgagee may enjoin the removal of a refrigerating plant from a brewery, where the plant is included within his mortgage: *Schmaltz v. York Mfg. Co.*, 204 Pa. St. 1,

93 Am. St. Rep. 782, 53 Atl. 522, 59 L. R. A. 907. And a trespasser engaged in removing a building may be enjoined by a mortgagee, although the trespasser is of undoubted solvency: *State Sav. Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310. And where a person holds a mortgage upon three-fourths of a parcel of timber land he may enjoin the holders of the one-fourth interest from cutting off all the timber. But "it may be that in a proper case where one cotenant in common threatens to cut off timber from the land, to the destruction of its entire value, the injunction should reserve the reasonable right of the defendant to cut off timber proportionably to his interest; but in this case there should be no such reservation, for it appears that the defendants have already taken off nearly all of the valuable timber, and greatly in excess of their just proportion": *Atkinson v. Hewitt*, 51 Wis. 275, 8 N. W. 211.

The rule with respect to the granting of injunctions against the removal of timber and the like from mortgaged premises was stated, after a review of the English authorities, by Chancellor Kent in *Watson v. Hunter*, 5 Johns. Ch. 169, 9 Am. Dec. 295, as follows: "After timber is cut it ceases to be part of the realty, and is converted into personal property and trover will lie for it. The question is whether this court ought to interfere in the first instance, to control the disposition of that personal property; and that, too, without any special or extraordinary necessity stated for such interference. The practice of granting injunctions, in cases of waste, is to prevent or stay the future commission of waste; and the remedy for waste already committed is merely incidental to the jurisdiction in the other case assumed to prevent multiplicity of suits, and to save the party the necessity of resorting to trover at law."

And in a California case where a house was moved by a flood from the mortgaged premises, the trial court refused to enjoin the mortgagor and his purchaser from removing the house from the place whence it had been moved by the flood. And the supreme court affirming the trial court said: "The severance, *proprio vigore*, changed the character of the property from real to personal, irrespective of the means by which it was accomplished. If, while the house was yet upon the land, the mortgagor, or anyone claiming under him, had threatened to remove it, and the mortgagee had filed a bill to restrain the removal on the ground of waste, the removal would not have been enjoined except upon proof that, as matter of fact, the lot without the house would be an inadequate security. The general rule in equity is that a mortgagor, in possession, has the right to cut timber on the lands mortgaged, and to do other parallel acts, and a court of equity will not interfere to restrain him or his assigns in the exercise of that right until it is made to appear that the cutting, or other like act, is being carried to an extent calculated to render the land an insufficient security for the amount due upon the mortgage: *King v. Smith*, 2 Hare, 239; *Brady v. Waldrons*, 2 Johns. Ch. 147; *Hampton v. Hodges*, 8 Ves. 105; *Wright v. Atkyns*, 1 Ves. & B. 313; *Van Wyck v. Alliger*, 6

Barb. 507; 2 Story's Equities, sec. 915. Now, if in the absence of the fact named, a mortgagor would have the right to withdraw timber, growing upon the mortgaged lands, from the lien of the mortgagee, by severing and converting it to his own use, why should he or his vendee, in the absence of the same fact, be restrained from converting the property after severance, assuming it to be then subject to the lien? The questions are identical": *Buckout v. Swift*, 27 Cal. 433, 87 Am. Dec. 90.

Thus it will be seen that an injunction against the mortgagor or anyone claiming under him may be had to prevent waste where the mortgaged premises, without the removed portion, will be an inadequate security for the mortgage debt: *Cooper v. Davis*, 15 Conn. 556; *Harris v. Bannon*, 78 Ky. 568; *Collins v. Rea*, 127 Mich. 273, 86 N. W. 811.

With respect to the right to enjoin the sale of mortgaged real estate under an execution or other judicial proceedings the authorities are apparently not harmonious. Where the proceedings relative to the proposed execution sale show that the sale is to be made subject to the mortgage, the mortgagee cannot restrain the sale, but where it appears that the proposed sale is of the full title of the property, then the mortgagee may interfere and restrain the sale: *Plumb v. Bay*, 18 Kan. 415. And where the mortgage is for an amount equal to or exceeding the value of the mortgaged premises, and the mortgagor, to avoid the expenses of foreclosure, has conveyed the premises to the mortgagee, he may enjoin the sale of the premises by a junior judgment creditor or restrict the lien of the latter to the equity of redemption: *Richardson v. Hockenbull*, 85 Ill. 124. And where the title acquired at the execution sale would only be a cloud on the title of a bona fide purchaser, the mortgagee may restrain the execution sale: *Christie v. Hale*, 46 Ill. 117; *Pettit v. Shepherd*, 5 Paige, 493. But where the rights of the mortgagees, after the proposed execution sale will stand on the same footing as before, the court will not enjoin the sale: *Purdy v. Irwin*, 18 Cal. 350. And the mere fact that the plaintiffs in execution publicly assert that the mortgage is fraudulent and void, is not ground for allowing the mortgagee to enjoin the execution sale: *Ramsdell v. Tama Water Power Co.*, 84 Iowa, 484, 51 N. W. 245. But where a satisfaction of plaintiff's mortgage was inadvertently placed on record so that the rights claimed by the mortgagee to the attached land are not evidenced in whole by title of record but are dependent in part upon facts dehors the record, the sale under the attachment may be enjoined: *Ivory v. Kempner*, 2 Tex. Civ. App. 474, 21 S. W. 1006. And where, in a foreclosure suit, the court decides that certain machinery is not covered by the mortgage, and he appeals from the decision, he may restrain the defendant from selling the machinery under an execution held by him, pending the appeal: *Penn Mutual Life Ins. Co. v. Semple*, 38 N. J. Eq. 314.

Where a chattel mortgagee seeks to foreclose his mortgage, but an attaching creditor of a person not the mortgagor seizes upon the

same goods and attempts to sell them under his attachment, the court will restrain the sale by the attaching creditor in order to avoid a multiplicity of suits: *Wiedemann v. Sann* (N. J. Ch.), 31 Atl. 211. And where the mortgagor of chattels has made an assignment for the benefit of his creditors, and his assignee advertises to sell the mortgaged chattels at one-third their cash value, the mortgagee may enjoin the sale where the proceeds would not be sufficient to pay the mortgage debt: *Ades v. Levi*, 137 Ind. 506, 37 N. E. 385. But a chattel mortgagee cannot restrain a sale of the chattels under an execution unless he can show that some damage will result to him which is not susceptible of remedy at law: *Stillwell v. Oliver*, 35 Ark. 184; *Bowyer v. Creigh*, 3 Rand. 25. Hence, a mortgagee who is in possession of the mortgaged chattels cannot ordinarily restrain an execution sale thereof. But where the chattels are articles of antiquity or curiosity, or memorials of affection, or constituted insignia of office, the courts will entertain jurisdiction to prevent their sale on the ground that the recovery of their intrinsic value in money would not be an adequate satisfaction to the owner: *La Motte v. Fink*, 8 Biss. 493, Fed. Cas. No. 8030; *Rollins v. Hess*, 27 W. Va. 570.

"A court of equity has no jurisdiction at the instance of a mortgagee, a mere lienholder, to enjoin a sale of mortgaged real estate under an execution issued upon a junior judgment against the mortgagor, simply because the mortgage is a prior lien upon the property, and the mortgagee is in possession thereof; the mortgagee is not the owner, even if in possession of the mortgaged property. He has no title to be clouded by a sale of the property under execution. He has a mere lien under which the property may, by a court of equity, be ordered sold at public auction to pay his debt, at which sale he, or some third person, may become the purchaser. His mortgage being of record prior to the rendition of the judgment, any sale under the execution can only pass the title subject to the mortgage if valid. If the real estate is sold, it cannot be removed, nor is it rendered less valuable by a sale under execution": *American Freehold etc. Co. v. Maxwell*, 39 Fla. 489, 22 South. 751.

Where a mortgagor in possession has removed a building on the mortgaged premises and placed it on another lot, and thereafter sells the lot with the building to a bona fide purchaser, the mortgagee cannot compel the purchaser by an order of the court to return the building on the mortgaged premises: *Verner v. Betz*, 46 N. J. Eq. 256, 19 Am. St. Rep. 387, 19 Atl. 206, 7 L. R. A. 630.

5. **Right to Obtain Compensation for Land Taken for Public Use or Injured by Maintenance of a Dam in the Neighborhood.**—Where land is taken for a public use, the damages for the taking are to be assessed to the owner of the equity of redemption without regard to the question whether or not there are mortgages on it, but the mortgagee may follow the damages awarded and have the same applied to the payment of the mortgage: *Keller v. Bading*, 169 Ill. 152, 61 Am. St. Rep. 159, 48 N. E. 436; *Farnsworth v. City*

of Boston, 126 Mass. 1. So, also, in Connecticut, the mortgagor is regarded as the owner as against the mortgagee in the awarding of damages for land taken for a street: *Whiting v. City of New Haven*, 45 Conn. 303. But in several instances the mortgagees have been held entitled to obtain the damages awarded for the taking of land covered by their mortgages for purposes of a public street: *Sherwood v. City of Lafayette*, 109 Ind. 411, 58 Am. Rep. 414, 10 N. E. 89; *Wilson v. European etc. Ry. Co.*, 67 Me. 358. So, also, where damages were caused to land by the breaking of a dam, the mortgagee has the paramount right to sue for and recover the damages, though he will hold what he so recovers under the mortgage and the mortgagor has an interest in the question of the amount to be recovered: *James v. Worcester*, 141 Mass. 361, 5 N. W. 826.

b. Effect of Solvency or Insolvency of Mortgagor.—Where the mortgagee has the right to the possession of mortgaged chattels by reason of condition broken, or the like, the solvency or insolvency of the mortgagor is immaterial in an action of trover and conversion against one who has converted the mortgaged chattels: *Conwell v. Jeger*, 21 Ind. App. 110, 51 N. E. 733; *J. I. Case etc. Co. v. Campbell*, 14 Or. 460, 13 Pac. 324. And in an action against a third person for the impairment of mortgaged real estate by the removal therefrom of certain steel beams, forming part of the building in the course of construction, it is immaterial whether the mortgagor is insolvent or not: *E. H. Ogden Lumber Co. v. Busse*, 92 App. Div. 143, 86 N. Y. Supp. 1098. And where the mortgagee is suing for the unlawful conversion of certain mortgaged cattle, it is not material whether the security remaining in his hands is worthless, since he is not required to look to the personal responsibility of the mortgagor or show his insolvency before recovering from a wrongdoer: *Scaling v. First Nat. Bank (Tex. Civ. App.)*, 87 S. W. 715. And where, after an attachment of mortgaged goods, the mortgagor goes into insolvency, it is the duty of the attaching officer to deliver the goods to the mortgagee as against the assignee of the mortgagor: *Howe v. Bartlett*, 8 Allen, 20.

c. Effect of Property Remaining in Possession of Mortgagor being Sufficient to Pay the Mortgage Debt.—The right of the mortgagee to recover damages for injuries to mortgaged chattels is not affected by the fact that the mortgagor has other property included in the mortgage, to which the mortgagee could resort: *First Nat. Bank v. Sproull*, 105 Ala. 275, 16 South. 879; *Wylie v. Ohio River etc. R. Co.*, 48 S. C. 405, 26 S. E. 676.

d. Effect of Express or Implied Consent of Mortgagee to a Sale by Mortgagor.—The question as to whether a chattel mortgage which authorizes the mortgagor to sell the mortgaged property in the regular course of business is fraudulent on its face, being outside of the scope of this note, we will not consider the question. It is sufficient to say that that question is not well settled.

The general rule, however, is that where the mortgagee, either expressly or impliedly, consents to a sale of the mortgaged chattels, he cannot thereafter sue the purchaser in trover or the like on account of such purchase: *Adams v. Pease*, 113 Ill. App. 356; *Carter v. Fately*, 67 Ind. 427; *Rogers v. Nidiffer* (Ind. Ter.), 82 S. W. 673; *Burroughs v. Butler-Ryan Co.*, 121 Iowa, 215, 96 N. W. 750; *Riley v. Conner*, 79 Mich. 497, 44 N. W. 1040; *Partridge v. Minnesota etc. El. Co.*, 75 Minn. 496, 78 N. W. 85; *Patrick v. Meserve*, 18 N. H. 300; *Jenckes v. Goffe*, 1 R. I. 511; *Flenniken v. Scruggs*, 15 S. C. 88. And where the mortgagors of a stock of goods, such as liquors, with the knowledge of the mortgagee, conduct daily sales from the mortgaged stock, the consent of the mortgagee will be presumed and estop him from reclaiming the goods in the hands of purchasers: *Ogden v. Stewart*, 29 Ill. 122. But where the mortgagor has the right to sell or exchange the mortgaged goods, under the terms of the mortgage, a creditor who, with knowledge of the mortgage, obtains a portion of the goods in payment of a past indebtedness, does not obtain such a title as will prevail against the mortgagee: *Dexter v. Curtis*, 91 Me. 505, 64 Am. St. Rep. 266, 40 Atl. 549. And where the mortgage covers a printing-press and a stock in trade, consisting of certain books and blanks, and the mortgage is fraudulent and void as to creditors as to the stock in trade because of allowing the stock to be sold in the course of trade, yet he may recover the printing-press if sold by the mortgagor: *Barnet v. Fergus*, 51 Ill. 352, 99 Am. Dec. 547. Hence, it is stated that where the mortgage upon a stock of merchandise allows the mortgagor to sell at retail, the mortgagee cannot recover the goods or damages from purchasers at retail, though if the sale of the stock were en masse, the rule might be otherwise: *Byam v. Johnson*, 93 Iowa, 243, 61 N. W. 970. And, of course, the sale of mortgaged chattels will not be valid as against the mortgagee where his consent was based on a condition which the mortgagor has failed to fulfill: *Dodson v. Dedman*, 61 Mo. App. 209. Where a chattel mortgage provides for the sale of the chattels and the application of the proceeds of such sale to the mortgage debt, it was said in *National Citizens' Bank v. Ertz*, 83 Minn. 12, 85 Am. St. Rep. 438, 85 N. W. 821, 53 L. R. A. 174, that: "The sale and application of the proceeds as agreed upon were perfectly proper, if the parties saw fit to make such an agreement. Its legal effect was to substitute the mortgagor, Cassiday, as the agent of the mortgagee, to do exactly what the latter had a right to do; that is, to sell the mortgaged property, and thus devote it to the payment of the mortgage debt. It was really a sale by the mortgagee, and legally was precisely as if the mortgagee had taken possession and placed a third person in charge, as agent, to sell the property and account for the proceeds: *Conkling v. Shelly*, 28 N. Y. 360, 84 Am. Dec. 348; *Brackett v. Harvey*, 91 N. Y. 214; *Dayton v. People's Sav. Bank*, 23 Kan. 421." The consent of the mortgagee to a sale of the mortgaged chattels by the mortgagor may be orally expressed: *Frick Co. v. Western Star Milling Co.*, 51 Kan.

370, 32 Pac. 1103; *Stafford v. Whitcomb*, 8 Allen, 518; *Pratt v. Maynard*, 116 Mass. 388; *Roberts v. Crawford*, 54 N. H. 532. And the purchaser of mortgaged chattels need not know when he makes the purchase that the mortgagee has consented to the sale: *Livingston v. Stevens*, 122 Iowa, 62, 94 N. W. 925. The mortgagee of chattels, may, however, ratify a sale of the property made by the mortgagor: *Burks v. Hubbard*, 69 Ala. 379; *Lafayette County Bank v. Metcalf*, 40 Mo. App. 494; *Harris v. Woodward*, 96 N. C. 232, 1 S. E. 544. Such a ratification may be evidenced in various ways, such as, for instance, accepting, with full knowledge of the sale, the proceeds thereof and applying them on the mortgage debt: *Hicks v. Ross*, 71 Tex. 358, 9 S. W. 315; *Field v. Doyon*, 64 Wis. 560, 25 N. W. 653. But where the mortgage covered various articles of property including certain machines, and the mortgagor exchanged the machines for other machines of a like character and then insured the property covered by the mortgage, which property was thereafter destroyed by fire, the fact that the mortgagee, after a demand from the purchaser for the machines, obtained an assignment of the insurance policies and collected the insurance, and also sold certain remnants of the property insured, consisting of old iron, does not amount to a ratification of the exchange of property made by the mortgagor: *Mack v. Phelan*, 92 N. Y. 20. Hence, it is said that where mortgaged property has been sold by the mortgagor without the knowledge of the mortgagee, the latter may disavow the sale and retake the property or ratify it and recover the proceeds: *Burke v. First Nat. Bank*, 61 Neb. 20, 87 Am. St. Rep. 447, 84 N. W. 408.

e. Necessity for Mortgagee to be Entitled to the Possession in Order to Maintain an Action.

1. **In General.**—The question whether it is essential for the mortgagee to have been in possession of the mortgaged property, or entitled to the possession, in order to maintain an action against a third person for interfering with his rights depends upon the character of the action he seeks to maintain. Actions in trespass or trover depend upon the mortgagee having the right of possession, while in actions for damages to the reversionary interest of the mortgagee, the mortgagor having the right of possession, it is not essential for the mortgagee to be in possession of the mortgaged property: *Manning v. Monaghan*, 23 N. Y. 539. But possession under a void mortgage gives the party in possession no more rights in the property as against creditors than if he had come into possession by a trespass: *Heflin v. Slay*, 78 Ala. 180; *Delaware v. Ensign*, 21 Barb. 85.

2. **Actions in Trover and Conversion.**—In *Elmore v. Simon*, 67 Ala. 526, the court said: "In order to maintain the action of trover the plaintiff must have a property in the goods, alleged to be converted, absolute or qualified, with the immediate right of possession at the time of suit being instituted. This right is not possessed by a mortgagee until after default, or the law day, where a stipulation in the

mortgage authorizes him to seize or take possession only after such date or event: *Ellington v. Charleston*, 51 Ala. 166; *Herman on Chattel Mortgages*, sec. 71; *Hathaway v. Brayman*, 42 N. Y. 322, 11 Am. Rep. 524; *Ring v. Neale*, 114 Mass. 111, 19 Am. Rep. 316."

Hence the general rule is stated that a mortgagee of chattels, who is not in possession nor entitled to possession under the terms of his mortgage, cannot maintain trover for the conversion of the mortgaged chattels by a stranger: *Hurst v. Bell*, 72 Ala. 336; *Ghio v. Byrne*, 59 Ark. 280, 27 S. W. 243; *Hunter v. Cronkhite*, 9 Ind. App. 470, 36 N. E. 924; *Kennett v. Peters*, 54 Kan. 119, 45 Am. St. Rep. 274, 37 Pac. 999; *Snyder v. Hitt*, 2 Dana, 204; *Field v. Early*, 167 Mass. 449, 45 N. E. 917; *Grove v. Wise*, 39 Mich. 161; *Hill v. Campbell Commission Co.*, 54 Neb. 59, 74 N. W. 388; *Fonts v. Ayres*, 11 Tex. Civ. 338, 32 S. W. 435. And if, by the terms of a chattel mortgage, the right of the mortgagee to take possession of the property is postponed until the maturity of the mortgage debt, he cannot maintain an action for the conversion or taking of the mortgaged property until after the law day of the mortgage: *Johnson v. Wilson*, 137 Ala. 468, 97 Am. St. Rep. 52, 34 South. 392. But where, under the provisions of the mortgage, the mortgagee is entitled to possession upon condition broken, he may maintain an action for the conversion of the property: *Close v. Hodges*, 44 Minn. 204, 46 N. W. 335; *Reynolds v. Fitzpatrick*, 23 Mont. 52, 57 Pac. 452. But under such circumstances he has not such a right of possession before condition broken as will maintain trover against a purchaser of the mortgaged property: *Heflin v. Slay*, 78 Ala. 180; *Bank of Little Rock v. Fisher*, 55 Mo. App. 51; *Hathaway v. Brayman*, 42 N. Y. 322, 1 Am. Rep. 524. Where the mortgage has a provision allowing the mortgagee to take possession of the chattels in case of their removal or sale by the mortgagor before maturity of the debt, the mortgagee may sue for the conversion of the property: *National Bank of Commerce v. City of Morris*, 114 Mo. 255, 35 Am. St. Rep. 754, 21 S. W. 511, 19 L. R. A. 463; *Sandager v. Northern Pac. Elevator Co.*, 2 N. Dak. 3, 48 N. W. 438. But in *Scaling v. First Nat. Bank (Tex. Civ.)*, 87 S. W. 715, the court, on rehearing, held that a mortgagee may maintain an action against one who wrongfully converts the mortgaged property or a part thereof, whether at the time he is entitled to the possession of the same or not, and whether or not the security remaining in his hands, if any, is exhausted or worthless.

3. **Replevin or Claim and Delivery.**—A mortgagee must show that as between himself and the mortgagor he has the right of possession in order to maintain replevin against a stranger: *Pierce v. Stevens*, 30 Me. 184; *Camp v. Pollock*, 45 Neb. 771, 64 N. W. 231; *Fuller v. Acker*, 1 Hill (N. Y.), 473. Hence a mortgagee, not in possession and not entitled thereto, cannot maintain an action of replevin against a bona fide purchaser of a fixture severed from the mortgaged premises and sold by the mortgagor while in possession: *McKelvey v. Creevy*, 72 Conn. 464, 77 Am. St. Rep. 321, 45 Atl. 4. And a mortgagee of future acquired property, who has never been in possession,

cannot maintain replevin: *Scudder v. Bailey*, 66 Mo. App. 40. But after the day of payment has passed, the mortgagee may sue to recover from a stranger mortgaged chattels wrongfully withheld from him: *Lacey v. Giboney*, 36 Mo. 320, 88 Am. Dec. 145.

With respect to the right of a mortgagee to maintain the action of replevin or claim and delivery, the court, in *First Nat. Bank v. Steers*, 9 Idaho, 519, 108 Am. St. Rep. 174, 75 Pac. 225, said: "The only question presented here and upon which we are asked to pass, is: Can a mortgagee maintain the action of replevin, or claim and delivery, as it is designated by our statute, for the recovery of possession of personal property covered by his mortgage? It will be seen that in this case the mortgagor contracted with the mortgagee that upon the happening of certain contingencies named therein the mortgagee might take possession of the property. It is contended by the respondent here that a provision of this kind in a mortgage cannot be lawfully made under the laws of this state. This contention is based upon the fact that a mortgage of personal property within this state does not pass any title to the mortgagee, and does not entitle him to the possession of the property, and that, therefore, the mortgagee obtains no such right of property or right of possession under the chattel mortgage as will authorize him, upon any possible contingency, to maintain the action of claim and delivery. Sections 3386 and 3387 of the Revised Statutes of 1887 were amended in 1899 (Sess. Laws 1899, p. 121), and it is provided by these sections that all mortgages of personal property, in order to be valid as against subsequent purchasers and encumbrancers, shall, among other things, be acknowledged and filed for record with the recorder of the county where the property is located. It is not contemplated by the laws of this state that the possession or right of possession of personal property mortgaged shall be transferred from the mortgagor to the mortgagee, and such is not necessary to the validity of the mortgage; but section 3387, *supra*, as amended, closes with the following sentence: 'Provided, further, that if the mortgagee receive and retain actual possession of the property mortgaged, he may omit the filing of his mortgage during the continuance of such actual possession.' The statute therefore recognizes the right of the mortgagor to contract with the mortgagee, whereby the latter may have the actual possession of the property mortgaged. In face of the expressed recognition of this right as embodied in the statute, we do not think the court would be justified in holding a stipulation in the mortgage invalid which authorizes the mortgagee upon named contingencies taking possession of the mortgaged property."

But where the mortgage confers upon the mortgagor the right of possession until default, attempt to remove or dispose of the mortgaged chattels, or until the mortgagee deems himself insecure, the mortgagee must establish the existence of one of these conditions in order to maintain claim and delivery: *Kellogg v. Anderson*, 40 Minn. 207, 41 N. W. 1045. In other words, the right to the posses-

sion of the mortgaged chattels is essential in order for the mortgagee to maintain an action for claim and delivery: *Laubenheimer v. McDermott*, 5 Mont. 512, 6 Pac. 344. A mortgage of an unplanted crop of cotton does not convey such a legal title as entitles the mortgagee to maintain a statutory claim suit unless there has been an actual delivery of the crop after it has been gathered: *Wetzler v. Kelly*, 83 Ala. 440, 3 South. 747.

f. Effect of Laches of Mortgagee in Assuming Possession after Default.—Where the mortgagee neglects to reduce the property to possession upon the default of the mortgagor, or within a reasonable time thereafter, to be determined by the circumstances of the parties, he cannot claim a lien as against attaching parties: *Shannon v. Wolf*, 173 Ill. 253, 50 N. E. 682. Thus, in accordance with this rule, where the mortgagee failed to take possession of a mortgaged horse for more than three months after default in the payment of the mortgaged debt, and the horse during that time had been transferred several times, his laches bars his recovery of the horse from a bona fide purchaser: *Bear v. Hansen*, 16 Colo. App. 483, 66 Pac. 448.

g. Effect of Penal Statute Declaring Sale by Mortgagor to be a Felony.—In some of the states there are statutes making it a felony to sell mortgaged property without the consent of the mortgagee. The court in *Gage v. Whittier*, 17 N. H. 312, in construing the effect of such a statute upon the rights of the purchaser as against the mortgagee, said: "These provisions were designed for the protection of mortgagees, who were liable, by means of the fraudulent practices of mortgagors in selling or pledging the mortgaged chattel, and so causing it to pass into other hands, and to be removed to distant places, to be put to inconvenience in preserving it, or in recovering possession of it. Its further design was to protect from imposition such as might be induced, through ignorance of the title of the mortgagee, to become the purchaser of the mortgaged chattel, and to pay value for it.

"To secure these objects the statute imposes a restraint upon the mortgagor, and prohibits the sale of the property. It does not in terms prohibit a purchase of it, or declare such a transaction void. The sale being prohibited, and a penalty inflicted upon the seller, the transaction, as to him, is void, and he could not, according to the well-established principle, maintain an action for the avails of such a sale, as founded in any manner upon such illegal transaction.

"But it is another thing to say that one who has purchased a mortgaged chattel, and paid value for it, and taken it into possession, shall take nothing by his purchase, and acquire by it no right to retain the possession, merely upon the ground that the sale was prohibited by law, and that a penalty was provided against the party making the sale."

The decisions of the court in *Stafford v. Whitcomb*, 8 Allen, 518, and *Sanford v. Duluth & D. Elevator Co.*, 2 N. Dak. 6, 48 N. W.

434, were also to the same effect. The court in the case last cited also observed: "In the absence of notice or knowledge of the criminal nature of the act of selling, any purchaser would be justified in proceeding upon the assumption that the mortgagor was not in the act of committing a felony. Should a case arise where it appears that a purchaser buying mortgaged chattels knew and had actual knowledge at the time of his purchase that the mortgagor had no legal right to sell, and that the sale was, as to the mortgagor, a criminal act, a different question might be presented. In the supposed case it might become necessary to determine what effect such actual knowledge of the mortgagor's crime would have upon the question of demand as prerequisite to a suit by the mortgagee for the possession or the value of the chattels, but as we have seen no such question arises upon this record."

h. Effect of Statute Providing for Only One Action for Recovery of the Mortgage Debt or Enforcement of Mortgage Rights.—A statute providing that there can be but one action for the recovery of any debt or the enforcement of any rights secured by mortgage does not prevent a mortgagee from recovering the possession of mortgaged chattels from a third party by an action of claim and delivery, since such an action is merely an action to recover the possession of the security of which the mortgagee has been wrongfully deprived, in order that thereby he may by a foreclosure and sale under his mortgage recover the debt and enforce the rights secured to him by the mortgage: *O'Neil v. Whitcomb*, 3 Idaho, 624, 32 Pac. 1133.

i. Effect of Mingling the Mortgaged Property with Other Property and Selling the Whole Mass.—Where a mortgagor of chattels mingles them, purposely or carelessly, with other goods not included within the mortgage, the mortgagee may replevy the whole mass from a purchaser, in the absence of evidence to distinguish the mortgaged goods from those not mortgaged: *Adams v. Wildes*, 107 Mass. 123.

V. Right to Maintain Action Where Purchaser of Mortgaged Property Merely Exercises Dominion Subject to the Mortgage.

While personal property covered by a mortgage remains in possession and the conditions of the mortgage remain unbroken, the mortgagor may sell his right of possession or whatever interest he has in the property to a third person, but such third person holds the property subject to the lien of the mortgage: *Heflin v. Slay*, 78 Ala. 180; *McFadden v. Hopkins*, 81 Ind. 459; *Cadwell v. Pray*, 41 Mich. 307, 2 N. W. 52; *Daly v. Proetz*, 20 Minn. 411 (Gil. 363); *Witezinski v. Everman*, 51 Miss. 841; *White v. Quinlan*, 30 Mo. App. 54; *National Bank of Commerce v. Morris*, 114 Mo. 255, 35 Am. St. Rep. 754, 21 S. W. 511, 19 L. R. A. 463; *Davis v. Blume*, 1 Mont. 463; *White v. Phelps*, 12 N. H. 382; *Doughten v. Gray*, 10 N. J. Eq. 323; *Hall v. Sampson*, 35 N. Y. 274, 91 Am. Dec. 56; *Hamill v. Gillespie*, 48 N. Y. 556; *Huber v. Ehlers*, 76 App. Div. 602, 79 N. Y. Supp. 150; *Kanaga v. Taylor*, 7 Ohio St. 134, 70 Am. Dec. 62;

Blythe v. Crump, 28 Tex. Civ. App. 327, 66 S. W. 885; Cotton v. Marsh, 3 Wis. 221; Illinois Trust etc. Bank v. Alexander Stewart Lumber Co., 119 Wis. 54, 94 N. W. 777. Hence where the purchaser holds the property in recognition of the mortgage lien, the mortgagee has no right of action against him for its conversion: Dean v. Cushman, 95 Me. 454; Sanford v. Duluth & D. Elevator Co., 2 N. Dak. 6, 48 N. W. 434. Of course the grantee of an equity of redemption does not occupy any better position in relation to the mortgage than that of his grantor: Miller v. Williams, 27 Colo. 34, 59 Pac. 740. But a sale by the mortgagor, to be valid, must be made in recognition of the mortgage and not in antagonism to it—that is, the mortgagor must not purport to convey a complete title in disregard of the mortgage: La Fayette County Bank v. Metcalf, 40 Mo. App. 494. And where a purchaser of mortgaged chattels asserts a right to the ownership of the property in disregard of the mortgage lien, he is guilty of converting the property, and an action in the nature of trover will lie against him: White v. Phelps, 12 N. H. 382. A person who in purchasing mortgaged property assumes the mortgage debt becomes liable to the mortgagee as a part of his contract of purchase: Prescott v. Jordan, 57 Ala. 272; Dwight v. Scranton & Watson Lumber Co., 69 Mich. 127, 36 N. W. 752; Raithel v. Smith, 58 Mo. 258; McCown v. Schrimpf, 21 Tex. 22, 73 Am. Dec. 221.

VI. Right to Maintain Action to Recover Fixtures, Crops, Timber, or Increase of the Mortgaged Property.

a. **Recovery of Fixtures.**—The mortgagee, if fixtures subject to a mortgage are removed unlawfully from the mortgaged premises, may, after he has foreclosed his mortgage and ascertained what deficiency remains due him, maintain an action against the persons guilty of such removal for the damages occasioned thereby: Lavenson v. Standard Soap Co., 80 Cal. 245, 13 Am. St. Rep. 147, 22 Pac. 184, and note attached thereto.

As to whether certain articles are fixtures or not, the same rule prevails as between mortgagor and mortgagee as prevails as between a grantor and grantee in a deed; consequently the owner of the realty may sue for the specific recovery of the articles themselves or in trespass for the damages to the freehold, in case the articles were fixtures: Laffin v. Griffiths, 35 Barb. 58.

Hence if machinery is purchased and placed for use in a permanent building under a contract that it shall remain the property of the seller, or, after such machinery is placed in the building, a chattel mortgage is given by the purchaser to the seller on such machinery, a prior real estate mortgage on the building given by such purchaser is not a prior lien on such machinery so as to estop the chattel mortgagee from foreclosing his mortgage: Anderson v. Creamery Package Mfg. Co., 8 Idaho, 200, 101 Am. St. Rep. 188, 67 Pac. 493, 56 L. R. A. 554. And ordinary portable kitchen ranges placed in each set of rooms of an apartment house under a contract between the owner of the house and the vendor of the ranges, with a stipula-

tion that the title should remain in the latter until they are paid for, do not, prior to such payment, become fixtures as between him and a mortgagee of the house, and hence the mortgagee cannot enjoin the vendor from removing them from the mortgaged premises: *Jennings v. Vahey*, 183 Mass. 47, 97 Am. St. Rep. 409, 66 N. E. 598. Where machinery, to be used for manufacturing purposes is sold under an agreement that the title to it is not to pass to the vendee until paid for, and the machinery is of that character that it does not necessarily become a part of the realty, a subsequent mortgagee of the realty is not entitled to retain it as against the vendor: *Case Mfg. Co. v. Garven*, 45 Ohio St. 289, 13 N. E. 493. And a like rule prevails as to the rights of a prior mortgagee of the realty under similar circumstances: *Binkley v. Forkner*, 117 Ind. 176, 19 N. E. 753, 3 L. R. A. 33. But where the machinery placed upon land is of such a character as to become a fixture, a prior mortgagee of the land may hold the fixtures as against one who accepted a chattel mortgage upon the machinery so placed: *Frok v. People's Nat. Bank*, 14 Colo. App. 21, 59 Pac. 63. Questions of this sort depend upon the determination of whether the article or piece of machinery is a chattel or a fixture. The question is generally held to be one of mixed law and fact. But with respect to furnishings or furniture for dwelling-houses, many things which were anciently built as a part of the house and thereby became fixtures are now so constructed that they remain chattels. Thus stock mantels, sold separately and adapted to any kind of a house, water-heaters not attached to the building except by their plumbing connections, and modern porcelain bathtubs, all of which can readily be attached to or detached from the house without injuring the realty, are not fixtures as between a mortgagee of the realty and the mortgagor: *Philadelphia Mortgage etc. Co. v. Miller*, 20 Wash. 607, 72 Am. St. Rep. 138, 56 Pac. 382, 44 L. R. A. 559. As to the effect of agreements between a mortgagor and a vendor that certain articles affixed to the realty shall retain the character of personal property, see the monographic note to *Fuller-Warren Co. v. Harter*, 84 Am. St. Rep. 877.

b. Recovery of Crops.—The mortgagee of a crop, who has a present right of possession, may maintain an action against a wrongdoer for the conversion of the crop: *Robinson v. Kruse*, 29 Ark. 575; *Donovan v. St. Anthony etc. Elevator Co.*, 7 N. Dak. 513, 66 Am. St. Rep. 674, 75 N. W. 809; *Butler v. Hill*, 1 Baxt. 375. And where the mortgagee of a wheat crop is entitled to a delivery of the mortgaged wheat, he may sue a third person for its conversion regardless of whether he has foreclosed his mortgage or not: *La Rue v. St. Anthony etc. Elevator Co.*, 17 S. Dak. 91, 95 N. W. 292. And where a landlord has also a lien upon the crop, the mortgagee may recover from the landlord where he, with notice of the mortgage, has seized and sold the entire crop under his landlord's lien and the value of the crop exceeds the landlord's claim: *Hamilton v. Maas*, 77 Ala. 283. So, also, where before the portion

of a cotton crop belonging to the landlord has been set aside, the mortgagor sells the crop without instructions from the landlord, the purchaser of the crop will be liable in trover to the mortgagee of the crop, even though the tenant paid the proceeds to the landlord: *Belser v. Youngblood*, 103 Ala. 545, 15 South. 863. And where the mortgagee is by the terms of the chattel mortgage entitled to the possession of the mortgaged crop, he may maintain an action for its conversion or an action of replevin for the crop, regardless of a statutory provision providing that the lien of a mortgage on growing crops continues on the crop after severance. "so long as the same remains on the land of the mortgagor": *Wilson v. Prouty*, 70 Cal. 196, 11 Pac. 608; *Bank of Woodland v. Duncan*, 117 Cal. 412, 49 Pac. 414. "Though a mortgage on an unplanted crop creates only an equity, which unless possession is taken or received after it is planted, or there is some new act effectual to pass the legal title, will not support an action of trover, the mortgagee may maintain an action on the case against a stranger who has converted or disposed of the crop with notice of the lien": *Whittleshoffer v. Strauss*, 83 Ala. 517, 3 South. 524. Since a chattel mortgage on crops to be thereafter sown attaches only to such interest as the mortgagor has in the crop when it comes into being, the mortgagee cannot maintain replevin against a person, who had contracted to raise the crop on shares, for the portion which the person was entitled to under his cropping contract: *Christianson v. Nelson*, 76 Minn. 36, 78 N. W. 875, 79 N. W. 647. Where the mortgagor was authorized by the mortgagee to house and prepare the crop for market and the proceeds of sales made by the mortgagor were used by him for that purpose, the mortgagee cannot recover against the purchasers on the ground of conversion: *Etheridge v. Hilliard*, 100 N. C. 250, 6 S. E. 571. And where, under the terms of the mortgage on a cotton crop, it was stipulated that the mortgagor should deliver a certain number of bales of cotton on the first day of November, and the remainder on the first day of January, the mortgagee cannot maintain trespass against a creditor of the mortgagor for levying an attachment on the crop before the first day of November, since the mortgagee had no right of possession before that time: *Boswell v. Carlisle*, 70 Ala. 244.

c. **Recovery of Timber.**—In *Searle v. Sawyer*, 127 Mass. 491, 34 Am. Rep. 425, the court observed: "Upon the question whether, if a mortgagor commits waste by removing buildings, wood, timber, fixtures, or other parts of the realty, the mortgagee out of possession can follow the property after it has been severed, and recover it or its value, there have been conflicting decisions in different jurisdictions. In New York and Connecticut, it has been held that a mortgagee out of possession cannot maintain an action at law for waste committed by the mortgagor; and that he has no property in wood or timber, cut and removed, so as to enable him to maintain trover for its conversion: *Peterson v. Clark*, 15 Johns. 205; *Cooper v. Davis*, 15 Conn. 556. On the other hand, it has been

held in Maine, New Hampshire, Vermont and Rhode Island that timber, if wrongfully cut and removed by the mortgagor, remains the property of the mortgagee out of possession, and he may recover its value of the mortgagor or a purchaser from him: *Gore v. Jenness*, 19 Me. 53; *Frothingham v. McKusick*, 24 Me. 403; *Smith v. Moore*, 11 N. H. 55; *Langdon v. Paul*, 22 Vt. 205; *Waterman v. Matteson*, 4 R. I. 539."

Relief by means of an injunction is frequently sought where the removal of the timber from the mortgaged premises decreases the security afforded by the mortgage. Thus in *Bank of Chenango v. Cox*, 26 N. J. Eq. 452, the court, with reference to such cases, said: "Such injunctions will sometimes be granted but only under special circumstances: *Watson v. Hunter*, 5 Johns. Ch. 169; *Spear v. Cutter*, 5 Barb. 486; *Johnson v. White*, 11 Barb. 194; *Winship v. Pitts*, 3 Paige, 259; *Ensign v. Colburn*, 11 Paige, 503; *Emmons v. Hinderer*, 24 N. J. Eq. 39; *High on Injunctions*, sec. 428. Where the person against whom relief must be sought for the waste committed is insolvent, or where no redress can be obtained at law or in equity if the removal be permitted, the injunction may be granted. And so, too, where there is fraud. But where, as in the case before me, there is no allegation of insolvency, nor any evidence of fraud, nor any circumstance leading to the conclusion that no redress at law or in equity can be had unless it be by injunction, and an account is prayed in the bill from the person who has committed the waste, the injunction should not be granted."

Injunctive relief against the removal of the timber by third persons is based on the proposition that the mortgage security will be impaired and not strictly upon the right of the mortgagee to the possession of the timber after being cut. In *Atkinson v. Hewett*, 63 Wis. 396, 23 N. W. 889, the entire value of the land consisted in its being timber land, but the court, in allowing an injunction against the removal of the timber on the ground of the removal impairing the security, also took in consideration the fact that the mortgagor was insolvent. In *Webber v. Ramsey*, 100 Mich. 58, 43 Am. St. Rep. 429, 58 N. W. 625, in a similar case, the court did not consider the circumstance of the mortgagor being insolvent as material, and observed: "The mortgage was a valid encumbrance upon the land, and the mortgagee had the right to the whole security to meet the amount of his mortgage encumbrance and could not be compelled to take a part." A like conclusion was arrived at in *Collins v. Rea*, 127 Mich. 273, 86 N. W. 811.

Where the mortgagee has expressly or impliedly assented to the mortgagor selling the timber cut from the mortgaged premises, he has no cause of action against third persons for purchasing it, but in such cases, it is a question whether the mortgagor was authorized to sell the timber or allow it to be removed from the premises: *Meyer v. Munro*, 9 Idaho, 46, 71 Pac. 969; *Smith v. Moore*, 11 N. H. 55; *Wilson v. Maltby*, 59 N. Y. 126; *Moore v. Southern States etc. Timber Co.*, 83 Fed. 399. In connection with this branch of

the subject, see, also, subd IV, a, 4, and the monographic note to *Anderson v. Cowan*, 106 Am. St. Rep. 305, on the law of estovers in the United States.

d. Recovery of the Increase of Mortgaged Cattle or Sheep.—Where a mortgagee under his mortgage is entitled to the increase of the mortgaged cattle, he cannot hold the increase as against a third person, after the period of nurture without having taken the increase into possession: *Desany v. Thorp*, 70 Vt. 31, 39 Atl. 309. But where the mortgage makes no mention of the increase of mortgaged ewes, the mortgagee is entitled to recover the fund arising from their sale as against a garnishing creditor of the mortgagor: *Gannaway v. Tate*, 98 Va. 789, 37 S. E. 768.

VII. Right to Recover the Mortgaged Property, or Damages, as Against Levying Officers, Consignees, Factors, Brokers and Other Persons.

a. Levying Officers or Purchasers at Judicial Sales.—“In many of the United States the courts have proceeded upon the theory that, except as between the mortgagor and the mortgagee, the former, while by the terms of the mortgage he is entitled to retain possession for a definite time, must be treated as the real owner of the property mortgaged. They have therefore held that the mortgagor’s interest in the chattels, while he has the right to retain possession, may be sold under execution”: *Freeman on Executions*, sec. 117.

Where, however, the mortgagee is in possession of mortgaged chattels or entitled to such possession, he may maintain an action of replevin against an officer levying upon the mortgaged property: *Stringer v. Davis*, 35 Cal. 25; *Cummins v. Holmes*, 109 Ill. 15; *Olds v. Andrews*, 66 Ind. 147; *Rankine v. Greer*, 38 Kan. 343, 5 Am. St. Rep. 751, 16 Pac. 680; *Macomber v. Saxton*, 28 Mich. 516; *Rosenfield v. Case*, 87 Mich. 295, 49 N. W. 630; *Hausman v. Hope*, 20 Mo. App. 193; *Peckinbaugh v. Quillin*, 12 Neb. 586, 12 N. W. 104; *McDonald v. Bowman*, 40 Neb. 269, 58 N. W. 704; *Koenig v. Smith*, 57 N. J. L. 486, 31 Atl. 979. And even when the mortgagor was in possession at the time of the levy, the mortgagee may replevin the property on becoming entitled to the possession: *Ament v. Greer*, 37 Kan. 648, 16 Pac. 102. “If an officer having a writ against a mortgagor insists upon seizing, or otherwise interfering with, the property after such breach of condition, he is answerable to the mortgagee in an appropriate action which the latter may bring either to recover the property or for its conversion”: *Freeman on Executions*, sec. 117; *Metzler v. James*, 12 Colo. 322, 19 Pac. 885; *Trice v. Walker*, 71 Mass. 968; *State v. Carroll*, 24 Mo. App. 358; *Pollock v. Douglas*, 56 Mo. App. 487; *Manchester v. Tibbetts*, 121 N. Y. 219, 18 Am. St. Rep. 816, 24 N. E. 304; *Leadbetter v. Leadbetter*, 125 N. Y. 290, 21 Am. St. Rep. 738, 26 N. E. 265; *Ex parte Lorenz*, 32 S. C. 365, 17 Am. St. Rep. 862, 11 S. E. 206; *Norris v. Sowles*, 57 Vt. 360. After the law-day has passed, the mortgagee

may maintain trespass against a sheriff who takes the property on execution against the mortgagor: *Manning v. Wells*, 104 Ala. 383, 16 South. 23. Likewise he may maintain trespass against an attaching officer when the mortgage allows him the right to take immediate possession of the property if it be attached: *Welch v. Whittemore*, 25 Me. 86. Or where he is in possession, he may recover its value from a levying officer, not exceeding the mortgage debt, who illegally seizes the chattels: *Burchinel v. Koon*, 25 Colo. 59, 52 Pac. 1100; *Freeman v. Freeman*, 17 N. J. Eq. 44; *Williams v. Dobson*, 26 S. C. 110, 1 S. E. 421. But where neither the mortgagor nor mortgagee are in possession, it is said to be, with respect to one who has attached it, *res inter alios*: *Gibbs v. Childs*, 143 Mass. 103, 9 N. E. 3. And a mortgagee with no right to present possession cannot maintain a statutory claim proceeding against the attaching creditors of the mortgagor: *Cavanaugh Hdw. Co. v. Lewis*, 43 Fla. 435, 31 South. 270. Where the law casts upon the levying officer the duty of paying the mortgage debt before taking the property, the officer assumes the making good to the mortgagee the detriment caused by the seizure: *Wood v. Franks*, 56 Cal. 217; *Irwin v. McDowell*, 91 Cal. 119, 27 Pac. 601. And where the mortgagee agreed with the attaching creditor that he might attach if he would pay the mortgage from out of the proceeds of the sale, the mortgagee may sue the officer for the amount of the mortgage debt: *Stevens v. Whittier*, 43 Me. 376.

Before default, if the security of the mortgage is in danger from the process of other creditors, the remedy of the mortgagee is in equity: *Curd v. Wunder*, 5 Ohio St. 92. But where the mortgagee has the right of possession, if he deems himself insecure, he may proceed in trover against the attaching officer: *McGraw v. Bishop*, 85 Mich. 72, 48 N. W. 167; *Ashley v. Wright*, 19 Ohio St. 291. But where the chattel mortgage is void on its face, or constitutes no lien because of not being recorded, and the officer has no notice, the mortgagee cannot maintain replevin against the officer: *Hall v. Johnson*, 21 Colo. 414, 42 Pac. 660; *Gaff v. Harding*, 48 Ill. 148.

Where the right to levy upon and sell mortgaged chattels is given in general terms, it is usually understood to be subject to the limitation that an officer cannot exercise it after a breach of condition has deprived the mortgagor of his right of possession: *Freeman on Executions*, sec. 117; *Heflin v. Slay*, 78 Ala. 180; *Durfee v. Grinnel*, 69 Ill. 371; *Lewis v. D'Arcy*, 71 Ill. 648; *Simmons v. Jenkins*, 76 Ill. 479; *Broadhead v. McKay*, 46 Ind. 595; *State v. Milligan*, 106 Ind. 109, 5 N. E. 871; *Sperry v. Ethridge*, 70 Iowa, 27, 30 N. W. 4; *Ament v. Greer*, 37 Kan. 648, 16 Pac. 102; *Butler v. Lee*, 54 Miss. 476; *Pancoast v. Miller*, 29 N. J. L. 250; *Blawelt v. Fechtman*, 48 N. J. L. 430, 8 Atl. 728; *Arnold v. Chapman*, 13 R. L. 586.

Where the levying officer sells the property as the absolute property of the mortgagor instead of the mere interest which the mortgagor has in the property, he is liable in conversion to the mortgagee: *Kackley v. State*, 91 Ind. 437; *State v. Milligan*, 106 Ind. 105, 5

N. E. 871; *State v. Althaus*, 60 Mo. App. 122; *Wheeler v. McFarland*, 10 Wend. 318; *Frisbie v. Langworthy*, 11 Wis. 375; *Shinners v. Briel*, 38 Wis. 648. But it has been held that the mere fact that an execution sale is made in general terms without notice being taken of the mortgage does not make the officer a trespasser: *Manning v. Monaghan*, 28 N. Y. 585. And likewise it is said that where the officer seizing the mortgaged chattels does nothing to place the property beyond the reach of the mortgagee or prevent him from taking possession of it when his right to do so accrues, he is not liable to the mortgagee for damages: *Locke v. Shreck*, 54 Neb. 472, 74 N. W. 970. And where the mortgagee is not in possession and the proceedings relative to the execution sale do not show that the levying officer intends to sell the property without regard to the rights of the mortgagee, replevin will not lie in his favor: *National Bank v. Miller*, 67 Vt. 66, 30 Atl. 700. And it has been held that the mere declaration of the levying officer that he intends to sell the absolute estate in the property will not render the taking unlawful or authorize the mortgagee to maintain replevin: *Squieres v. Smith*, 10 B. Mon. 33. But the mortgagee may replevin the mortgaged chattels from an officer who takes them under an invalid attachment: *Allen v. Wright*, 134 Mass. 347. The fact that a mortgaged boat was being used for purposes of prostitution will not deprive the mortgagee from maintaining an action against an officer who had seized it without authority: *Tieman v. Haw*, 49 Iowa, 312.

With respect to the purchaser at an attachment or execution sale, the general rule is stated that the purchaser obtained possession subject to the terms of the mortgage, and hence that he obtains no greater rights than the mortgagor had: *Kannady v. McCarron*, 18 Ark. 166; *Merritt v. Niles*, 25 Ill. 282; *Pike v. Colvin*, 67 Ill. 227; *Swigert v. Thomas*, 7 Dana, 220; *Mercer v. Tinsley*, 14 B. Mon. 273; *Gillespie v. Brown*, 16 Neb. 457, 20 N. W. 632; *Levi v. Legg*, 23 S. C. 282; *Cotton v. Watkins*, 6 Wis. 629. Although a purchaser at an execution sale is entitled to possession until foreclosure and to the equity of redemption, still where he removes the property to another state and claims the property absolutely, the mortgagee may proceed against him as for conversion: *Roach v. St. Louis Type Foundry*, 21 Mo. App. 118.

In connection with the subject of the rights of a mortgagee as against a levying officer, see, also, the monographic note to *St. Mary's etc. Co. v. National etc. Co.*, 96 Am. St. Rep. 689.

b. *Consignees, Factors, Warehousemen and Auctioneers.*—Much of what has been said in the preceding subdivision is applicable to actions by the mortgagee against commission men and their purchasers. The question sometimes arises with respect to sales of wheat, cattle or cotton. In *La Fayette County Bank v. Metcalf*, 40 Mo. App. 494, which was a case involving a sale of cattle by a firm of commission men, the court, in answer to the argument that the commission firm were merely the agents of the mortgagor and turned over to him the proceeds of the sale, less their commission,

said: "As to this, we have to say, that one who finds himself in possession of property belonging to another, yet does nothing with the property or to the property in hostility to the true owner, is not guilty of a conversion. 'A mere bailee is guilty of no conversion, though he receives property from one not rightfully entitled to possession, and acting as a mere conduit, delivers it in pursuance of the bailment, if this is done before notice of the rights of the real owner': *Hanson v. Jacob*, 93 Mo. 331, 3 Am. St. Rep. 531, 6 S. W. 246. But any wrongful act which negatives, or is inconsistent with, the plaintiff's right is, per se, a conversion: *Dusky v. Rudder*, 80 Mo. 400."

Hence, if a mortgagor has, under the terms of the mortgage, a vendible interest in mortgaged wheat, or the like, at the time of selling it to a grain elevator company, a purchaser from the elevator company is not a wrongdoer, and the mere fact of purchase and taking possession will not work a conversion, but the purchaser will take the grain subject to the lien where the mortgage was properly recorded: *Sanford v. Duluth etc. Co.*, 2 N. Dak. 6, 48 N. W. 434. But where the mortgagee requests the mortgagor to haul away the wheat covered by the mortgage and sell it in order to pay the mortgage debt, he waives his right to assert the mortgage lien as against an elevator company buying the wheat: *Peterson v. St. Anthony etc. Elevator Co.*, 9 N. Dak. 55, 81 Am. St. Rep. 528, 81 N. W. 59.

And where the mortgagee of cattle who was not entitled to possession until after default in the mortgage, at the time of demanding their possession from a commission firm, to whom they had been consigned, knew that the cattle had been sold and the proceeds remitted to mortgagor, but did not inquire to whom they had been sold or who had control of them, he cannot maintain an action for conversion against the commission firm: *Dawes v. Rosenbaum*, 179 Ill. 112, 53 N. E. 585. A cotton factor in another state, to whom mortgaged cotton has been shipped for sale on account of the shipper, is not liable to the mortgagee where he, without knowledge of the mortgage and in good faith, sells the cotton and applies part of the proceeds to an indebtedness to himself and remits the balance to the mortgagor: *Hernandez v. Aaron*, 73 Miss. 434, 16 South. 910. And an auctioneer who in the regular course of his business sells mortgaged chattels on commission and pays the proceeds to the mortgagor without notice of the mortgage, is not liable to the mortgagee as for conversion although the mortgagor acted fraudulently in the matter: *Frizzell v. Rundle*, 3^d Tenn. 396, 17 Am. St. Rep. 908, 12 S. W. 918. But see the principal case (*Greer v. Newland*, 70 Kan. 315, ante, p. 424, 78 Pac. 835), for a dicta to the contrary effect. In *Cooper v. McKee* (Ky.), 89 S. W. 203, it was said that the fact that mortgaged horses were purchased at a sales stable added nothing to the title of the purchaser where the mortgage merely allowed the mortgagor to exchange or swap horses.

c. Tax Collector, Tax Certificate Holders, Receivers and Persons Commencing Collusive Suits.—A mortgagee of chattels is entitled to possession as against a tax collector who has distrained them for a tax due from the mortgagor: *Fuller v. Day*, 103 Mass. 481. But a mortgagee cannot recover against the holder of a tax sale certificate for the conversion of a boiler and engine taken by him from the premises since the tax lien was superior to the mortgage lien: *Alexander v. Shonyo*, 20 Kan. 705. And where the mortgagor was bound to pay the taxes, the assignee of a tax certificate obtained by the mortgagor obtains no rights as against the mortgagee: *McLaughlin v. Darlington*, 6 Kan. App. 212, 50 Pac. 507.

A receiver is not entitled to the possession of mortgaged chattels as against the mortgagee who is in possession after default: *Hammond v. Solliday*, 8 Colo. 610, 9 Pac. 781. In other words, the receiver of a mortgagor takes the property subject to the mortgage: *Frankhouser v. Worrall*, 51 Kan. 404, 32 Pac. 1097; *Chafey v. Mathews*, 104 Mich. 103, 62 N. W. 141.

Where a third person colludes with the mortgagor and thereby obtains the mortgaged chattels, either by means of process or otherwise, and withholds the possession from the mortgagee or so hides them or mixes them with his own so that the mortgagee is deprived of the security of his lien, the mortgagee may recover the property or damages from such third person: *Harris v. Grant*, 96 Ga. 211, 23 S. E. 390; *Crocker v. Atwood*, 144 Mass. 588, 12 N. E. 421.

VIII. Right to Pursue Proceeds of Sale of the Mortgaged Property.

Where the purchase money arising from the sale of mortgaged property remains unpaid, the mortgagee is sometimes allowed to waive the tort and sue the purchaser in assumpsit: *McArthur v. Murphy*, 74 Minn. 53, 76 N. W. 955; *Knapp v. Hobbs*, 50 N. H. 476. If money deposited in a bank was held by the depositor in a fiduciary character, its character is not changed by being credited to his credit in his bank account. Hence where a commission merchant deposits the proceeds of mortgaged cattle in his bank and his account is overdrawn, the bank cannot apply the money to his account, to the detriment of the mortgagee who had a right to the proceeds of the cattle: *Cady v. South Omaha Nat. Bank*, 46 Neb. 756, 65 N. W. 906. The same principles were upheld in *Alter v. Bank of Stockham*, 53 Neb. 223, 73 N. W. 667. But the contrary rule was announced in *Burnett v. Gustafson*, 54 Iowa, 86, 37 Am. Rep. 190, 6 N. W. 132, the court observing: "It would greatly embarrass commercial transactions if a party could not safely receive the proceeds of personal property without first examining the records of the one hundred counties in the state to see whether any mortgage upon the property is recorded. The party receiving the proceeds of such property has a right to presume that the sale was proper, or, if not, that the party entitled to the lien will pursue the property itself and not its proceeds. If the fact of the existence of a mortgage was known, and the identical proceeds could be traced, a different question might arise."

IX. Right to Recover the Property or Damages Where the Mortgaged Property has been Removed to Another State.

The principles governing the rights of a mortgagee on the removal of the mortgaged property into another state were exhaustively discussed in the monographic note to *Kanaga v. Taylor*, 70 Am. Dec. 67. The following cases are the leading ones dealing with that question subsequent to the writing of that note, viz.: *Donald v. Hewitt*, 33 Ala. 534, 73 Am. Dec. 431; *Munford v. Canty*, 50 Ill. 370, 99 Am. Dec. 525; *Ames Iron Works v. Warren*, 76 Ind. 512, 40 Am. Rep. 258; *Aultman etc. Co. v. Kennedy*, 114 Iowa, 444, 89 Am. St. Rep. 373, 87 N. W. 435; *Handley v. Harris*, 48 Kan. 606, 30 Am. St. Rep. 322, 29 Pac. 1145, 17 L. R. A. 703; *Corbett v. Littlefield*, 84 Mich. 30, 22 Am. St. Rep. 681, 47 N. W. 581, 11 L. R. A. 95; *National Bank v. Morris*, 114 Mo. 255, 35 Am. St. Rep. 754, 21 S. W. 511, 19 L. R. A. 463; *Hornthal v. Burwell*, 109 N. C. 10, 26 Am. St. Rep. 556, 13 S. E. 721, 13 L. R. A. 740; *Wilson v. Rustad*, 7 N. Dak. 330, 66 Am. St. Rep. 649, 75 N. W. 260; *Snyder v. Yates*, 112 Tenn. 309, 105 Am. St. Rep. 941, 79 S. W. 796, 64 L. R. A. 353; *Craig v. Williams*, 90 Va. 500, 44 Am. St. Rep. 934, 18 S. E. 899.

McCONNELL v. WOLCOTT.

[70 Kan. 375, 78 Pac. 848.]

EXECUTIONS—Proceedings in Aid of.—The service on a judgment debtor of a notice requiring him to appear and answer regarding his assets, in a proceeding supplementary to and in aid of execution, without any order being made forbidding the transfer or other disposition of his property by him, does not give the judgment creditor any lien on his funds, nor prevent him from purchasing and paying for a homestead with them, which cannot be sold for the satisfaction of the judgment. (p. 459.)

HOMESTEADS—Purchase by Insolvent—Exemptions.—The homestead exemption may be asserted even as to property purchased by an insolvent debtor with the proceeds of nonexempt property, in the absence of any special equity existing in favor of a creditor, and the fact that the purchase is made for the very purpose of acquiring a homestead exempt from execution does not alter the rule. (p. 460.)

HOMESTEADS—Sale of—Purchase of Another Homestead with Other Funds—Exemptions.—If the owners of a homestead sell it and receive and use the purchase money and subsequently purchase another homestead with other funds, the latter is not subject to sale under execution to satisfy a judgment which existed against them prior to the sale of the first homestead. (p. 460.)

J. D. Milliken, for the plaintiffs in error.

C. F. Foley and S. Jones, for the defendant in error.

³⁷⁵ MASON, J. F. D. Wolcott recovered a judgment on January 20, 1902, against F. M. McConnell and Florence Mc-

Connell, his wife, for two thousand two hundred and six dollars and fifty cents. An execution was issued January 29, 1902, which was returned February ³⁷⁶ 18, 1902, wholly unsatisfied for want of property on which to levy. February 18, 1902, the plaintiff instituted supplementary proceedings in aid of execution by filing an affidavit that the defendants had property which they unjustly refused to apply toward the satisfaction of the judgment, and an order was issued commanding them to appear before the probate judge on February 20th to answer questions touching their property, which was served upon them on the same day. At the time of the service Mrs. McConnell had in her possession a draft for fifteen hundred dollars. Before the time set for their examination the defendants used this draft for the purchase of a residence, into which they at once moved, claiming it as a homestead. These facts being developed upon the hearing before the probate judge, the plaintiff asked that the real estate so acquired and held be subjected to the payment of his judgment. This relief was refused by the probate court, but upon appeal the district court reversed the decision and ordered the property sold to pay the judgment. This proceeding is brought to review the action of the district court.

It is claimed by the defendant in error that the service of the order for the judgment defendant to appear and submit to examination as to her property gave rise to a new status, and that from that moment no transfer of her funds could be operative as between her and the judgment plaintiff; that the draft in her hands was in effect impressed with a lien in his favor. This contention finds much support in the authorities. In volume 24 of the American and English Encyclopedia of Law, first edition, at page 656, it is said: "The creditor, by instituting supplementary proceedings, acquires a lien upon the equitable assets of the debtor, which takes effect from the time of service of the order."

³⁷⁷ The decisions bearing upon the matter are collected and classified in the notes to the paragraph in which this language is used: See, also, 21 Century Digest, cc. 2064-2066; *Billson v. Linderberg*, 66 Minn. 66, 68 N. W. 771. The principle announced is seemingly so strongly entrenched in the adjudicated cases that the argument may plausibly be made that the question should be regarded as settled, and the reasoning upon which it is based no longer open to inquiry. This consideration no doubt had great weight with the learned trial

judge—a supposition which is strengthened by the circumstances that upon a first submission he approved the ruling of the probate court, and only reached a contrary conclusion upon a rehearing, after he himself had granted a new trial. Upon a close examination, however, we think the force of this line of decisions is less than it might at first appear. The doctrine referred to originated in New York, and, so far as it is applied in cases arising under statutes similar to ours, has been authoritatively approved only in the states of Wisconsin and Minnesota, and there only in decisions made without a full discussion, based expressly upon the prior holdings of the New York courts. The earliest judicial expression in the matter was made by the supreme court of New York in 1850, in *Porter v. Williams*, 5 How Pr. 441, a special term decision by one judge, in which it was said: “The code is silent as to the time when the judgment creditor shall be deemed to have acquired a lien upon his debtor’s equitable effects; but I think the order for his examination, made under the two hundred and ninety-second section [equivalent to section 483 of the Kansas Code], should be construed to give the creditor the same lien which he acquired under the former practice, by the commencement of a suit by creditor’s bill.”

378 An appeal was taken to the court of last resort and the judgment of the lower court was affirmed, but upon grounds in no way connected with the proposition stated in the portion of the opinion quoted, which was entirely ignored.

In October, 1857, the question again arose, this time before the supreme court for the fifth judicial district: *Voorhees v. Seymour*, 26 Barb. 569. In the first paragraph of the syllabus (one judge out of four dissenting) it was held: “A judgment creditor, by commencing supplementary proceedings against the judgment debtor under section 292 of the Code; and obtaining an order for the examination of the debtor, does not acquire a prior right to, or lien upon, the equitable assets of the debtor.”

The opinion presents the fullest discussion of the question under consideration to be found in any of the reports. The earlier case, so far as it bore upon this matter, is there disapproved, branded as dictum, and held to be unsound in principle, attention being called to the fact that the affirmation of the judgment was based upon other considerations. Nevertheless, in March, 1858, in the case of *Edmonston v. McLoud*, 16 N. Y. 543, when the court of appeals was first required to

pass upon the question, it followed *Porter v. Williams*, 5 How. Pr. 441, without any discussion and without referring to *Voorhees v. Seymour*, 26 Barb. 569 (which seems not to have been cited in the briefs, perhaps because then so recently announced), it apparently being assumed that the affirmance of the former case involved the adoption of all the views there expressed. It is therefore obvious that the construction placed upon the statute by an inferior court, through a misapprehension, and without independent examination ³⁷⁹ by the highest court, became the settled law of the state.

In view of this situation it is probable that the question might thereafter have received further investigation upon its merits by the New York court of appeals, except for a new condition affecting the matter, arising from subsequent legislation. In fact, a doubt of the soundness of the accepted doctrine was expressed in *Becker v. Torrance*, 31 N. Y. 631; but in 1862 it was decided, in *Van Alstyne v. Cook*, 25 N. Y. 489, that by the service of an order for the examination of a judgment defendant in supplementary proceedings no lien was acquired upon such personal property of the defendant as was subject to execution, the question as to the effect upon other personal property being explicitly left for future determination. In view of this decision the legislature in the same year amended the statute by adding provisions giving in express terms a lien, defining its extent, and specifying the time when it should take effect. In consequence of this amendment it became unnecessary to make any further judicial inquiry concerning the interpretation of the law as it was originally enacted.

A precedent so established has little force as an authority, and, unless justified by sound logic, it ought not to be followed. The argument offered in its support is this: The filing of a creditor's bill gave the judgment creditor a lien upon the equitable assets of his debtor, and inasmuch as the statutory remedy is a substitute for that in equity, the commencement of proceedings under it should be given the same effect. That such a lien results from the beginning of a creditor's suit is well settled: 12 Cyc. 61. It may also be granted that the statutory proceeding, although not a complete substitute for the equitable ³⁸⁰ remedy, in the sense of precluding resort to the latter, is so nearly akin to it that it should by analogy be governed by the same rules, except where a special reason to the contrary exists. The reasons for the enforcement of the

lien in the equity practice are that the superior diligence of the creditor who first takes steps to enforce his demand out of the debtor's intangible assets should be rewarded by securing to him the fruits of his own efforts, and that the doctrine of *lis pendens* applies from the time a bill is filed. It has been said with much plausibility that in order for a creditor's bill to give a lien it must point out specific property sought to be reached (12 Cyc. 64, e), and a distinction might be made in this regard in the case at bar.

But a more obvious consideration invites attention. The statute, while in a sense providing a substitute for the suit in chancery, purports to afford a complete remedy in itself. One of its provisions (Code, sec. 491; Gen. Stats. 1901, sec. 4968) is that "the judge may also by order forbid a transfer or other disposition of the property of the judgment debtor not exempt by law, and any interference therewith." Now, this right to an order which must have the effect of preserving the status of the defendant's property is not an outside matter. To avail himself of it the plaintiff need not resort to equity, or begin any new action. It is afforded by a part of the very statute under which he is proceeding. He may procure an order for the examination of the defendant, with or without the further order forbidding the transfer of any property. If the mere order for such examination operates as a lien on the debtor's assets it is difficult to see the purpose of the provision for an order against a disposition of his property, or the effect of such an order ³⁸¹ when made. In *Union Bank of Rochester v. Union Bank of Sandusky*, 6 Ohio St. 254 (citing with approval *Porter v. Williams*, 5 How. Pr. 441), it was said that where a third person alleged to be indebted to the judgment defendant is served with notice to appear and answer as to such matter, no order forbidding a transfer need be made in order to bind any property in the hands of such third person, who is in effect a garnishee. The conclusion announced was mere dictum, for the court held that no valid notice of any kind had been served; but it would not be difficult to make a distinction between that case and the one at bar. Such a distinction was recognized by the federal circuit court for the southern district of Ohio in *Gregory v. Hewson*, 1 Bond, 277, Fed. Cas. No. 5801, where it was said: "The supreme court of Ohio, in the case of *Union Bank of Rochester v. Union Bank of Sandusky*, 6 Ohio St. 254, hold that where, at the instance of a judgment creditor, a third person had been cited to an-

swer as to property and effects held by him belonging to the judgment debtor, the notice operated as *lis pendens*, and that the party, from the time of the service of the notice, could make no disposition of the property or effects in his hands. But clearly this principle does not apply to the case of a judgment debtor, as to whom there has been a mere order for his examination, without an order restraining him from disposing of his property."

Cases may be imagined in which the judgment creditor, while desirous of investigating his debtor's real condition, might not wish to tie his hands by impressing a lien upon his assets, and in which the interests of both might be jeopardized if such a result were the necessary consequence of taking the first step toward such an inquiry. Inasmuch as the statute by specific provision affords ample means by which ³⁸² the judgment plaintiff may prevent the transfer by the defendant of any property pending an inquiry into his condition, we see no occasion for holding that such a result will follow where this provision is not invoked. Since in this case no order was made or asked against the disposition by defendant of the draft or other property in her possession, we conclude that, notwithstanding the service upon her of the notice requiring her to appear and answer as to her property, she was at liberty to purchase and pay for a homestead, which could not be sold for the satisfaction of the judgment.

A further argument is made that in view of all the circumstances of the case, irrespective of any question of a specific lien, the property claimed as a homestead ought to be subjected to the payment of the plaintiff's judgment, for the reason that to refuse this is to allow the defendants to make the exemption given them by the law a means of defrauding the plaintiff. It appears that, prior to the term of court at which the judgment was rendered, the defendants sold some real estate which they owned, for the express purpose of placing their property beyond the reach of the expected judgment; that after the term began they sold another tract, which it is claimed was their homestead, and which, but for its homestead character, would have been subject to the lien of the judgment; that the proceeds of these sales were squandered by defendant, F. M. McConnell, before his examination took place; that the fifteen hundred dollar draft was not the proceeds of the sale of any of the tracts just referred to, or of any homestead, but was derived from the sale of property belonging to de-

fendant, Florence McConnell, made several years before; that the draft was used for the purchase of the real estate in question for the ³⁸³ purpose of exchanging it for property that should constitute a homestead and be beyond the reach of an execution on plaintiff's judgment.

We do not think that these facts make the investment of the wife's funds in a homestead a fraud upon plaintiff. The prior sale of other real estate with a view to evade the enforcement of the judgment had no effect upon any question relating to the exemption of the homestead. The plaintiff had no peculiar claim upon the draft with which the homestead was purchased, such as, in the case of *Long v. Murphy*, 27 Kan 375, was held to authorize a creditor to hold for the payment of his demand property otherwise exempt. The homestead exemption may be asserted even as to property purchased by an insolvent debtor with the proceeds of nonexempt property, in the absence of any special equity existing in favor of a creditor: 15 Am. & Eng. Ency. of Law, 2d ed., 617. The fact that the exchange may have been made for the very purpose of acquiring exempt property does not alter the rule: *Jacoby v. Parkland Distilling Co.*, 41 Minn. 227, 43 N. W. 52; *Paxton v. Sutton*, 53 Neb. 81, 68 Am. St. Rep. 589, 73 N. W. 221. The fact that the defendants disposed of one homestead at a time when they were enabled to convey a good title only because it was exempt did not preclude their subsequently acquiring another. At the time of the purchase of the property in question they had no homestead. Nor was any claim of exemption asserted with regard to the proceeds of the former homestead on the theory that it was to be devoted to the purchase of a new one. The sale of the first homestead, so far from being a fraud upon plaintiff, was theoretically beneficial to him, as it converted exempt into nonexempt property. In this situation it was competent ³⁸⁴ for the defendants to acquire a new homestead with any means they might have. To hold otherwise would be to say in effect that if an insolvent head of a family sells his homestead, being enabled to do so by reason of its being exempt, and spends the purchase money, he may never thereafter acquire another homestead as against creditors whose claims existed at the time of the sale. This, we think, is not the law.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

All the justices concurring.

Proceedings Supplementary to Execution are discussed in the monographic note to *Lathrop v. Clapp*, 100 Am. Dec. 500-515. Such proceedings are regarded in a general way as a substitute for creditors' bills: *Herrlich v. Kaufmann*, 90 Cal. 271, 37 Am. St. Rep. 50. If the judgment debtor disposes of his property after having been enjoined to do so, he may be punished for contempt: See the note to *Lathrop v. Clapp*, 100 Am. Dec. 514.

A Debtor may Acquire a Homestead and hold it exempt from execution for pre-existing debts not then reduced to judgment, although the homestead is purchased with, or obtained by exchange for, non-exempt property: *Paxton v. Sutton*, 58 Neb. 81, 68 Am. St. Rep. 589. The exemption of the proceeds of a homestead is discussed in the note to *Morgan v. Rountree*, 45 Am. St. Rep. 237-239. The claims for which a homestead is liable are discussed in the note to *Mertz v. Berry*, 45 Am. St. Rep. 383-389.

GRAY v. STEWART.

[70 Kan. 429, 78 Pac. 852.]

CONVICT'S ESTATE—Status of Convicted Murderer.—A convicted murderer who has been sentenced to death under a statute providing that the death penalty shall be inflicted at a time to be appointed by the governor after the expiration of one year from the time of conviction is not, during the time of his detention in the penitentiary after conviction, legally dead, nor rendered incapable of managing his own estate. Such a sentence is not one of imprisonment for life, or for a term less than natural life. (p. 463.)

STATUTES in Derogation of Natural Rights of a person to hold and manage his own property must be strictly construed. (p. 463.)

JUDGMENTS Against Convicts—Dormancy.—If, while a convicted murderer sentenced to death is in prison, his land is sold under a judgment rendered before his imprisonment, and the sale is confirmed and a deed issued, the judgment is not dormant by reason of such imprisonment, and the proceedings and deed are valid. (p. 464.)

W. S. Shattuck, Jr., and Conly & Conly, for the plaintiff in error.

E. T. Hackney and K. Harris, for the defendants in error.

⁴²⁹ CUNNINGHAM, J. The assignment of error in this case is the granting of the motion of defendants below for judgment upon the pleadings, and rendering ⁴³⁰ such judgment for defendants. The petition was one in statutory form in ejectment, with a second cause of action for rents and profits. The answer pleaded, as justification for the defendants' possession, a sheriff's deed, "which deed was duly executed and delivered" to defendants' grantors, and was based upon a

foreclosure of two mortgages, the steps in which foreclosure action were set out in detail. The reply specifically admitted the giving of the mortgages by the plaintiff, the commencement of the foreclosure action thereon, the due rendition of judgment of foreclosure, but denied the other allegations of the answer. The denial, however, was not verified. By way of avoidance of the validity of the sheriff's deed the reply further alleged that the plaintiff, Anderson Gray, was, prior to the rendition of the judgment of foreclosure, convicted of the crime of murder in the first degree and sentenced under such conviction, as provided by statute, to be confined at hard labor in the penitentiary for one year and then to be executed by hanging, upon the order of the governor issued therefor; that after the rendition of the judgment in the foreclosure case, but before the issuance of the order of sale, the sale thereunder, the confirmation thereof, and the execution of the sheriff's deed under which the defendants claimed, Gray was taken to the penitentiary and there confined during this time. He was subsequently pardoned and restored to his civil rights.

The claim, in short, is that, by reason of his sentence and the imprisonment thereunder at the time of the proceedings subsequent to the rendition of the judgment in the foreclosure case, such proceedings were void and ineffectual to transfer the title of the land in controversy from Gray to the purchaser at the sheriff's sale, there having been no revivor of the foreclosure action against Gray.

⁴³¹ This brings us to the consideration of sections 337 and 338 of the Code of Criminal Procedure (Gen. Stats. 1901, secs. 5775, 5776). Unless by the terms of these sections the judgment in the foreclosure case became dormant, the sale proceedings thereunder and the sheriff's deed were and are good, and conveyed title. If, however, the judgment became dormant by reason of such sentence and imprisonment, then the sheriff's sale and deed conveyed no title, no revivor having been had. The sections referred to read as follow:

“Whenever any person shall be imprisoned under a sentence of imprisonment for life, his estate, property and effects shall be administered and disposed of in all respects as if he were naturally dead.

“Whenever any person shall be imprisoned in the penitentiary for a term less than his natural life, a trustee to take charge of and manage his estate may be appointed by the probate court of the county in which said convict last resided.”

By the terms of the statute (Crim. Code, secs. 258, 259; Gen. Stats. 1901, secs. 5703, 5704) the sentence imposed upon one convicted of murder in the first degree is that he suffer death, the same to be inflicted at a time appointed by the governor, not less than one year from the time of conviction, and until such time the convicted man is to be safely kept by the warden of the penitentiary.

Now, we think this sentence does not fall within the terms of either section 337 or 338. Clearly, the convict was not imprisoned under a sentence for life. His imprisonment might be for life, if his execution were not ordered, but his sentence was not for life. Nor was he imprisoned under a sentence for a term less than his natural life. The sentence was one of death. The detention in the penitentiary was something incidental to the sentence, and pending the ⁴³² carrying out thereof. It will not be contended that, were the sentence of death to be inflicted presently by the sheriff of the county, as provided prior to the enactment of the present law, the provisions of neither of these sections would operate. The detention, however, of the condemned man would be no different in quality in the one case than in the other. These sections were the law long before the adoption of the present provision relative to the execution of one condemned to suffer capital punishment, and, of course, were not then applicable. Being in derogation of the natural rights of persons to hold and manage their own property, the sections must be strictly construed and their provisions extended no further than the clear import of their terms requires. In this they are analogous to the case where a spendthrift is deprived by statutory proceedings of his natural right to manage his own property: *Smith v. Spooner*, 3 Pick. 229; *Jones v. Semple*, 91 Ala. 182, 8 South. 557; *Strong v. Birchard*, 5 Conn. 357; *Black on Construction and Interpretation of Laws*, 300; *Endlich on Interpretation of Statutes*, sec. 340; *Sutherland on Statutory Construction*, sec. 366; 26 Am. & Eng. Ency. of Law, 2d ed., 661.

We are aware that the case of *Ashmore v. McDonnell*, a Kansas commissioners' decision, reported in 16 Pac. 687, not found in the Kansas reports, announces a view contrary to the above. In this case, however, it does not appear that the terms of the two sections quoted were critically considered. They certainly were not commented upon, either in the opinion or in the briefs of the attorneys in the case. It seems to have been assumed by the attorneys for both parties, as well as in

the opinion, that the terms of one or the other of these sections applied to the estate of one convicted of murder in the first degree. The judgment of the commissioners in this case was reversed ⁴³³ by this court in 39 Kan. 669, 18 Pac. 821, but upon a point which did not involve the consideration of the statute now under view. The court, however, did say, in a very incidental and subordinate manner, without discussion, and apparently without any consideration, that the commissioners' decision would have been correct were it not for the matters discussed in its opinion.

It is also true that the court, in the cases of *Seeley v Johnson*, 61 Kan. 337, 340, 78 Am. St. Rep. 314, 59 Pac. 631, and *Manley v. Mayer*, 68 Kan. 377, 75 Pac. 550, in referring to the case of *Ashmore v. McDonnell*, assumed that the sentence there was one for life, and hence that the terms of section 337 applied, following in the wake of the assumption in that case, without discussion or thought.

We are convinced that the question now under consideration has never before received consideration by this court.

It may be urged that the need for the appointment of a trustee and the revivor of a judgment is as great where one is confined in the penitentiary pending his execution as though he were sentenced to the term of one or more years as punishment. That may be so, but if the statute, strictly construed, does not so provide, the discussion, so far as we are concerned, must end. The question is one for the legislature, and not the courts.

We hold that the confinement of Gray in the penitentiary under the sentence imposed did not cause the judgment of foreclosure against him to become dormant, nor require the appointment of a trustee, and hence that the proceedings under such judgment which ripened into a sheriff's deed were valid and ⁴³⁴ vested an indefeasible title to the land in the purchaser.

A point is sought to be made arising out of the denial in the reply of one of the deeds in the chain of conveyance from the purchaser at the sheriff's sale. This claim is without merit, for it is admitted in the reply that Stewart is in possession claiming under the title derived by the sheriff's deed. Therefore, having found the sheriff's deed good, defendants are entitled to retain possession; and besides, the plaintiff must recover on the strength of his own title. Having been divested

of that by the sheriff's deed, he cannot recover, even though the defendants have nothing but possession.

The judgment of the lower court is affirmed.

All the justices concurring.

The Doctrine of Civil Death as applied to persons sentenced to life imprisonment is discussed in *Estate of Donnelly*, 125 Cal. 417, 73 Am. St. Rep. 62; *Davis v. Laning*, 85 Tex. 39, 34 Am. St. Rep. 784; *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99; note to *Avery v. Everett*, 6 Am. St. Rep. 379-383.

A Sale of Land after the Death of the judgment debtor, made upon a special execution without a revivor of the judgment, is held void in *Seeley v. Johnson*, 61 Kan. 337, 78 Am. St. Rep. 314. See, in this connection, *Tucker v. Carr*, 20 R. L. 477, 78 Am. St. Rep. 893.

STILLMAN v. HAMER.

[70 Kan. 469, 78 Pac. 836.]

ATTACHMENT—Purchaser Pendente Lite.—A purchaser of land with knowledge or notice of an attachment lien thereon takes the land subject to the lien with no better right to contest the validity of the lien than his grantor. (p. 467.)

ATTACHMENT—Lien.—Duration of an attachment lien is the duration of the judgment in which it was perfected. (p. 467.)

ATTACHMENT—Lien—Abandonment.—Before an attachment lien will be deemed to have been abandoned there must be some affirmative act or conduct of the creditor inconsistent with the continuance of the lien. (p. 468.)

ATTACHMENT—Return of Writ—Collateral Attack.—The failure of a return of an order of attachment to state whether a copy thereof was left with the occupant of the attached premises is a mere irregularity and not a fatal defect, and therefore not open to collateral attack. (p. 468.)

Nicholson & Pirtle and Herrick & Allen, for the plaintiffs in error.

J. K. Owens, for the defendants in error.

⁴⁶⁹ JOHNSTON, C. J. This was a suit by Prudence E. Stillman to enjoin the sale of lands in Morris county under orders of sale based on two judgments rendered by the district court of Miami county in favor of the First National Bank of Paola. The actions were begun by the bank in April, 1896—one against Samuel E. Stillman and S. R. Stillman, for \$2,229.67, and the ⁴⁷⁰ other against Samuel E. Stillman, Ray Stillman, and S. R. Stillman, for \$587.57. Orders of attach-

ment were issued in each case, directed to the sheriff of Morris county, which were received by that officer, and on April 22, 1896, were levied upon the land in question, then owned by S. R. Stillman. On July 16, 1896, judgment was rendered in favor of the bank in the first case for \$2,229.67, and in it the attachment was confirmed, and it was decreed that the attached lands should be sold and the proceeds applied to the payment of the judgment. Later, a judgment was rendered in the second case, and like orders as to the attached land were made. On July 25, 1896, and after the above-mentioned judgment had been rendered, S. R. Stillman conveyed the attached land to his wife, Prudence E. Stillman, for the specified consideration of \$7,000, "subject to a mortgage of \$4,000, and a judgment for \$3,000."

Orders of sale were issued on the judgments in August and October, 1896, which were returned unsatisfied by the direction of the judgment creditor. Certified transcripts of the judgments were filed in the district court of Morris county on December 23, 1896, and on April 10, 1901, executions were issued and levied upon the land in question; but a sale under the executions was not made because a suit to enjoin it was begun by the plaintiff, which she dismissed before the application for injunction was finally heard, and the executions were returned unsatisfied. In June, 1902, other orders of sale were issued, which the sheriff was proceeding to execute when the present suit in injunction was begun. It appears that in October, 1896, the Bradford Belting Company obtained a judgment against Stillman, and in May, 1899, an execution was issued and levied on the land, ⁴⁷¹ under which the land was sold to the belting company. The sale was made subject to the redemption law, and before the expiration of the period of redemption the belting company assigned the certificates of purchase to Prudence E. Stillman, the plaintiff herein, and subsequently a sheriff's deed was issued to her.

She claims that the belting company acquired a paramount lien on the property under its judgment, and that by assignment she has succeeded to the rights of that company. The trial court rightly rejected her claim. The judgment of the belting company against S. R. Stillman did not operate as a lien upon the land in question, for the reason that the title had entirely passed from him months before the judgment was rendered. The judgment against him was no more than a general lien from the first day of the term at which it was ren-

dered, on the real estate then owned by him. The judgment, as has been seen, was rendered at the October, 1896, term of the court, and the complete title had passed from him to his wife on July 25, 1896, which was after the attachment liens in favor of the bank had been perfected by judgment. She is, therefore, not in the position of a lienholder, and hence the rules invoked governing contests between lienholders do not apply. She took the title to the lands subject to existing liens thereon, and in the deed of conveyance there is specific recognition of judgments against the lands to the extent of \$3,000, and that amount is about the sum of the two judgments in favor of the bank in the attachment cases. By the conveyance the plaintiff was placed in the position of her husband, and she has no more nor any better rights in contesting the bank's liens than he would have had. The levies of the attachments at the commencement ⁴⁷² of the actions created contingent liens, which were perfected when the judgments were rendered. The validity of the liens was then adjudicated, and after that time neither the conveyance of Stillman nor any other act of his could destroy the liens, or lessen the rights of the bank. His wife, who occupies the same position, took her title to the lands with knowledge of the attachments, and holds subject to the liens which matured in the judgment.

The claim that the liens were abandoned, forfeited or lost by delay, or by the return of the orders of sale and executions unsatisfied at the instance of the bank, is not good. In the absence of some affirmative act of surrender or abandonment the attachment lien on land, when confirmed in a judgment, will ordinarily endure as long as the judgment itself. Our statute places no limit on the duration of an attachment lien, as is the case in some of the states. Of course, the attachment will be discharged and the lien lost if judgment be given for the defendant, but its confirmation in a judgment perpetuates the lien, and while it is in a sense merged in the judgment its priority is preserved, and so far as the specific land attached is concerned it relates back to the lien of the attachment. The lien will be lost if the lien of the judgment be allowed to expire by limitation, but since we have no express enactments regulating the continuance of an attachment lien no reason is seen why the duration of the lien should not be the duration of the judgment in which it is perfected: *Floyd v. Sellers*, 7 Colo. App. 498, 44 Pac. 376; 4 Cyc. 625. The fact that at the instance of the bank some of the orders of sale were returned

unsatisfied does not show an abandonment of the lien acquired in the proceedings. The law does not favor abandonment or forfeiture, nor are they to ⁴⁷³ be lightly presumed. Before an attachment lien will be deemed to have been abandoned there must be some affirmative act or conduct of the creditor inconsistent with the continuance of the lien: *Wright v. Westheimer*, 3 Idaho, 232, 35 Am. St. Rep. 269, 28 Pac. 430; 4 Cyc. 630. The cause of the return of the orders of sale unsatisfied is not fully explained, but the efforts of the plaintiff and her husband to defeat the claims and liens of the bank suggest that their interference and obstructions may have prevented the sales and afforded reasons for such returns. At any rate, the persistent efforts of the bank to enforce its liens discloses no purpose to waive or abandon them, and we think there was no abandonment.

It is next contended that the returns of the sheriff in the attachment cases were fatally defective because they failed to show that copies of the orders of attachment were left with the occupant, or, in case there was no occupant, that they were left in a conspicuous place on the premises. No mention is made in the returns as to leaving copies of orders with an occupant or upon the attached premises, but that is no longer a material matter. Personal service was made upon Stillman, and hence he was fully informed as to the attachment. More than that, he appeared generally in that action and contested the validity of the attachment upon other grounds than the defect in question, and hence he is not in a position to challenge the service of the orders in this collateral way; and his wife occupies no better position. The omission of any statement as to what was done in respect to leaving the copies of the orders does not overcome the presumption that the officer did his duty in the premises. If the sufficiency of the return had been attacked in the attachment action it might have been ⁴⁷⁴ amended so as to have shown the leaving of the order, if that was the fact. If omitted entirely, it was a mere irregularity, not a fatal defect, and therefore not available to the plaintiff in this collateral way: *Wilkins v. Tourtellott*, 28 Kan. 825; *Head v. Daniels*, 38 Kan. 1, 15 Pac. 911.

The mortgage lien of the insurance company was subject and subordinate to those of the bank.

We find no error in the record, and the judgment is therefore affirmed.

All the justices concurring.

The Purpose of an Attachment is to hold property of the defendant as security for such judgment as may be rendered; and when the judgment is rendered and becomes a lien upon the attached property, the lien of the attachment becomes merged in that of the judgment, and its only effect thereafter is to preserve the priority thereby acquired, which priority is maintained and enforced under the judgment: *Bagley v. Ward*, 37 Cal. 121, 99 Am. Dec. 256.

The Duration of Attachment liens and the abandonment of attachments are discussed in the note to *Franklin Bank v. Bachelder*, 39 Am. Dec. 609; and in the subsequent cases of *McDonald v. Burke*, 2 Idaho, 995, 35 Am. St. Rep. 276; *Jones Lumber etc. Co. v. Faris*, 6 S. Dak. 112, 55 Am. St. Rep. 814.

WILLIAMS v. VINCENT.

[70 Kan. 595, 79 Pac. 121.]

EXEMPTIONS—Bowling-alley.—A bowling-alley, including the pins and balls used in the game of bowling, is not exempt from seizure and sale on execution as the tools or implements of the trade or business of the keeper of the alley. (p. 471.)

O. T. Boaz, for the plaintiff in error.

Campbell & Campbell, for the defendant in error.

⁵⁹⁵ BURCH, J. The single question in this case is whether a bowling-alley is exempt from seizure and sale on execution, the term "bowling-alley" being construed to connote pieces of wood so joined as to permit a plane surface forty-two inches wide and seventy-two feet long, and wooden pins and wooden balls, all used in the ⁵⁹⁶ game of bowling. The party claiming the exemption is the head of a family, has no income except revenue derived from the use of the alley, and the amount of money received from that source is not greater than the reasonable necessities of life require.

The decision turns upon the meaning of the eighth subdivision of section 3018 of the General Statutes of 1901. The statute reads: "Every person residing in this state, and being the head of a family, shall have exempt from seizure and sale upon any attachment, execution or other process issued from any court in this state, the following articles of personal property: Eighth, the necessary tools and implements of any mechanic, miner, or other person, used and kept in stock for the purpose of carrying on his trade or business, and in addition thereto, stock in trade not exceeding four hundred dollars in value."

By section 3019 a like exemption is allowed in favor of a person not the head of a family, except that the word "instruments" is used in the place of "implements." Evidently the two words were meant to describe the same species of property, and should be regarded as of identical import, and decisions of this court interpreting the meaning of section 3019 are authoritative when applied to section 3018.

Tools and implements are usable articles employed as means to effect an end. A mechanic works upon wood, metal and other substances, and fashions them into desired forms or structures. That is his trade or business. The production of the desired form, or structure, is the end in view. Tools and implements are employed to bring about the desired result. The miner digs minerals from the interior of the earth; the matter of extracting the coveted substance and ⁵⁹⁷ bringing it to the surface is his trade, or business. In order to conduct it he uses tools and implements.

The exemption law names the mechanic and the miner. Not wishing to compile a catalogue of all tool-using trades, the framers of the statute followed these two particular descriptions by the words, "or other person," and their meaning is other persons obliged to use tools or implements to carry on their trades or business in the same way that a mechanic or miner requires tools and implements to carry on his trade or business.

The rule of interpretation employed is known technically as that of *ejusdem generis*. It requires that the meaning of general terms be restricted by particular words preceding them (*Small v. Small*, 56 Kan. 1, 54 Am. St. Rep. 581, 42 Pac. 323, 30 L. R. A. 243), and it was applied by this court to the section of the statute now under consideration in the case of *Guptil v. McFee*, 9 Kan. 37. In the opinion in that case Mr. Justice Valentine said: "The words of the eighth section [subdivision] were intended to comprehend a class of citizens who earn their livelihood by the use of tools and implements, in whole or in part. A man may derive his principal support from some business in the exercise of which tools and implements are necessary, and still not be strictly a mechanic or miner. Such persons were intended to be included by the words 'or other person,' in this subdivision of the act, and it should read, 'the tools and instruments [implements] of every mechanic, miner, or other person, to the exercise of whose trade or business tools or implements are necessary.' "

It is obvious that the bowling-alley cannot be used as a requisite to an end like a saw and plane, or a hammer and anvil, or a pick and shovel. Its keeper has no object to accomplish beyond its mere maintenance ⁵⁹⁸ for hire. He has no trade or business beyond the mere keeping and letting. All notions of use and of instrumentality are wanting, and unless an article be adapted to employment as a utensil in the execution of some design or the production of some result after the analogy of the tool or implement of the mechanic or miner the protection of the statute does not extend to it. This distinction is plain from all the cases.

A lamp, show-cases, tables and other pieces of personal property used by a jeweler in the business of manufacturing and repairing watches and jewelry are exempt, because used by him in promoting a mechanical enterprise: *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120.

Cheese-vats, cheese-presses, curd-knives and other appliances used by a woman in making cheese are exempt. They are tools and implements necessary to her business of making cheese: *Fish v. Street*, 27 Kan. 270.

An iron safe, a set of abstracts, a cabinet and a table used by an abstracter in his business of making and supplying abstracts of title to persons desiring them are exempt. The trade or business is that of an abstracter of titles. The safe and other articles named are means whereby the abstracter carries on that business, through which he procures a livelihood: *Davidson v. Sechrist*, 28 Kan. 324.

A printing-press and printing materials employed in editing and publishing a county newspaper are tools and implements of the editor, printer, and publisher: *Bliss v. Vedder*, 34 Kan. 57, 55 Am. Rep. 237, 7 Pac. 599; *Jenkins v. McNall*, 27 Kan. 532, 41 Am. Rep. 422.

The harness and buggy of a man earning a living by driving through the country soliciting life insurance ⁵⁹⁹ are true implements when kept and used by the owner for the purpose of carrying on his business of insurance: *Wilhite v. Williams*, 41 Kan. 288, 13 Am. St. Rep. 281, 21 Pac. 256.

The tools of a tinner engaged in putting tin roofs upon buildings are exempt because they are necessary to carry on that kind of work: *Miller v. Weeks*, 46 Kan. 307, 26 Pac. 694.

The omnibus of a hotel-keeper used to carry guests to and from his hotel, and necessary for the successful conduct of

the business of keeping a hotel, is an implement of that vocation: *White v. Gemeny*, 47 Kan. 741, 27 Am. St. Rep. 320, 28 Pac. 1011.

In all of these cases the debtor was engaged in some trade or business, as a means of support, as an incident to which he was obliged to resort to the agency of some article or appliance as a means of effecting the ultimate end, and such use alone converted the article into a tool or implement within the meaning of the law.

The distinction between tools and implements which the debtor must use in order to perform some work in which he is engaged, and articles which may be kept for other purposes, is illustrated in the fourth subdivision of the third section of the exemption law (Gen. Stats. 1901, sec. 3018), which withholds from the reach of process, among other things, "one sewing-machine, all spinning-wheels and looms and all other implements of industry, and all other household furniture not herein enumerated, not exceeding in value five hundred dollars."

Household implements of industry are analogous to the tools of a trade, but other household furniture, within the limit of value, may consist of pictures upon the walls, mere ornaments, furniture for a guest-room ⁶⁰⁰ or furniture for persons who may pay for board or rent rooms in the house: *Rasure v. Hart*, 18 Kan. 340, 26 Am. Rep. 772.

By virtue of the same principle the lamp, show-cases, tables and other utensils of the jeweler in *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120, when kept and used as an adjunct to his business of keeping a jewelry store, were not exempt; and if the tinner's tools in *Miller v. Weeks*, 46 Kan. 307, 26 Pac. 694, had merely formed a part of the defendant in error's stock of hardware they would have been mere merchandise.

The debtor claims that he has the same rights as the fiddler in the case of *Goddard v. Chaffee*, 2 Allen, 395, 79 Am. Dec. 796, and enforces his argument by an illustration from the thrilling drama of *Richelieu*, as follows: "As around the sacred form of his beloved niece the aged cardinal drew the magic circle of the church at Rome, the precincts of which no myrmidon of the temporal law dare penetrate, so around certain things the people of this commonwealth have erected a barrier to penetrate which no court can issue a writ sufficiently forceful, and among these certain things are 'the neces-

sary implements of a person used and kept in stock for the purpose of carrying on his business.' "

The fiddler, however, could operate his own fiddle with some profit; but the debtor in this case might enter his alley in the morning when the sun's flamboyant beams of gold and fire first break upon the still and pulseless world and stay there until its expiring rays ensanguine the cloud heaps of the west with an angry dye, making the vibrant earth to tremble with the thunder of his rumbling balls and shivering the circumambient air with the crash of his stricken pins without making a cent, or even arousing a suspicion that he was at work, or was using the tools and ⁶⁰¹ implements of any kind of trade or business; but, more than this, he does not claim that he is even a bowler, engaged in the business of bowling, and that he cannot work at his trade except by the aid of his alley; and until he does something equivalent to this, and establishes himself on the plane of the woman making cheese, by showing that his alley is an instrumentality in the same sense as her vats and presses and curd-knives, it is subject to the payment of his debts.

The judgment of the district court is affirmed.

All the justices concurring.

Exemption Statutes should be construed liberally in favor of the debtor: See the note to *Tabb v. Mallette*, 102 Am. St. Rep. 102, 103. It has recently been held that a dentist's chair is not exempt from execution as a "common tool of trade": *Burt v. Stocks Coal Co.*, 119 Ga. 629, 100 Am. St. Rep. 203. And a set of harness does not fall within the words "common tools of trade": *Kirksey v. Rowe*, 114 Ga. 893, 88 Am. St. Rep. 65. But the tools and instruments of a tailor are exempt under a statute exempting the tools and instruments of a mechanic "used to carry on his trade for the support of himself and family," although he is neither a householder nor the head of a family, if such an intention appears from the entire statute: *Geiger v. Kobilka*, 26 Wash. 171, 90 Am. St. Rep. 733. See the note to *Kilburn v. Demming*, 21 Am. Dec. 545-554, on what are tools and implements within the meaning of exemption laws.

CASES
IN THE
SUPREME COURT
OF
MAINE.

PROCTOR v. MAINE CENTRAL RAILROAD COMPANY.

[100 Me. 27, 60 Atl. 423.]

ADVERSE POSSESSION, When does not Extend to the Whole of the Land Described in a Deed.—If a conveyance purports to convey two parcels of land, to one of which the grantor has title and to the other he has none, the grantee does not, by taking and holding possession of the former, acquire adverse possession of the latter, though the two parcels join and he claims title to both. (p. 475.)

Charles P. Mattocks, W. K. and A. E. Neal, for the plaintiff.

J. W. Symonds, David W. Snow, Charles Sumner Cook and Charles L. Hutchinson, for the defendant.

27 STROUT, J. This is a real action to recover possession of two parcels of land, mostly flats, on Fore river, Portland. The title to both is in the plaintiff, unless title thereto has been acquired by adverse possession of defendant and those under whom it claims.

28 Defendant introduced a deed from David A. Crosswell to Frederick W. Clark, dated January 9, 1852, conveying a piece of upland running to the Cumberland and Oxford canal, adjacent to the flats in controversy. The title to this lot was then in Crosswell, and passed by this deed to Clark. The deed also contained another grant—"also all of said lot west of said canal to Fore river, including that part covered by said canal." This last description includes the land in controversy, but it was not owned by Crosswell at the date of his deed. The defendant now holds the title which Clark acquired under the Crosswell deed, and also all title to the flats, if any, which Clark may have acquired by adverse possession.

Notwithstanding Clark acquired no title to the flats in controversy under his deed, defendant claimed that he did acquire title thereto by adverse possession from January 9, 1852, the date of his deed, to December 14, 1885, when he conveyed to Rollins, who subsequently conveyed to defendant, and that the adverse possession of Clark was continued and maintained without interruption by his grantees and the defendant.

Upon this question the presiding justice instructed the jury that "if under that deed he [Clark] entered into the possession of the territory described in that deed, claiming to own it to the full boundaries of the deed, and continued an occupation for twenty years or more, which was open and notorious and adverse and exclusive and uninterrupted, of the territory that he had actually occupied, then by force of law the jury would have a right to say that his occupation extended to the boundaries that his deed included—that is, if the deed covered the flats, it would extend to the flats. But that would only be true in case he claimed adversely, and the boundaries in the deed would not extend it beyond what he actually claimed. It would extend the constructive possession, but it does not extend the claim itself."

"You may consider whether having a deed which embraced the flats, he claimed them or not. If he didn't claim the flats, of course he wouldn't get any title to them, no matter how long the possession might be, but if he claimed to the full extent of his deed, and occupied adversely some portion of it, then the jury have a right to ²⁰ consider whether he didn't intend his occupation to include the whole. If he occupied part, intending to claim the whole, then the boundaries of that deed would mark the extent of his right."

If Clark ever occupied any part of the land covered by that deed and "claimed to own, or claimed to hold to the limits of his deed and so claiming occupied for twenty years, under such circumstances as would be adverse and open, notorious, exclusive and uninterrupted, it would work a constructive possession to the boundaries of the deed." The case is here on exception to these instructions.

It may be that under some state of facts, as for instance, if the grantor of Clark had no title to any part of the land attempted to be granted, and a third party in fact owned it all, the instructions would be appropriate. But, applied to the facts in this case, they were erroneous. They authorized the jury to find that if Clark occupied only that part of the land

described in the deed to which he had undoubted title, claiming all that was described in the deed, it operated a disseisin of the owner of the flats, even if Clark never in fact entered upon and occupied them. Title to the flats by adverse possession could only be acquired by actual possession and occupation of them for the requisite period. The instructions did not require this.

Occupation by Clark and his successors of the land which he and they owned cannot be regarded as constructive occupation of that to which they had no title. Such occupation cannot be regarded as notice of claim to the flats to their owner, and afforded him no ground of complaint. *Walsh v. Wheelwright*, 96 Me. 174, 52 Atl. 649, is a case in point.

Exceptions sustained.

To Constitute Adverse Possession there must be open, notorious, exclusive, and continuous possession, hostile and under claim of title. Such possession under a paper title usually draws to the actual possession of a part the constructive possession of the whole tract which is described; but the holding of a claimant who has no color of title is generally confined to that land which he actually reduces to possession: See *Chastany v. Chastany*, 141 Ala. 451, ante, p. 45, and cases cited in the cross-reference note thereto.

MARDEN v. PORTSMOUTH, KITTERY AND YORK STREET RAILWAY.

[100 Me. 41, 60 Atl. 530.]

STREET RAILWAYS.—A Person About to Cross a Track of an electric street railway is not under a duty to observe the same degree of watchfulness and care as when attempting to cross a steam railroad, and he cannot, therefore, be adjudged guilty of contributory negligence because he did not stop, look and listen. (pp. 479, 481.)

STREET RAILWAYS, Care Which Must Use.—Electric street railways in using the public streets are not vested with the same rights as steam railways. Instead of running at a rapid rate of speed, regardless of the rights of others in the streets, they are required to make reasonable use of such streets consistent with the rights of other persons and of vehicles which may occupy the streets in conjunction with them. (pp. 479, 480.)

STREET RAILWAYS, Duties of Drivers and Conductors of Toward Third Persons.—The drivers and conductors of electric street railways have in general the same rights and duties with reference to other vehicles crossing their course that the drivers of omnibuses or any other vehicles have. (p. 481.)

STREET RAILWAYS.—Between the Crossings, a Street Railway Car Necessarily Has Precedence Over Other Vehicles, because it cannot move from its track and is confined to one course, while other vehicles and teams can be moved with ease. (p. 481.)

STREET RAILWAY CARS and Other Vehicles, Paramount Rights of the Former Between Crossings.—As cars must be run upon tracks and cannot be turned out for vehicles drawn by horses, the former must have the preference, and all other vehicles must, as they can, in a reasonable manner, keep off the railway tracks, so as not to prevent the free and uninterrupted passage of cars. As to such vehicles, the railways have a paramount right, to be exercised in a reasonable and prudent manner. (p. 481.)

STREET RAILWAY CARS and Other Vehicles.—What is a reasonable use of a public street as between the cars of street railways and other vehicles is a question of fact dependent on the circumstances of each particular case, having reference to the manner in which street railways are compelled to be operated and the purposes for which they are designed. (p. 481.)

STREET RAILWAYS, Crossing Without Stopping to Look and Listen.—Whether the failure of a party injured to stop, look and listen before undertaking to pass in front of an electric street railway car constitutes negligence is a question of fact, while the failure to do so while attempting to pass in front of a steam car is a matter of law. (p. 482.)

STREET RAILWAY CARS and Other Vehicles—Rights of at Crossings.—The rights of street railway cars and other vehicles are equal. Neither has a paramount right over the other. (p. 484.)

STREET RAILWAY CARS, Duties of Motormen of at Crossings.—With respect to the motormen of electric and other motor cars at street crossings, the motormen, when approaching a public street crossing, must anticipate that any person approaching the cars from either side may drive his team on it, and the former must exercise all due care and have his car under such control as to be able to stop it at a crossing if necessary to avoid accident. (pp. 484, 485.)

STREET RAILWAYS, Negligence in Speed of Cars of.—The speed of a street railway car is a fact from which negligence may be inferred, and whether such speed in any particular case constitutes negligence is a question for the jury. (p. 487.)

STREET RAILWAYS, Right of Persons Crossing to Presume that Care Will be Exercised.—A person undertaking to cross the track of an electric street railway with a team and vehicle has a right to rely upon the assumption that the company and its agents will discharge their legal duty in approaching crossings by having their car under control. (p. 489.)

STREET RAILWAYS, Contributory Negligence in not Looking and Listening.—One about to cross the line of an electric street railway with his team is not necessarily required to look the whole length of the visible track to see if a car is coming, but only along the track far enough to warrant an ordinarily careful and prudent man, having in mind his own safety, under like circumstances, to conclude that no car is in such proximity, if properly managed, as to endanger his safety. (p. 489.)

STREET RAILWAYS, When may be Adjudged Guilty of Negligence, and a Person Injured to be Free of Contributory Negligence. If a person about to cross the track of an electric street railway with a team looks down the track and sees that it is clear for a distance of two hundred and forty feet, and then attempts to cross, and the motorman, running his car down a steep grade, in daylight, having such person in view all the time, who does not set his brakes for the purpose of controlling his car until within forty feet of the crossing, and a collision occurs, the street railway may be adjudged guilty of actionable negligence, and the person injured not to have been guilty of contributory negligence. (pp. 489, 490.)

H. H. Burbank and John G. Smith, for the plaintiff.

J. C. Stewart, Emery & Sims and Orville Dewey Baker, for the defendant.

• ⁴² SPEAR, J. This is an action on the case for negligence resulting from a collision between the plaintiff's cart and the defendant's electric car. The case shows that the plaintiff, on the fifteenth day of June, 1901, was driving a covered butcher's cart along a public street in the town of Kittery in an easterly direction, parallel with the defendant's road about three feet northerly thereof, the track being on the southerly side of the road. The highway and the track descend quite sharply toward the east, the grade being about six feet in one hundred. At the bottom of the grade, a cross-street called Williams avenue runs substantially at right angles and southerly from the highway on which the plaintiff was driving. When the plaintiff reached the mouth of Williams avenue he attempted to turn his team into it, thereby squarely crossing the defendant's rails. While crossing the track the front part of the off hind wheel of the plaintiff's cart was struck by the defendant's car and the injuries were produced of which the plaintiff complains. After a long trial involving more than two hundred and fifty pages of testimony, the jury returned a verdict for the plaintiff of eleven hundred and three dollars and seventy-three cents. The case comes up on motion to set this verdict aside as against the law and the evidence. The real issues to be considered are whether the defendant was guilty of negligence with respect to the speed with which they were running their car at the time the accident occurred, and whether the plaintiff was guilty of contributory negligence. The evidence upon the one side and the ⁴³ other upon the point of speed is conflicting, the plaintiff and some of his witnesses contending that the car was running from fifteen to twenty miles an hour down the grade toward the crossing, while those of the defendant assert the car was moving at a rate of only four or five miles an hour. There was also testimony on the part of the plaintiff bearing upon the question of speed tending to show that the cart and horse were thrown bodily in the air when the car struck them, the cart some forty feet and the horse half that distance, and that the car itself ran from one hundred and fifty to two hundred feet beyond the center of the crossing before it could be stopped, although

the motorman claims that he did all in his power to check the car in the quickest possible manner after he discovered that the plaintiff was about to cross the track in front of it. In finding the defendant guilty the jury must have come to the conclusion that they were running their car at the time of the collision at an unsafe and unreasonable rate of speed.

But the defendant says, admitting its negligence as found by the jury, it is not guilty because the plaintiff's own testimony, allowing it to be true, clearly discloses the fact that, by his own negligent acts, he contributed to the accident which caused his injuries. Whether the plaintiff in his connection with the accident was guilty of contributory negligence, assuming the guilt of the defendant, may depend in a large degree upon the duty which the defendant, under the particular circumstances in this case, owed to the plaintiff. This consideration involves a question with respect to the relative rights and duties of electric cars and vehicles, while concurrently approaching and passing over public street crossings. The law upon this subject seems to be well settled in many states. While the contention has been made that a person approaching an electric road with the intention of crossing the track should observe that same degree of watchfulness and care as when attempting to cross a steam road, it is readily obvious that the cases are entirely dissimilar. The steam road is invariably possessed of a private roadbed, protected by law, and vested with the right to punish, as a trespasser, any person who may invade its property outside of that part of its premises made public for the prosecution of its business. They are also permitted by law to propel their trains at a tremendous rate of speed, so that it is impracticable, ⁴⁴ if not impossible, to stop them quickly or within a short distance. The law recognizes these facts, and, not only for the protection of the individual who may undertake to cross a steam railroad track, but for the safety of the many who may be riding in the public coaches, requires the individual, when he approaches the passageway of such an engine of destruction, within a proper distance of the track to look and listen, not only with his eyes and ears, but with his mind, to discover whether a train is approaching. The law makes it imperative for travelers to do this, and a failure to comply with this law presumes them to be guilty of contributory negligence, if they are injured by a collision with a passing train. This

is undoubtedly a wise and judicious law in its application to steam roads, but it should not be fully applied to the use of electric and other street railroads.

An electric road is installed and operated upon a principle entirely different from that of the steam road. Our court has said in *Briggs v. Lewiston etc. R. R. Co.*, 79 Me. 367, 1 Am. St. Rep. 316, 10 Atl. 47, that "the laying down of rails in the street and running the street-cars over them for the accommodation of persons desiring to travel that street is only a later mode of using the land as a way, using it for the valuable purpose for which it was originally taken. It may be a change in the mode, but it is not a change in the use. The land is still used for a highway." This rule of law applies equally, whether the motor for propelling the car is a horse, steam or electricity. It is apparent, therefore, that the electric cars which are now becoming of very common use, not only in our cities but in our villages and country towns, are operated for the most part within the limits of the legally located highways, as said in *Benjamin v. Holyoke St. Ry. Co.*, 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95, where "the use of the street for electric cars and by the general public is concurrent; and the defendant is bound in using the street to have reference to its reasonable use by others." Unlike steam cars, the electric cars run, or may be run at times, through streets crowded with people and vehicles, and therefore, instead of being vested with the right to run at a rapid rate of speed, they are required to make a reasonable use of the streets, consistent with the rights of other persons and vehicles who may occupy the streets in conjunction with⁴⁵ them. Upon this point the court in *Driscoll v. West End St. Ry.*, 159 Mass. 142, 34 N. E. 171, holds that "the drivers and conductors of street railway cars, whatever the motive power, have in general the same rights and duties with reference to other vehicles crossing their course that the drivers of omnibuses have, for example, or that the driver of any other vehicle has": *O'Neil v. Dry Dock etc. Ry. Co.*, 128 N. Y. 125, 26 Am. St. Rep. 512, 29 N. E. 84. In *Commonwealth v. Temple*, 14 Gray, 69, 75, it is said: "Where the entire public, each according to his own exigencies, has a right to the use of the highway, in the absence of any special regulation by law, the right of each is equal. Each may use it to his own best advantage, but with a just regard to the like right of others": See, also, *Newark Passenger Ry. Co. v. Block*, 55 N. J. L. 605,

27 Atl. 1067, 22 L. R. A. 374. But a reasonable use must be measured by the relative facility with which cars and other kinds of vehicles are able to move about with respect to one another in the streets. It must be recognized that cars are confined to a track and are unable to turn to the right or to the left, that they are permitted to occupy the streets for the purpose of facilitating travel, and that teams and travelers as far as practicable must keep out of their way, and not impede their progress more than is absolutely necessary. It is perfectly obvious that a team can move with ease, while a car cannot, but is confined to one course; hence a reasonable use of the streets, having reference to the relative facility with which the locomotion of teams and cars can be controlled, necessarily gives the car between street crossings certain privileges over other vehicles. These superior privileges are well stated in *O'Neil v. Dry Dock etc. R. R. Co.*, 129 N. Y. 129, 26 Am. St. Rep. 512, 29 N. E. 84, as follows: "As the cars must run upon the tracks and cannot turn out for vehicles drawn by horses, they must have the preference, and such vehicles must, as they can, in a reasonable manner, keep off from the railroad tracks so as not to prevent the free and unobstructed passage of the cars. In no other way can street railroads be operated. As to such vehicles the railways have a paramount right to be exercised in a reasonable and prudent manner."

But in the end, what is a reasonable use is a question of fact depending upon the circumstances of each particular case, having ⁴⁶ reference to the manner in which street railroads are obliged to be operated and the purpose for which they are designed: *Hall v. Ogden etc. Ry. Co.*, 13 Utah, 243, 57 Am. St. Rep. 726, 44 Pac. 1046; *Driscoll v. West End St. Ry.*, 159 Mass. 142, 34 N. E. 171.

Yet the defendant seems to assume in its brief, that the same rule with respect to approaching a public street crossing traversed by electric cars applies to electric as to steam roads, and asserts that, on this point, this case falls clearly within the decision of *Blumenthal v. Railroad* and *Day v. Railroad*, both reported in 97 Maine. But the same rule does not apply. While it may be found as a matter of fact, in any case involving an accident by crossing in front of an electric car, that it was the duty of the person undertaking to so cross to look and listen, it cannot be laid down as a rule of law that a failure to do this does per se constitute negligence. That

is, whether the failure of the party injured to look and listen, before undertaking to pass in front of an electric car, constitutes negligence, is a question of fact, while the failure to do so in attempting to pass in front of a steam car is a matter of law. Our court has directly passed upon this distinction with respect to the duty imposed upon one approaching the crossing of steam and electric railroad tracks, in *Fairbanks v. Bangor etc. Ry. Co.*, 95 Me. 78, 49 Atl. 421, and *Warren v. Bangor etc. Ry. Co.*, 95 Me. 115, 49 Atl. 609; but the question is now so distinctly raised anew, and becomes so material in determining the rights of the parties in this case, that a more extended consideration may also be proper. The defendant claims as a matter of law that the plaintiff should have looked and listened immediately before going upon the crossing, but both of the cases last cited in the 95th Maine hold to the contrary, and the weight of authority and the soundness of reasoning are, also, clearly the other way. This question was sharply raised in a recent Massachusetts case—*Robbins v. Springfield St. Ry.*, 165 Mass. 30, 42 N. E. 334. The defendant requested the judge to give the following instruction: "If the plaintiff failed to look and listen, when by looking and listening he could have perceived the approach of the car, and the plaintiff drove in front of the car, and such failure to look and listen contributed directly to his injuries, then he cannot recover, and the verdict should be for the defendant." The judge refused to give the instruction. Chief Justice Field, in passing upon ⁴⁷ the ruling of the court, said: "The question of the due care of the plaintiff and of the negligence of the defendant's servants, we think, were for the jury on the evidence which appears in the exceptions." He then holds, alluding directly to the above request, that "the third request could not properly have been given as an absolute rule of law. The decisions of this court show that a distinction has been taken with respect to the duty to look and listen, when crossing the tracks of a steam railroad where a railroad train has the exclusive right of way, and when crossing the tracks of a street railway company in the public street where the cars have not an exclusive right of way, but are run in the street in common with other vehicles and travelers. The fact that the power used by the street railway company is electricity instead of that of horses has not been deemed by the court sufficient to make the rule of law which has been laid down concerning the crossing of the track of a steam railroad ex-

actly applicable to a street railway." In *Hall v. West End St. Ry.*, 168 Mass. 461, 47 N. E. 124, the court say: "There is no absolute rule of law that, to be in the exercise of due care, one about to cross a public street must look and listen for approaching vehicles," and cite *Robbins v. Springfield St. Ry.*, 165 Mass. 30, 42 N. E. 334. In this case the verdict was directed for the defendant because, under the peculiar circumstances, the inference of fact was conclusive that the plaintiff's failure to look and listen constituted negligence and contributed to the accident. Again, it is held in *Benjamin v. Holyoke St. Ry. Co.*, 160 Mass. 3, 39 Am. St. Rep. 446, 35 N. E. 95, that "the court rightly refused to instruct the jury that a mere failure to look would prevent her from recovering. This has been so held even in cases of collision: *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 55 Am. St. Rep. 620, 34 Atl. 1094, 33 L. R. A. 122; *Shapleigh v. Wyman*, 134 Mass. 118; *French v. Taunton Branch R. R.*, 116 Mass. 537. This question was left to the jury with proper instructions."

In *Hall v. Ogden City St. Ry. Co.*, 13 Utah, 243, 57 Am. St. Rep. 726, 44 Pac. 1046, it is held: "Persons traveling on the public street along or across the street railway track are not held to the exercise of the same degree of care and precaution as they are when traveling along or upon or across an ordinary steam road."

In *Consolidated Traction Co. v. Scott*, 58 N. J. L. 682, 55 Am. St. Rep. 620, 34 Atl. 1094, 33 L. R. A. 122, we find the rule stated in this way: "It may be said ⁴⁸ with reference to this request to charge, that the proposition that one, to be in the exercise of due care, must look and listen before crossing a steam railway, is well established, but this duty does not apply with equal force to one crossing the track of a street railway."

Wendell v. New York etc. R. Co., 91 N. Y. 429, holds: "The rules of conduct which should govern the approach of travelers to crossing over street railways or in the track of vehicles whose rate of progress is under the control of their drivers, are necessarily quite different from those applicable to the crossing of the track of steam railroads, whose trains traverse vast distances carrying great burdens and moving with a momentum necessarily destructive to bodies with which they come in contact." This case was against a steam railway company and the above quotation is employed to show the distinction between the rights and duties of steam and electric roads.

It is said in *Evansville St. Ry. Co. v. Gentry*, 147 Ind. 408, 62 Am. St. Rep. 421, 44 N. E. 311, 37 L. R. A. 378: "The rules that govern as to the crossing of steam railroads by travelers upon the highway are not fully applicable to street railway crossings in cities. . . . The rule, therefore, to stop and look and listen cannot apply as it does to a crossing on a steam railroad track."

In *White v. Worcester St. Ry.*, 167 Mass. 43, 44 N. E. 1052, Mr. Justice Holmes, as late as 1896, stated the proposition in this way: "But we suppose that the request was intended to embody a statement of the rights of electric cars irrespective of practice and to put street railways on very nearly the footing of steam railroads. Whatever may be the law as to the latter, there is a great difference between the two cases. Electric cars are far more manageable and more quickly stopped than trains upon steam railroads."

The duty imposed upon street-cars when approaching public street crossings also clearly shows that the same rule with respect to such crossings cannot be invoked for both electric and steam cars. The very fact that the law, as far as we have been able to discover, almost universally holds that upon the approach of public street crossings, the rights of street-cars and vehicles are equal, that neither has a paramount right over the other, necessarily modifies the rule applicable to the approach of steam car crossings.

⁴⁹ If it was not incumbent upon the plaintiff, as a matter of law, to look and listen, what was the duty of the defendant to the plaintiff in the management of their car in approaching a public crossing in conjunction with the plaintiff? We can readily see, if the law gave the defendant an absolute right of way to the exclusion of all else like a steam car, and also required the plaintiff to look and listen, and if he saw a car coming, however far away, and was injured, make him guilty of negligence, and, if he did not see the car, make him guilty for not seeing it, that the defendant could run its cars at almost any rate of speed, however negligent, without being chargeable with liability, on account of necessary contributory negligence on the part of the plaintiff.

But under the above principles of law, applicable to the reasonable use of the highway by electric cars, and to the duty of travelers in their relations with them, we think the safe rule to lay down with respect to the management of electric or other motor cars at street crossings is this: that the motorman,

when approaching a public street junction, shall be held to anticipate that any person, approaching such junction from either side, may turn his team into it, and shall then exercise all due care and have his car under such control as to be able to stop it at the crossing if necessary to avoid an accident. This rule places upon the railroad using the highway only that degree of care that is commensurate with public safety and with a reasonable use of the road. It is also well-settled law. And it is proper to here observe that the decisions impose a special duty upon cars operated in the streets when approaching street crossings—a duty which, instead of clothing them with the paramount rights conceded between crossings, places them upon an equal footing with other vehicles rightfully occupying the streets. In the great state of New York with its numerous cities and large towns, in which without doubt the necessity for rapid transit is as imperative as in any state in the Union, we find the distinction fully and clearly stated in the *O'Neil* case above cited. After the quotation above alluded to, finding, as to vehicles moving in the streets, that the railways have a paramount right to be exercised in a reasonable and prudent manner, the court then proceeds to define their rights upon approaching crossings in ⁵⁰ this language: "But a railway crossing a street stands upon a different footing. The car has the right to cross and must cross the street and the vehicle has the right to cross and must cross the railroad track. Neither has a superior right to the other. The right of each must be exercised with due regard to the right of the other, and the right of each must be exercised in a reasonable and careful manner so as not to unreasonably abridge or interfere with the right of the other."

Driscoll v. West End St. Ry., 159 Mass. 142, 34 N. E. 171, involving an accident at a street crossing, also recognizes the difference between the privileges of street-cars while moving along the streets and when approaching street crossings, and expressly differentiates *Commonwealth v. Temple*, 14 Gray, 69, relative to the rights of cars running between crossings. The court say: "Street railway companies under the decisions of *Commonwealth v. Temple*, 14 Gray, 69, in running their cars have certain rights in the streets different from those which belong to the drivers of ordinary vehicles, but none of these rights is directly involved in the case at bar," and then lay down the principle, "The drivers and conductors of street railway cars, whatever the motive power, have, in general, the

same rights and duties with reference to vehicles crossing their course, that the drivers of omnibuses have, for example, or the driver of any other vehicle has," and cite and adopt the O'Neil case in the 129th New York, *supra*, which specifically distinguishes the rights of cars at street crossings.

In *Richmond Ry. Co. v. Garthright*, 92 Va. 627, 53 Am. St. Rep. 839, 24 S. E. 267, 32 L. R. A. 220, it is held: "The people of a city and vehicles have the same right to pass along an intersecting street as the car has to go across it. The car has the right to cross and must cross the street; and vehicles and foot-passengers have a right to cross and must cross the railroad track. Neither has a superior right to the other: *O'Neil v. Dry Dock etc. R. R. Co.*, 129 N. Y. 125, 26 Am. St. Rep. 512, 29 N. E. 84; *Buhrens v. Dry Dock etc. R. R. Co.*, 53 Hun, 571, 6 N. Y. Supp. 224; affirmed, 125 N. Y. 702, 26 N. E. 752; *Chicago City Ry. Co. v. Young*, 62 Ill. 238; *Booth on Street Railway Law*, sec. 304, and cases there cited. And it is gross negligence in a street railway company to overcrowd and load down ⁵¹ its cars with passengers beyond any reasonable and proper limit, and consequently not be able to control and stop them readily as they approach an intersecting street in case it may be necessary to do so to avert a collision or prevent an accident."

Evers v. Philadelphia Traction Co., 176 Pa. St. 376, 53 Am. St. Rep. 674, 35 Atl. 140, holds: "The fact that more caution should be exercised in running over crossings than on the street between them warrants no inference that the car can be run without caution except on approaching crossings. In the one case, rapid running is of itself evidence of negligence; in the other it is not." This case distinctly holds that it is negligence per se to run an electric car rapidly over a crossing.

Buhrens v. Dry Dock Ry. Co., 53 Hun, 571, 6 N. Y. Supp. 224, note, 25 Am. St. Rep. 477: "But at street crossings the right of the street railway to the street and its right to the use thereof, in respect to other vehicles, are precisely the same as those of such other vehicles."

Anderson v. Minneapolis Ry. Co., 42 Minn. 490, 18 Am. St. Rep. 525, also holds: "The driver of a street-car must be in a place and condition to exercise a reasonable degree of care and diligence in watching the street ahead of him so as to prevent collision and avoid injuries to pedestrians lawfully traveling thereon."

In *Evansville St. Ry. Co. v. Gentry*, 147 Ind. 408, 62 Am. St. Rep. 423, 44 N. E. 311, 37 L. R. A. 378, it is held: "The street-car, therefore, ought to be under full control as it passes over the crossing, and as said in *Cincinnati St. Ry. Co. v. Whitcomb*, 14 C. C. A. 183, 66 Fed. 915, it is not the law that persons crossing street railway tracks in the city are obliged to stop as well as look and listen before going over such tracks, unless there is some circumstance which would make it ordinarily prudent to do so." See, also, other authorities cited showing that the rules which must be observed in crossing the tracks of the steam railroads do not strictly apply to the crossing of electric or cable lines in cities.

In *Joyce on Electric Law*, section 589, we find the following: "An electric car has no paramount right of way over pedestrians or other vehicles at street crossings and the rights of each are equal." See, also, numerous cases cited in the note.

If it was the duty of the motorman, and we find that it was, to run his car in approaching a public crossing at a rate of speed that ⁵² would enable him to have it under the degree of control prescribed by the above rules of law, then arises the first question of fact put in issue in this case. Did the motorman in approaching the crossing at which the plaintiff was injured, have his car under proper control or, e converso, was he running it at an unreasonable and negligent rate of speed? The undisputed evidence shows that the approach to this crossing was down a sharp grade, upon which the speed of the car would, from gravity alone, naturally be rapid. As before stated, the testimony of the plaintiff's witnesses tend to show that the car was moving at a rate of fifteen to twenty miles an hour, and this testimony seems to be corroborated by other evidence relative to the distance which the horse and cart were carried by the impact of the car, and the distance which the car traversed before it finally stopped. All this evidence is controverted by the defendant's witnesses, but a careful reading of the testimony, while it might leave the question of speed somewhat in doubt, nevertheless, warranted the jury in concluding that, under all the circumstances, the defendant's car in approaching the crossing was propelled at an unreasonable and dangerous rate of speed. "In determining whether the cause should go to the jury, we must give plaintiff the benefit of the most favorable view of his facts and of every reasonable

inference therefrom: *Buck v. People's St. Ry. etc. Co.*, 108 Mo. 186, 18 S. W. 1090."

Upon this point, then, assuming that the finding of the jury was correct, arises the legal proposition, Does an unreasonable rate of speed by a street-car constitute negligence? Our courts have repeatedly held that the speed of a car is a fact from which negligence may be inferred, and that whether such speed in any particular case constituted negligence, was peculiarly a question for the determination of the jury.

In *Hall v. Ogden St. Ry. Co.*, 13 Utah, 243, 7 Am. St. Rep. 726, 44 Pac. 1046, we find this principle: "Some courts hold that where speed is greater than that permitted by the ordinances, it is negligence per se, but the better rule, and the one sustained by the weight of authority, appears to be that it is a circumstance from which negligence may be inferred and is always proper to be considered by the jury in determining the question whether or not the railway company was guilty of negligence."

⁵³ In *Birmingham Ry. etc. Co. v. City Stable Co.*, 119 Ala. 615, 72 Am. St. Rep. 955, 24 South. 558, the court say: "But if he had a right to drive on the track for the purpose of crossing it at this particular place, then it became their duty, not only to keep a lookout to observe him, but also to run the car at such a rate of speed on approaching the place and to retain such control over it as to be able to bring it to a full stop before striking the horse." In *Newark Passenger Ry. Co. v. Block*, 55 N. J. L. 614, 27 Atl. 1067, 22 L. R. A. 374, in the court below, the defendants requested the judge to rule in effect that they had a right to run their cars through the streets at a high rate of speed, to accomplish the object of "rapid transit," and that it was the duty of other occupants of the street, at their peril, to keep out of the way of a moving car, and the court held: "It is a proposition applicable to a crossing the highway by the lines of a steam railroad. It is inapplicable to the crossing of the street railway, the cars on which must not exceed such speed as will permit the lawful customary use of the highway by others with reasonable safety."

But it is unnecessary to cite further decisions upon this point. Not only all the authorities, but good common sense invoke such to be the law. We therefore must let the verdict of the jury stand with respect to the rate of speed at which the defendants were running their car in approaching the cross-

ing at the time of the collision, causing the accident to which the plaintiff attributes his injuries.

The only remaining question to be determined is whether the plaintiff, under the circumstances in this case, in attempting to pass over the crossing as he did, was guilty of contributory negligence. We have already seen that he was not required, as a matter of law, to look and listen. The question therefore now arises whether, as a matter of fact, under all the testimony, the exercise of ordinary care and prudence required him to do so, otherwise than the undisputed testimony shows he did, at a distance of twenty feet from the track. Upon this point, the defendant's contention is that, "if the plaintiff looked at all when twenty feet away from the crossing, he looked carelessly and failed to see what was in plain sight. There can be no legal difference between negligence in the manner of looking and negligence in not looking at all." This may be a correct proposition ⁵⁴ of abstract law, but it does not fully apply to the facts in this case. Whether the plaintiff was negligent, if he looked and did not see, was a question of fact, depending upon the measure of the duty devolving upon him to see. If this had been a steam road it would undoubtedly have been the duty of the plaintiff to have observed the track to the fullest extent of the view to see if a train was coming, because ordinary care in such a case requires it, the degree of care on his part being commensurate with degree of danger incident to the irresistible degree of speed and momentum acquired by steam cars when in motion. In like manner the degree of care to be observed by the plaintiff in crossing the defendant's track at the street junction is to be measured by the correlative duty of the electric car in approaching the same junction. But we have already determined that a car in approaching a crossing has only the same rights as other vehicles and must be under control. Hence, as a corollary of this proposition, the plaintiff had a right to rely upon the assumption that the defendant would discharge its legal duty in approaching the crossing by having their car under control, and such assumption is embraced within the rule of ordinary care in its application to the plaintiff's duty. Under this rule, the plaintiff was not necessarily required to look the whole length of the visible track to see if a car was coming, but along the track far enough to warrant an ordinarily careful and prudent man, having in mind his own safety, under like circumstances, to conclude that no car was in such proximity, if

properly managed, as to endanger his safety in crossing: *Hill v. West End St. Ry.*, 158 Mass. 458, 33 N. E. 582.

The decisions amply sustain this position. *Newark Passenger Ry. Co. v. Black*, 55 N. J. L. 605, 27 Atl. 1067, 22 L. R. A. 374, is a case in which the relative rights and duties of a street railroad in operating its cars in the streets and of other occupants of the street are fully discussed and carefully considered. The decision arose upon the following request: "If the jury believe the account of the plaintiff and her witnesses as to the fact that one car stopped at Prince street and passed the other below that street, it was the duty of plaintiff to wait long enough before crossing to allow the down car to pass far enough for her to see whether another car was coming, and if she neglected that duty ⁵⁵ she was guilty of contributory negligence and cannot recover, although the jury may believe that the up car was going at an unusual rate of speed, the track being straight and the car visible far enough to avoid it at any possible speed." The judge declined to give this request otherwise than he had already done and exceptions were taken. The court then proceeds to say: "The contention of plaintiff in error rather takes this shape: It asserts that its cars, propelled by electricity, are capable, of being run at greater speed than other vehicles in the highway, and that the public convenience demands for passengers carried in such cars what is called 'rapid transit,' and it draws the inference that its cars may therefore be run at such speed as will satisfy this public demand, and that other persons lawfully using the highway in the customary modes must govern themselves and use the highway accordingly. Judicial opinions have been cited to us which appear to support these extraordinary propositions. I am unable to subscribe to the notion which, carried to its logical conclusion, would permit this company and other companies running cars in public highways, propelled by electricity, cables, etc., to run at any rate of speed which they may deem a demand, undefined and unrecognized by law to require.

"But the request before us brings into question the extent to which one crossing the roadway on foot must extend his observation. Its claim is that such observation must be extended to any approaching car, no matter how distant. But this is obviously an exaggerated notion of the duty required. The most prudent man would never suppose himself required to thus observe. If such rule of duty were adopted and prac-

ticed in a crowded city, the crossing of many streets would be barred to pedestrians for a great part of the time. The general rule to which we have recurred does not justify this excessive view of the duty required. It will require one crossing the roadway on foot to extend his observation only to the distance within which vehicles proceeding at customary and reasonably safe speed would threaten his safety."

"Prudence doubtless requires one about to cross a railroad track to use his eyes to observe any approaching car within his vision. But, as has been shown, prudence does not require one crossing the ⁵⁶ track of a street railway to extend his observation to the whole line of track within his vision, but only to such distance as, assuming the required care in their management, approaching cars would imperil his crossing."

While the last two paragraphs apply particularly to pedestrians, we think that they are equally applicable to the duty devolving upon teams, in their use of the streets in connection with electric or other motor cars, or, as expressed in the opinion, upon "persons lawfully using the highway in the customary modes." In fact, the opinion quoted bases its discussion of the principle therein enunciated upon the relative rights of cars using the streets and of "persons lawfully using the highway in the customary modes," which of course embraces both teams and pedestrians. Under these rules of law governing the duty of the plaintiff, was he, in crossing the defendant's tracks, under all the circumstances involved, as a matter of law, guilty of contributory negligence; or was the question, whether his conduct on that occasion constituted contributory negligence, one of fact for the jury? The plaintiff testifies as to what he did with respect to the exercise of care in looking for the car as follows: "Q. Did you allow your eye that day as you looked back to travel back as far as you could see at your point of the view? A. That I could not say. I know I looked back to see if there was a car coming,—I know I looked back beyond Mrs. Morse's." The undisputed evidence shows that the Morse house referred to was two hundred and forty-four feet from the crossing. Another witness testifies positively, that at the time the plaintiff was making a turn to cross the track into Williams avenue, the electric car was just coming by the end of the Morse house, as the evidence shows two hundred and forty-four feet away.

The motorman testified as follows: "Q. When did you observe Mr. Marden turning to cross? A. When I was most to

the avenue. Q. How far? A. Between forty or fifty feet; somewhere along there. Q. How near was Mr. Marden's team to the rails when he made the turn or attempted to make the turn? A. Five feet. Q. Did Mr. Marden at any time from the top of the hill until he made the turn to Williams avenue, drive his horse to the other side of the road? A. I did not see him do ⁵⁷ that. Q. Did Mr. Marden or anybody else look out from the grant end of the cart back toward the car? A. No, sir. Q. Was the rear end of the cart closed or open? A. Closed. Q. Was the cart entirely covered or an open cart? A. Entirely covered. Q. When Mr. Marden turned his horse to cross the track, what did you do? A. I set up my brakes as hard as I could." And this, as far as the evidence shows, was the first act on the part of the motorman toward any effort to check the car so as to have it under control at the crossing?

Can the court say, under the law applicable to the duty respectively resting upon cars and teams in approaching a street junction that it was negligence per se for the plaintiff to undertake to cross the car track into another street when the track was clear for a distance of two hundred and forty-four feet? We think it cannot. We think it was a question for the jury to determine. If the jury believed, as they might, that the plaintiff, twenty feet therefrom, looked up the track a sufficient distance to discover whether a car was in such close proximity as to imperil his crossing the track, and, discovering none, undertook to cross, they well might find that the plaintiff was not guilty of contributory negligence, and that the failure of the motorman to apply the brakes until within forty feet of the accident, was a clear case of negligence.

Driscoll v. West End St. Ry., 159 Mass. 146, 34 N. E. 171, already cited, is a case which, in many of its elements, is not unlike the case at bar. The court say: "In the present case, we think the question of due care on the part of the plaintiff and of the defendant's servants were for the jury. One circumstance to be considered is that the plaintiff's horse was across the defendant's track at the time the wagon was hit. When two vehicles are approaching at reasonable rates of speed on converging lines, the question arises as to which should give way; one circumstance to be considered is, which, according to the rates of speed they are going, will first reach the point where the lines of travel cross each other. The plaintiff's testimony is that the car was nearly four hundred

feet from him when he proceeded to cross Hanover street diagonally to Elm street. It seems to have been daylight, and although it does not appear when the driver of the car first saw ⁵⁸ the plaintiff, no reason appears why he should not have seen him long before he applied the brakes. The evidence was that he put on the brakes five or ten seconds before the collision and when the front of the car was about twenty feet from the plaintiff. It was the duty of the driver of the car to keep a reasonable lookout for teams coming from cross streets and reasonable control of his car so as to avoid collision and we think that there was evidence for the jury that this was not done. Neither can we say that there was not evidence for the jury that the plaintiff was in the exercise of due care. Apparently, if the speed of the car had been seasonably checked, the collision would have been avoided, and the danger was not immediate when the plaintiff undertook to cross the track."

This case, we think, is fully applicable to the one at bar. In this case the motorman was running his car down a sharp grade in plain daylight, having the plaintiff in view all the time, approaching the crossing of a street at this time "considerably used for vehicles" as the evidence shows, charged with the duty of anticipating that the plaintiff might turn into the avenue as he did, and of having his car under control, and yet he did not set the brakes for the purpose of controlling his car until within forty feet of the crossing. We feel inclined to affirm of this conduct what was said in the last case cited, "Apparently if the speed of the car had been seasonably checked the collision would have been avoided, and the danger was not immediate when the plaintiff undertook to cross the track."

Motion overruled. Judgment on the verdict.

Street Railways have no Paramount Right at street crossings over other vehicles. Their cars have a right to cross the streets, and other vehicles a right to cross the railway track. Neither has a right superior to the other. The right of each must be exercised with due regard to the right of the other; and the right of each must be exercised in a reasonable and careful manner, so as not unreasonably to abridge or interfere with the right of the other: O'Neil v. Dry Dock etc. R. R. Co., 129 N. Y. 125, 26 Am. St. Rep. 512. See, also, Evers v. Philadelphia Traction Co., 176 Pa. St. 376, 53 Am. St. Rep. 674; Richmond Ry. etc. Co. v. Gartright, 92 Va. 627, 53 Am. St. Rep. 839; Evansville St. R. R. Co. v. Gentry, 147 Ind. 408, 62 Am. St. Rep. 421; McCracken v. Consolidated Traction Co., 201 Pa. St. 378, 88 Am. St. Rep. 814; Rascher v. East Detroit Ry. Co., 90 Mich. 413, 30 Am. St. Rep. 447; Thatcher v. Central Traction Co., 166 Pa. St. 66, 45 Am. St. Rep. 645; North Chicago St. R. R. Co. v. Zeiger, 182 Ill. 9, 74 Am. St. Rep. 157.

The Rule that Travelers must Stop, Look, and Listen before crossing a railway track is not so unbending and absolute in the case of street railways as it is in the case of steam or commercial railroads: See Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 55 Am. St. Rep. 620; Driscoll v. Market St. etc. Ry. Co., 9 Cal. 553, 33 Am. St. Rep. 203; Hall v. Ogden etc. Ry. Co., 13 Utah, 243, 57 Am. St. Rep. 726; Evansville St. R. R. Co. v. Gentry, 147 Ind. 408, 62 Am. St. Rep. 421. Compare, however, McCracken v. Consolidated Traction Co., 201 Pa. St. 378, 88 Am. St. Rep. 814.

INHABITANTS OF PERU v. BARRETT.

[100 Me. 213, 60 Atl. 968.]

FERRIES.—*The Only Proprietorship in a Ferry in Maine is a franchise conferred by statute, and the party holding it has no common-law remedy against those who, without right, interfere with his profits, but the remedy is by statute.* (p. 495.)

PLEADING—Statute.—*It is not Necessary in a Civil Action to set out a statute or make any reference to it in the declaration, but the cause must be brought within its provisions by alleging the requisite facts.* (p. 496.)

FERRIES, Rights of Towns in.—*When towns in Maine provide a person to keep the ferry, they are entitled to the tolls and profits of the ferry, and have a right of action against those interfering with them.* (p. 496.)

FERRIES—Towns, Presumption in Favor of.—*It is unnecessary, in an action by a town, to allege its acts in providing a ferry-keeper, or that he was licensed and gave bond, as required by law. It is presumed that all things have been done correctly by the towns to entitle them to a right of action. If anything has been omitted, the defendant may raise the question in his defense.* (p. 496.)

FERRIES—Rights Which May be Exercised Against.—*Private persons have the right to keep and use boats on a river for their own accommodation in passing over it and transporting their families, servants, and goods, and to occasionally carry across a customer and his purchases.* (p. 497.)

FERRIES, What is an Unlawful Interference with Rights and Profits of.—*If a merchant controls both sides of a river, having a store on one side and a warehouse on the other, and keeps two row-boats in which he transports his customers and their purchases, without charge, as an encouragement to increase his trade, and it has that effect, and diminishes the profits of an established ferry, this is, in effect, a transportation of property and persons for hire, and renders him liable to the holder of the ferry franchise for interference with his profits.* (p. 497.)

John P. Swasey and John S. Harlow, for the plaintiffs.

George D. Bisbee and Ralph T. Parker, for the defendants.

214 PEABODY, J. This is an action on the case brought by the plaintiff towns as proprietors of a ferry across the Androscoggin river at Peru Center in Oxford county, Maine,

against the defendants for damages caused by interference with their rights in ferrying passengers and property.

The case comes before the law court on report.

The ferry was legally established prior to the date of the alleged wrongful acts of the defendants, and the plaintiffs were charged with the duty of its maintenance in accordance with the provisions of chapter 20, section 2 of the Revised Statutes of 1883, which is as follows: "Sec. 2. They [county commissioners] may establish ferries at such times and places as are necessary, and fix their tolls. When no person is found to keep them therefor, the towns in which they are established shall provide a person to be licensed to keep them, and shall pay the expenses, beyond the amount of tolls received, for maintaining them. When established between towns, they shall be maintained by them ²¹⁵ in such proportions as the commissioners order. For each month's neglect to maintain such ferry or its proportions thereof, the town forfeits forty dollars."

The defendants contend that the declaration neither sets out sufficiently a statutory or common-law cause of action. The only proprietorship in a ferry in Maine is the franchise conferred by statute, and the party holding it has no common-law remedy against those who, without right, interfere with his profits, but the remedy is by section 6, chapter 20 of the Revised Statutes of 1883. The right of the plaintiff towns to receive the compensation fixed for ferriage is incident to the obligation imposed upon them by law to maintain the ferry, and the statute protects them against wrongful interference: *Day v. Statson*, 8 Me. 365; *Blisset v. Hart*, Willes, 508. The declaration is sufficient to present a case by statute. It is not necessary in a civil action to set out the statute or to make any reference to it in the declaration, but the case must be brought within its provisions by alleging the requisite facts: 1 Chitty on Pleading, 16th Am. ed., 237; Gould on Pleadings, 111, sec. 16, note 3; 20 Ency. of Pl. & Pr. 594, 595; *Town of Griswold v. Gallup*, 22 Conn. 208; *Chicago etc. R. Co. v. Porter*, 72 Iowa, 426, 34 N. W. 286; *Hayes v. West Bay City*, 91 Mich. 418, 51 N. W. 1067; *Bogardus v. Trinity Church*, 4 Paige (N. Y.), 178; *Kennayde v. Pacific R. Co.*, 45 Mo. 255.

While the obligation rests upon the plaintiffs to maintain the ferry so as to make it convenient for the public, they were only required to act when no person was found to keep the ferry for the established tolls. They were then obliged to pro-

vide a person to be licensed to keep it and to pay the expenses beyond the amount of tolls received for maintaining it. It was necessary that the ferry-keeper should be licensed to give bond to the state for the protection of passengers over the ferry, whether the licensee was appointed by the county commissioners or provided by the towns to be licensed when no person was found to keep the ferry for the tolls. When the towns provide a person to keep the ferry, they are entitled to the tolls and profits of the ferriage and have a right of action against those interfering with them. It is unnecessary to allege in the declaration the action of the town in providing the ferry-keeper or that the keeper was licensed and gave bond as required by law. It is presumed that all ²¹⁶ things have been correctly done by the plaintiffs to entitle them to a right of action. If any prerequisites have been omitted the defendants may raise the question in defense. It appears from the report that the defendants for four years prior to May, 1902, were operating the ferry under an arrangement made with the selectmen of the two towns, and that since this arrangement ceased the ferry has been operated under the direction of the municipal officers.

The liability of the defendants depends upon the character of their acts in respect to the plaintiffs' ferry. They deny that they kept a ferry contrary to sections 1 and 2 of chapter 20 of the Revised Statutes of 1883, or transported passengers or property across any licensed or established ferry for hire, or furnished for hire a boat or other craft for such purpose, and they claim that whatever construction may be put upon their acts as being within the definition of keeping a ferry, they did not interfere with the franchise of the plaintiffs. They were merchants and kept a country store in Peru on the Androscoggin river, near the ferry in question, and had a storehouse on the opposite side of the river in Dixfield. In the storehouse they deposited grain and merchandise for their customers on the Dixfield side. At a short distance below the ferry approaches they controlled land on each shore of the river and one or two small rowboats which they had used in going back and forth from the store to the storehouse, and they gave their customers free use of the boats in crossing the river to trade at their store or storehouse. This privilege was well known to persons trading with the defendants. It was an inducement intended to increase, and did increase, their business and actually diminished the tolls of the ferry.

It was in effect a transportation across the river of persons and property for hire; they received in the profits of the sales what was a full equivalent for the ferriage of their customers, consisting of the public generally. The defendants had an undoubted right to keep and use boats for their own accommodation in passing over the river and transporting their families, servants and goods, and to occasionally carry across a customer and his purchases, or to use them under any similar conditions, because this would not constitute a public carrying for hire. The statute fixes no limit to the exclusive privilege of the holder of a ferry franchise to transport passengers²¹⁷ and property, and in deciding this case it must be determined, by a rule of interpretation consistent with reason and justice, whether the defendant's boats were run usually within the line of travel implied in the location and establishment of the plaintiffs' ferry. There was a change, by regular proceedings, of the location of this ferry up the river thirty or forty rods from the original ferry known as "Green's Ferry," which was then abandoned; and changes were made in the highways leading to the new location in Peru and Dixfield. There was a bridge three and one-half miles above and another seven miles below the ferry. The defendants' boats were kept for the most part at the landings of the old ferry and were run at different points between the old and new locations. Occasionally they were run in and above the passway of the new ferry. The transportation of passengers and goods at this point clearly diminished the plaintiffs' profits; and we therefore hold that these boats were run within the line of travel to which the plaintiffs had the exclusive ferry rights, the criterion being the interference with the ferry franchise causing a natural, appreciable loss of patronage: *Warren v. Tanner* (Ky.), 56 S. W. 167, 49 L. R. A. 248; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 9 L. ed. 773.

Judgment for plaintiffs. Damages to be assessed at nisi prius.

The Owner of a Ferry established by law has a right to protection as against one who sets up a rival ferry without public authority: *McGowen v. Stark*, 1 Nott & McC. 387, 9 Am. Dec. 712; *Smith v. Harkins*, 3 Ired. Eq. 613, 44 Am. Dec. 83. But one may lawfully use his own boats for the transportation of himself, his employés, guests, friends, and goods, where another has an exclusive right of ferry: *Alexandria etc. Ferry Co. v. Wisch*, 73 Mo. 655, 39 Am. Rep. 535; *Hunter v. Moore*, 44 Ark. 184, 51 Am. Rep. 589.

BURRILL v. WHITCOMB.

[100 Me. 286, 61 Atl. 678.]

LIENS, When Created.—An Agreement to Give Security on Property not yet in Existence or in the Ownership of the Party Making the Contract, or property to be acquired by him in the future, constitutes an equitable lien on the property so existing, or acquired at a subsequent time, which is enforceable in the same manner and against the same persons as the lien on a specified thing existing and owned by the contracting parties at the time of the contract. (pp. 501, 502.)

MORTGAGE—Voluntary Delivery of the Property to the Mortgagee, What Equivalent to.—The taking possession of mortgaged chattels by the mortgagee, in the exercise of an authority expressly granted by the mortgage, is equivalent to its voluntary delivery to him by the mortgagor. (p. 506.)

MORTGAGE on After-acquired Chattels, When Takes Precedence Over an Attachment.—If a mortgage includes an existing stock of merchandise and all such stock to be acquired, and authorizes the mortgagee to take possession of the mortgaged property and all additions which may be made thereto whenever he shall deem it to his interest to do so, and, acting under this authority, he takes possession of subsequently acquired parts of such stock, though not acquired by the proceeds of the property owned by the mortgagor at the date of the mortgage, his rights as mortgagee become perfect and are superior to those of a creditor attaching after possession was taken. (pp. 509, 510.)

F. C. Burrill and L. B. Deasy, for the plaintiff.

A. W. King, for the defendant.

287 WHITEHOUSE, J. This is an action of trover brought against the defendant as sheriff of Hancock county to recover the value of a quantity of tea attached by him on a writ in favor of M. Gallert and against M. M. and E. E. Davis.

The plaintiff claims title to the attached property by virtue of a mortgage from the Davises to him, duly recorded, in which the property is described as follows: "All the stock in trade, consisting principally of teas, coffees, spices, crockery and small wares, store furnishings and fixtures, present and future book accounts, now contained in the store situated on the north side of Main street, in Ellsworth, Maine, occupied by us and where we now carry on business and also all stock in trade, furniture and fixtures that may be hereafter acquired."

The mortgage also contains the following provisions and agreements: "Provided, however, that it shall and may be lawful for the said grantors, said M. M. & E. E. Davis, to con-

tinue in possession of the property herein mortgaged until such time as said Burrill . . . shall consider it for his or their interest to take possession under this mortgage for the enforcement of any and all rights given to said Burrill under this mortgage, the said grantee, said Burrill, by the acceptance of this conveyance, hereby expressly constituting the said grantors, said M. M. & E. E. Davis, his trustees, to continue in possession of the property herein mortgaged until such time as said grantee shall deem it for his interest to take possession of the same for any of the purposes in this mortgage specified, or for the purpose of enforcing his legal or equitable rights hereunder.

“And the said grantors, said M. M. and E. E. Davis, further hereby agree and declare that all stock in trade, general merchandise, book accounts, and debts due, of every name and description which they may from time to time hereafter during the continuance of this mortgage add or supplement, or incorporate with stock in trade, general merchandise, book accounts and debts due, and personal property herein mortgaged, for the purpose of carrying on the said business²⁸⁸ shall be subject to and included in this mortgage, and the provisions herein contained be applicable to them also.

“And the said grantors hereby further agree that if at any time during the continuance of this mortgage the said Charles C. Burrill, his executors, administrators or assigns, shall deem it for their interest to take possession of the property herein mortgaged or of any additions thereto that may be made, the said Burrill, his executors, administrators or assigns, shall thereupon have the right to take such possession, peaceably and quietly, and that thereupon and so soon as said Burrill, his executors, administrators and assigns, take such possession, the whole debt secured by this mortgage shall be due and payable, whether the time for its payment has elapsed or not, anything in this mortgage to the contrary notwithstanding, and the said Burrill, his executors, administrators or assigns, shall thereupon have the right to foreclose this mortgage by any of the methods provided by the law of the state of Maine for the foreclosure of mortgage of personal property. . . . Said Burrill may also have the right to move the goods to any place that he may deem for his best interest.”

At the time of the execution and delivery of the mortgage the tea, for the conversion of which this suit is brought, had not been bought by the mortgagors, and was not in their pos-

session. Between the date of the mortgage and February 19, 1904, the tea was brought by the mortgagors and placed in their store as a part of their stock for the purpose of carrying on their business. It was not paid for by the proceeds of any of the mortgaged stock.

On February 19, 1904, the plaintiff, deeming it for his interest so to do, took possession of all the stock in the store, including the tea, for the purpose of enforcing his rights under the mortgage, and removed the same to another store and retained possession of it until February 20, 1904, when the tea was attached and taken away by the defendant, as sheriff of Hancock county, as above stated.

There was no act of delivery of the tea in question on the part of the mortgagors at any time after it was purchased by them, and the taking possession of the tea by the plaintiff with the rest of the stock ²⁸⁹ was without any other consent of the mortgagors than that contained in the agreement found in the mortgage.

By agreement of the parties the case was heard by the presiding judge, without the aid of a jury with leave to except in matters of law. The court found as matters of fact that the mortgage had been foreclosed and the foreclosure completed more than forty-eight hours before the bringing of this action, and also that the written notice provided by Revised Statutes, chapter 83, section 45, had been seasonably given by the plaintiff to the defendant.

But the presiding judge also ruled as a matter of law that the mortgage of future acquired chattels was void against attaching creditors without some new act on the part of the mortgagor, and that possession taken without the consent of the mortgagor and retained by the mortgagee before and until the attachment was not sufficient to make the mortgage good. Judgment was accordingly rendered for the defendant, and the case comes to this court on exceptions to this ruling.

The case thus stated presents for the determination of the court the single question of law whether a mortgagee in a chattel mortgage duly recorded, who has taken and retained possession of after-acquired stock in trade as a part of the property described in the mortgage, by virtue of an explicit agreement in the mortgage authorizing him so to do, is entitled to hold such after-acquired property not purchased with the proceeds of any of the stock sold, as against a creditor who attaches it after possession taken by the mortgagee.

The defendant contends that inasmuch as the tea in question was not owned or possessed by the mortgagors at the date of the mortgage, the mortgage itself was not operative to transfer the title to the plaintiff; and as there was no subsequent act of delivery on their part, and no voluntary transfer of it to the plaintiffs or consent that the plaintiff should take possession of it, given after they acquired title to it, the possession taken and retained by the plaintiff by virtue of the consent in the mortgage was not sufficient to entitle him to hold it even against a creditor who did not attach it until after possession taken by the mortgagee.

The plaintiff does not controvert the well-settled general rule ²⁰⁰ that a mortgagee of after-acquired chattels obtains no title or right to them as against a creditor of the mortgagor, who attaches them in the hands of a mortgagor before the mortgagee has taken possession. The exceptions to this rule respecting chattels of which the mortgagor had potential ownership at the time the mortgage was given, and chattels purchased with the proceeds of those sold and substituted for them in accordance with the terms of the mortgage, as already seen, are not involved in the present case. It is not questioned that the defendant's attachment would have been good if it had been made while the tea was in possession of the mortgagor. But the plaintiff contends that in case of mortgages like the one at bar, the executory agreement of the mortgagor is a continuing agreement, and that the taking of possession by the mortgagee of after-acquired property by virtue of the previous consent of the mortgagor given in the mortgage is equivalent to a delivery of possession by the mortgagor, and that the mortgagee's equitable lien is thereby made good without any new act or consent on the part of the mortgagor.

The respective rights of mortgagee and attaching creditors or other third parties in regard to after-acquired property claimed under chattel mortgages upon facts analogous to those at bar have frequently received the attention of this court, and obiter dicta may be found, and some early authorities are cited in several Maine cases tending to support the defendant's position; and, on the other hand, recent decisions from other states have been cited with approval tending to support the plaintiff's contention; but the precise question now presented does not appear to have been necessarily involved and directly determined in any reported case in this state. It has often been

decided, however, in other jurisdictions by courts of great respectability and high authority, and this court is now at liberty to adopt the view which is most in accord with the principles of equity and sound reason and at the same time best supported by the weight of judicial opinion in other American states.

It is a well-settled principle in equity requiring no citation of authorities in its support that "an agreement to give security upon property not yet in existence or in the ownership of the party making the contract, or property to be acquired by him in the future,"²⁹¹ although, with the exception of chattels, having potential existence, it creates no legal estate in the things when they afterward come into existence or are acquired by the promisor, does constitute an equitable lien upon the property so existing or acquired at a subsequent time, which is enforced in the same manner and against the same parties as a lien upon specific things existing and owned by the contracting party at the date of the contract": 3 Pomeroy's Equity Jurisprudence, sec. 1236. So in *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9673, it is said by Judge Story, "that whenever parties, by their contract, intend to create a positive lien or charge either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy."

In *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 395, relied upon by the defendant as an authority to support his contention, this doctrine of equitable lien is recognized by our court. In the opinion the court say: "While at common law the mortgage covers the existent property of the mortgagor and does not transfer any right to after-acquired property, it is otherwise in equity. Though that court recognizes the rule of the common law, yet it holds such conveyance operative as an executory agreement binding on the property when acquired.

The mortgagor holds the property as trustee and equity enforces the trust. In some cases the decision rests upon grounds of an equitable lien"; and *Mitchell v. Winslow*, 2 Story, 630, Fed. Cas. No. 9673 is cited in support of this principle.

In *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 395, the mortgaged property consisted of hotel furniture and the mortgage contained a provision that it should be lawful for the mortgagors to continue in the possession of the property "without denial or interruption" by the mortgagee until condition broken. There was a formal delivery of the subsequently purchased goods to the mortgagee but possession of them was not retained by him. The mortgagee's possession was only instantaneous. It was immediately resumed by the mortgagor. This was the decisive fact in that case. The court say: "The authorities are uniform ²⁹² in requiring not merely delivery, but retention, of the property delivered as indispensable to the perfection of the mortgagee's title."

The question now before the court was not raised by the facts disclosed in that case, and consequently it was not there adjudicated. The elaborate discussion in the opinion of the rights of mortgagees in chattel mortgages covering after-acquired property must be understood to apply only to the facts of that case. The early cases of *Head v. Goodwin*, 37 Me. 181, and *Jones v. Richardson*, 10 Met. 481, cited by the defendant, are there adopted by the court as leading authorities upon the question discussed in the opinion. In *Jones v. Richardson*, it is true, evidence that the mortgagee had taken possession of after-acquired property for the purpose of foreclosure was said to be immaterial and some new act on the part of the mortgagor was held to be necessary, thus apparently supporting the defendant's contention. But in that case the mortgage contained no express agreement that the mortgagee should take possession. Furthermore, the doctrine in that case has been repudiated in four subsequent cases in that state, and thus the authority upon which the decision in *Head v. Goodwin*, 37 Me. 181, is founded, is seen to have been denied by the court from which it emanated. Besides, the facts in *Head v. Goodwin* differ *toto coelo* from those in the case at bar and the decision is in no respect an authority for the defendant. There a vendor sold one-half of a chaise to which he had no title, and afterward purchased the chaise and delivered it at a certain stable into the custody of the person to whom he had sold one-half of it; but the court found no satisfactory evidence that this delivery was made for the purpose of effectuating the former sale, and held that it was not such a new act as to transfer the property.

In *Sawyer v. Long*, 86 Me. 541, 30 Atl. 111, possession of the stock was not taken by the mortgagee, but was retained by the mortgagor, and the property passed to the assignee, who transferred it to the defendant as purchaser of the assignee's interest. In *Dexter v. Curtis*, 91 Me. 505, 64 Am. St. Rep. 266, 40 Atl. 549, it was held that while the mortgagor by the terms of the mortgage had the right to sell or exchange any portion of his stock, he did not have the right to sell those goods to his creditors in ²⁹³ payment of past indebtedness. The question now before the court was not involved in either of these cases.

On the other hand, in *Deering v. Cobb*, 74 Me. 332, 43 Am. Rep. 596, the facts more clearly resemble those in the case at bar, except that the rights of an attaching creditor were not involved. In the opinion the court say: "It seems, also, that when, as in this case, a mortgage is effective between the parties as a transfer of title to property to be subsequently acquired by the use of the proceeds of the original stock, and the mortgage contains a power to the mortgagee to enter and take possession of such future property when acquired, possession taken and retained in the exercise of that power makes the mortgage effective, without any new act of the mortgagor, against third persons claiming under him by later attachment or conveyance."

"A proposition at least as strong as this is sustained in *Jones on Chattel Mortgages*, sections 160, 167, by a full citation of authorities, English and American, which there is no occasion here to examine more minutely: *Hope v. Hayley*, 5 El. & B. 830; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706; *Cook v. Corthell*, 11 R. I. 482, 23 Am. Rep. 518; *Walker v. Vaughn*, 33 Conn. 577.

"But in a more recent case in Massachusetts, which has been one of the states to hold most closely to common-law doctrines in regard to mortgages of this kind, it has been held that 'if the after-acquired property is taken by the mortgagee into his possession before the intervention of any rights of third persons, he holds it under a valid lien by the operation of the provision of the mortgage in regard to it. . . . Such taking of possession, though effected immediately before insolvency proceedings were instituted, and with full knowledge of the insolvency of the mortgagor, would not be the acceptance of a preference, but the assertion of a right which had been previously acquired by the mortgagee under

an instrument in writing made when the parties to it were both competent to contract, and when there was no qualification of the right of either to deal with the other": *Chase v. Denny*, 130 Mass. 566.

In this case our court plainly recognizes the progressive development of the law upon this subject, although the precise question ²⁹⁴ under discussion was not then presented for decision. It shows a strong tendency to reject the narrow interpretation of the common-law rule found in some of the earlier decisions, and a readiness to adopt the more reasonable and equitable doctrine which simply requires the mortgagor to observe the obligation of his express agreement in the mortgage. The common-law dogma which is said to require some new act on the part of the mortgagor to protect the mortgagee's lien appears to have been founded mainly upon one of Lord Bacon's Latin maxims, which declares that "though the grant of a future interest is invalid, yet a declaration may be made which will take effect on the intervention of some new act"—"*interveniente novo actu.*" As one of the first instances stated by Lord Bacon to illustrate the maxim had reference to a "new act" on the part of a grantor, it appears to have been assumed by some of the courts that no other act would suffice to effectuate the prior agreement. But such a restricted meaning was not required by the text of the maxim, and it was explicitly repudiated in *Congreve v. Evetts*, 10 Ex. 298. In the bill of sale in that case it was agreed that the plaintiff might take possession of the crops and other effects which might from time to time be substituted in lieu of the crops, or which should be found on the farm. The plaintiff seized and took possession of some of the crops which had been sown after the indenture was made. In delivering the judgment of the court Parke, B., said: "If the authority given by the bill of sale had not been executed, it would have been of no avail against the execution; . . . but when executed to the extent of taking possession of the growing crops, it is the same, in our judgment, as if the debtor himself had put the plaintiff in actual possession of those crops": See, also, *Carr v. Allatt*, 3 Hurl. & N. 964.

But it is suggested that by section 1 of chapter 93 of the Revised Statutes: "No mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee, or the mortgage is recorded, etc." In this case

it has been seen the mortgage was duly recorded, and possession of the goods therein described, including the after-acquired property, was rightfully taken and retained by the mortgagee by virtue of the consent of the mortgagor previously granted on the ²⁹⁵ stipulation of the mortgage. It is universally conceded, as before stated, that possession taken by the mortgagee, by virtue of the mortgagor's consent given after the property is acquired, is to be deemed equivalent to a voluntary delivery by the mortgagor, and such a "new act" as will effectuate the previous agreement. It has now been shown by a uniform current of modern decisions that the law has advanced another step, and now holds that actual possession of such property taken by the mortgagee in the exercise of an authority expressly granted in the mortgage, is also equivalent to a voluntary delivery by the mortgagor, and if such possession is retained, it makes good the mortgagee's lien as against an attaching creditor. Statutory provisions for the registration of chattel mortgages in effect precisely like our own existed in all the states from which the foregoing decisions have been cited, but in no case directly involving the question now before the court have they been held to be in conflict with the equitable doctrine above stated.

It is uniformly conceded that if the mortgagee takes possession of after-acquired property, in accordance with an express agreement in the mortgage, with the consent of the mortgagor given after he acquired title, it will be sufficient to perfect the mortgagee's lien. But a stipulation in the mortgage authorizing the mortgagee to take possession at any time is not a mere license revocable at the pleasure of the mortgagor, but a valid and binding contract which continues in force until performed. It is therefore difficult to understand upon what principle of justice or conception of common right a mortgagor can be permitted to defeat the acknowledged equitable rights of the mortgagee by simply withholding his consent in violation of his express stipulation in the mortgage. According to this doctrine, if the mortgagee seeks to exercise his right to take possession of the property under the mortgage, and the mortgagor gives an express assent not required by the terms of the mortgage, the mortgagee's equitable rights are preserved. On the other hand, if the mortgagor objects, in violation of his agreement, or stands mute, the mortgagee's possession, though expressly authorized by the contract of the

parties, will not suffice and his rights are lost. Such a rule cannot be founded on principles of right and justice.

²⁹⁶ And it will now be seen that such a rule has no stronger support in authority than it has in reason and equity.

In *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706, the reasons for the contrary rule are thus stated: "A stipulation that future-acquired property shall be holden as security for some present engagement is an executory agreement of such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same; and that such act being done and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good."

Although the reasoning was not essential to the conclusion in that case, it has been accepted by that court as the law of that state and applied in all subsequent cases. A copious extract from the opinion in *Chase v. Denny*, 130 Mass. 566, was made by this court in *Deering v. Cobb*, 74 Me. 332, 43 Am. Rep. 596.

In *Blanchard v. Cooke*, 144 Mass. 207, 11 N. E. 83, the court say: "The only apparent change in our decisions is, that by the recent cases possession of after-acquired chattels rightfully taken by a mortgagee under the power contained in the mortgage, if the possession is retained, vests the title in the mortgagee as against third persons, and a delivery by the mortgagor is no longer held to be essential. . . . Our recent decisions have therefore proceeded upon the theory, which by a dictum in *Jones v. Richardson*, 10 Met. 481, was denied, that when the chattels are acquired and are identified by the terms of the mortgage, the title passes as between the parties, and a possession rightfully obtained by the mortgagee, and retained by him, vests the title in him as against third per-

it has been seen the mortgage was duly recorded, and possession of the goods therein described, including the after-acquired property, was rightfully taken and retained by the mortgagee by virtue of the consent of the mortgagor previously granted on the ²⁹⁵ stipulation of the mortgage. It is universally conceded, as before stated, that possession taken by the mortgagee, by virtue of the mortgagor's consent given after the property is acquired, is to be deemed equivalent to a voluntary delivery by the mortgagor, and such a "new act" as will effectuate the previous agreement. It has now been shown by a uniform current of modern decisions that the law has advanced another step, and now holds that actual possession of such property taken by the mortgagee in the exercise of an authority expressly granted in the mortgage, is also equivalent to a voluntary delivery by the mortgagor, and if such possession is retained, it makes good the mortgagee's lien as against an attaching creditor. Statutory provisions for the registration of chattel mortgages in effect precisely like our own existed in all the states from which the foregoing decisions have been cited, but in no case directly involving the question now before the court have they been held to be in conflict with the equitable doctrine above stated.

It is uniformly conceded that if the mortgagee takes possession of after-acquired property, in accordance with an express agreement in the mortgage, with the consent of the mortgagor given after he acquired title, it will be sufficient to perfect the mortgagee's lien. But a stipulation in the mortgage authorizing the mortgagee to take possession at any time is not a mere license revocable at the pleasure of the mortgagor, but a valid and binding contract which continues in force until performed. It is therefore difficult to understand upon what principle of justice or conception of common right a mortgagor can be permitted to defeat the acknowledged equitable rights of the mortgagee by simply withholding his consent in violation of his express stipulation in the mortgage. According to this doctrine, if the mortgagee seeks to exercise his right to take possession of the property under the mortgage, and the mortgagor gives an express assent not required by the terms of the mortgage, the mortgagee's equitable rights are preserved. On the other hand, if the mortgagor objects, in violation of his agreement, or stands mute, the mortgagee's possession, though expressly authorized by the contract of the

parties, will not suffice and his rights are lost. Such a rule cannot be founded on principles of right and justice.

²⁹⁶ And it will now be seen that such a rule has no stronger support in authority than it has in reason and equity.

In *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706, the reasons for the contrary rule are thus stated: "A stipulation that future-acquired property shall be holden as security for some present engagement is an executory agreement of such a character, that the creditor with whom it is made may, under it, take the property into his possession, when it comes into existence, and is the subject of transfer by his debtor, and hold it for his security; and whenever he does so take it into his possession before any attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement, may hold the same; but, until such an act done by him, he has no title to the same; and that such act being done and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge. The executory agreement of the owner, in such case, is a continuing agreement, so that when the creditor does take possession under it, he acts lawfully under the agreement of one then having the disposing power, and this makes the lien good."

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sons whose rights have not attached ²⁹⁷ before the possession is taken, and that delivery by the mortgagor is not necessary.

In *Bennett v. Bailey*, 150 Mass. 259, 22 N. E. 916, it was ruled at the trial that the taking of possession of such after-acquired property by the defendant without any delivery to him by the plaintiff was insufficient, but exceptions to this ruling were sustained. In the opinion the court say: "It was settled in *Blanchard v. Cooke*, 144 Mass. 207, 11 N. E. 83, after a careful review and a full consideration of the authorities, that possession of after-acquired personal property, rightfully taken and maintained by a mortgagee, under a mortgage purporting to cover it, gives him a title good not only against the mortgagor, but even against an assignee in insolvency or an attaching creditor. That principle is applicable to the present case."

In *Rowan v. Sharps' Rifle Mfg. Co.*, 29 Conn. 282, where a mortgage of a factory and its equipments embraced in its terms such machinery and stock as should be afterward purchased and placed upon the premises, and the mortgagee had afterward taken possession of the factory with such after-acquired property, it was held that whatever effect was to be given to the provision in itself, it became operative upon possession being taken by the mortgagee. This was reaffirmed in *Walker v. Vaughn*, 33 Conn. 577. See, also, *Williams v. Briggs*, 11 R. I. 476, 23 Am. Rep. 518; *McLoud v. Wakefield*, 70 Vt. 558, 43 Atl. 179; *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644; *Lamson v. Moffatt*, 61 Wis. 153, 21 N. W. 62; *Fisher v. Syfers*, 109 Ind. 514, 10 N. E. 306.

It may be deemed worthy of observation that the rights of attaching creditors were not directly involved in any of the cases hereinbefore cited from other states; but if any authority is required to establish the proposition that an attaching creditor cannot acquire any rights, either statutory or equitable, superior to those of a mortgagee who has taken and retained possession of the property by virtue of an express contract in the mortgage authorizing him so to do, it will be furnished by the following well-reasoned decisions from courts of eminent respectability.

In *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711, 43 N. E. 1045, the mortgage contained a stipulation like that in the case at bar authorizing the mortgagee to take possession of the property, and the court thus discussed the ²⁹⁸ question in the opinion: "The contention of the plaintiffs in error on

this point is, that it is essential to the acquisition of a valid lien on the after-acquired property under such a mortgage that the mortgagor voluntarily deliver the property to the mortgagee, or give his consent to the mortgagee's possession when taken; and that the lien does not arise if, as in this case, the mortgagee of his own accord take the possession. . . . Acting under this contractual authority in obtaining possession of the property, the consent of the mortgagor thereto at the time can neither be necessary to the legality of the possession, nor can it in any way add to the rights of the mortgagee. Certainly, after possession so taken, the mortgagor could not successfully assert any claim to the property, for his contract would prevent him; and as whatever title he theretofore had to the property is thereby extinguished, nothing remains to be reached by his attaching or other creditors, unless it be such surplus as should remain after satisfying the mortgagee's debt."

In *Barton v. Sitlington*, 128 Mo. 164, 30 S. W. 514, a chattel mortgage contained an agreement that it should cover all merchandise that might subsequently be added to the mortgagor's stock, and it was held that the mortgagee acquired a valid lien by taking possession under the mortgage before the rights of other creditors intervened. In the opinion, the court say: "By the express terms of the mortgages it was provided that if the mortgagees should consider themselves insecure, they might take possession of any part or all of said merchandise, and the taking possession under an order of delivery, issued in the action of replevin instituted by the plaintiffs to obtain possession under the mortgages, was but a taking by and with an agreement entered into by the mortgagor, and was all that was necessary. . . . The taking possession of such property by the mortgagees under the authority given in the mortgages before the rights of other creditors had intervened created a valid lien on such property: *Jones on Chattel Mortgages*, secs. 164-168; *Keating v. Hannenkamp*, 100 Mo. 161, 13 S. W. 89; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706."

So, also, in *Tennis v. Midkiff*, 55 Ill. App. 642, and *Quirique v. Dennis*, 24 Cal. 154, it was held "that where a mortgage provides that it shall cover after-acquired property, and the mortgagee takes ²⁰⁰ possession of such property, his claim is prior to that of a subsequent attaching creditor."

In 6 *Cyclopedia of Law and Procedure*, 1051, the result of all the authorities is stated as a settled and unquestioned rule

that, with respect to after-acquired property, "an actual transfer of possession to the mortgagee, either by voluntary delivery from the mortgagor, or by the exercise of a power to take possession contained in the mortgage, is such a new act as will constitute a ratification of the mortgage." To the same effect is the rule formulated in 5 American and English Encyclopedia of Law, 980.

Nor is it apparent that such a contract respecting after-acquired property is in contravention of any established rules of public policy. Indeed, it would seem to be more in obedience to the principles of sound morality and consideration of public duty to sanction the act of the mortgagee in taking and holding the property in accordance with the express terms of the contract, rather than the act of the mortgagor or an attaching creditor in taking it away from him in violation of the agreement.

It is accordingly the opinion of the court that the action is maintainable and that the entry must be exceptions sustained.

MORTGAGE OF PROPERTY TO BE AFTERWARD ACQUIRED.

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I. At Law.

- a. The General Rule.—At common law a mortgage could operate only on property actually in existence at the time of giving the

mortgage, then actually or potentially belonging to the mortgagor as an incident of other property then in existence. Under the common-law rule a mortgage of chattels which the mortgagor does not own at the time of the execution of the mortgage, though he may afterward acquire them, is void in respect to the after-acquired goods as against his subsequent purchaser or attaching or judgment creditor. Nearly all of the early cases and quite a number of the late decisions maintain this rule, although the cases upon this topic of the law cannot be reconciled by any process of reasoning or on any principle of law. Among the many cases which maintain that a mortgage of property to be acquired in the future, and which at the time does not belong to the mortgagor and is not coupled with any interest in or growing out of property then belonging to him, is not the subject of a mortgage, and that a mortgage thereof is void per se as to attaching creditors of, or subsequent purchasers from, the mortgagor, may be cited the following cases: *Purcell's Admr. v. Mather*, 35 Ala. 570, 76 Am. Dec. 307; *Burns v. Campbell*, 71 Ala. 271; *Hunt v. Bullock*, 23 Ill. 320; *Christian & Craft G. Co. v. Michael*, 121 Ala. 84, 77 Am. St. Rep. 30. 25 South. 571; *Ross v. Wilson*, 7 Bush, 29; *Long v. Hines*, 40 Kan. 220, 10 Am. St. Rep. 192, 19 Pac. 796; *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 395; *Jones v. Richardson*, 10 Met. 481; *Pettis v. Kellogg*, 7 Cush. 456; *Chesley v. Josselyn*, 7 Gray, 489; *Ferguson v. Wilson*, 122 Mich. 97, 80 Am. St. Rep. 543, 80 N. W. 1006; *Steele v. Ashenfelter*, 40 Neb. 770, 42 Am. St. Rep. 694, 59 N. W. 361; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Otis v. Sill*, 8 Barb. 102; *Farmers' Loan etc. Co. v. Long Beach etc. Co.*, 27 Hun, 89; *Beebe v. Richmond etc. Co.*, 13 Misc. Rep. 737, 35 N. Y. Supp. 1; *Williams v. Briggs*, 11 R. L. 476, 23 Am. Rep. 518; *Phelps v. Murray*, 2 Tenn. Ch. 746; *Single v. Phelps*, 20 Wis. 398; *Mowry v. White*, 21 Wis. 417; *Hunter v. Bostworth*, 43 Wis. 583; *Case v. Fish*, 58 Wis. 56, 15 N. W. 808.

b. **As Against Creditors.**—Under the common-law rule a mortgage of property to be acquired in the future is constructively fraudulent as to the creditors of the mortgagor other than the mortgagee, and while it has been said that such a mortgage is good against creditors until attacked for fraud, it is sufficient, in order to constitute such an attack, to state that the property sought to be subjected was obtained subsequently to the giving of the mortgage, and is only embraced in it by a clause attempting to cover after-acquired property: *Leth v. Carty*, 85 Ky. 591, 4 S. W. 314. Thus a stipulation in a mortgage of personal property that property subsequently purchased by the mortgagor shall be subject to the same lien does not, without any other or further act, bind such after-acquired property, but it does not vitiate the mortgage as to property to which it attached at the time of its execution: *Codman v. Freeman*, 3 Cush. 306.

c. **As Between the Parties.**—Of course a mortgage of after-acquired property is valid as to the immediate parties; at least this is the result of cases examined: *Ludwig v. Kipp*, 20 Hun, 265; *Ken-*

nedy v. National Union Bank, 23 Hun, 494; Perry v. White, 111 N. C. 197, 16 S. E. 172. A number of cases are also found which maintain that even at law a recorded mortgage of chattels may be made to cover future acquisitions, and that the rights of the mortgagee therein will be enforced against all persons having notice, even though they be attaching creditors of the mortgagor: Scharfenburg v. Bishop, 35 Iowa, 60; and that a chattel mortgage may lawfully cover after-acquired property and is not void as against the mortgagor's creditors simply because it contains a clause covering such property: Louden v. Vinton, 108 Mich. 313, 66 N. W. 222.

d. **On Property to Take the Place of that Owned by the Mortgagor.** In Peabody v. Landon, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781, the court decided that a chattel mortgage, duly recorded, declaring that the mortgagor may remain in possession, and sell the mortgaged property as opportunity presents, the property as sold to be added to and replaced with other of like kind and of sufficient value to keep the security of the mortgagee good, but not providing that the avails of sales shall be accounted for by the mortgagor, is prima facie valid, as against an attaching creditor of the mortgagor. A mortgage making such after-acquired and substituted property subject to its terms is valid: Peabody v. Landon, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781. See the note appended to this case as reported in 15 Am. St. Rep. 912-917. It was also decided in an early case in Missouri that a mortgage of property with a clause covering after-acquired goods, and giving the mortgagor the right to possession and to sell in the regular course of business, was not void on its face by reason of such provision as against the mortgagee and in favor of creditors of the mortgagor: State v. Tasker, 31 Mo. 445; and this rule has been uniformly followed in that state: Wright v. Bircher's Exr., 72 Mo. 179, 37 Am. Rep. 433; Thompson v. Foerstel, 10 Mo. App. 290; Smith-Wallace Shoe Co. v. Wilson, 63 Mo. App. 326. See, also, post, subd. IV.

e. **Cases Affirming the General Validity of.**—Authority is not wanting to sustain the proposition that independent of any equitable consideration or principle a chattel mortgage may validly cover after-acquired property: Washington Trust Co. v. Morse Iron Works, 106 N. Y. App. Div. 195, 94 N. Y. Supp. 495. Thus some of the cases maintain that where persons by their contract in clear terms express an intention to create a mortgage lien upon personal property not then owned, but to be subsequently acquired by the mortgagor, whether then in being or not, the mortgage attaches as a lien on the property as soon as the mortgagor acquires it, as against him and all claiming under him with notice or by voluntary conveyance, the same as if the property had belonged to him when the mortgage was executed: Morton v. Williamson, 72 Ark. 390, 81 S. W. 235; Ludlum v. Rothchild, 41 Minn. 218; Sillers v. Lester, 48 Miss. 513, 43 N. W. 137; Brown v. Dail, 117 N. C. 41, 23 S. E. 45. In Judge v. Jones, 99 Tenn. 20, 42 S. W. 4, the court said: "It is now well

settled that a valid mortgage may be made of property not in existence at the date of the mortgage, so as to operate and attach to it as soon as it comes into existence, and make it an effective security for the debt provided for in the mortgage." Under this rule a mortgage of all future book accounts is valid and includes all unpaid accounts which are the proper subject of a book entry whether or not such entry has been made: *Dunn v. Michigan Club*, 115 Mich. 409, 73 N. W. 386. Or a chattel mortgage of personal property covering additions to maintain its condition and efficiency, is valid as against the mortgagor, and will be enforced as to the additions made for the purpose named, by a purchaser from the mortgagor who assumes his obligations under the mortgage, as against judgment creditors subsequently levying on the property: *Stoll v. Silson*, 65 N. J. Eq. 552, 56 Atl. 710; *In re Sentenne & Greene Co.*, 120 Fed. 436.

f. Expression of Intention to Cover Subsequently Acquired Property.—The intention of the parties that the mortgage shall take effect upon and include property not then owned by the mortgagor, but to be subsequently acquired by him, must be expressed by the mortgage itself in words sufficient to carry the intention into effect: *Montgomery v. Chase*, 30 Minn. 132, 14 N. W. 586; *Van Vechten v. McKone*, 69 Hun, 510, 23 N. Y. Supp. 428. A chattel mortgage will not cover after-acquired property unless the intention that it shall do so is fully and clearly expressed: *Letourna v. Ringgold*, 3 Cranch C. C. 103, Fed. Cas. No. 8282. Thus a mortgage conveying a stock of goods and all books of account and rights of credit arising out of the business will not cover accounts subsequently accruing upon the sale of the goods by the mortgagor with the consent of the mortgagee, in the regular course of trade: *Lormer v. Allyn*, 64 Iowa, 725, 21 N. W. 149.

g. Property Acquired by Conditional Sale.—A mortgage of after-acquired chattels of the mortgagor does not include such property delivered to him under a conditional contract of sale: *General Electric Co. v. Transit Equipment Co.*, 57 N. J. Eq. 460, 42 Atl. 101. And if it comes under the mortgage at all, it comes under the terms of such sale: *Washington Trust Co. v. Morse Iron Works*, 106 N. Y. App. Div. 195, 94 N. Y. Supp. 495.

h. Subordination of Mortgagee's Rights to Pre-existing Liens and Interests.—A mortgage covering all after-acquired property attaches only to such interest therein as the mortgagor acquires, subject to any liens under which it comes into the mortgagor's possession. Thus if the mortgagor purchases property subject to a lien for the purchase price, such lien is not displaced by the general mortgage: *United States v. New Orleans R. R.*, 12 Wall. 362, 20 L. ed. 434. An after-acquired property clause in a mortgage attaches to property to which the mortgagor subsequently acquires either the legal or equitable title, but subject to the limitation that the mortgagee is not a pur-

chaser for value as to such property, and can take by way of lien no greater interest than that acquired by the mortgagor, and the mortgagee's lien is subject to all known liens or equities, valid against the mortgagor, which arise in the act of purchase or acquisition, and which qualify the scope and extent of the ownership: *Harris v. Youngstown Bridge Co.*, 33 C. C. A. 69, 90 Fed. 322. The after-acquired property clause in a mortgage can only take effect as to such property subject to the vendor's lien thereon, unless there are reasons which render the enforcement of such lien inequitable as between the vendor and the mortgagee: *Venner v. Farmers' Loan etc. Co.*, 33 C. C. A. 95, 90 Fed. 348.

II. In Equity.

a. **General Validity of.**—Many of the cases, while they hold that under the doctrine of the common law a mortgage covers only the existent property of the mortgagor, no matter what its terms, and does not transfer any right to after-acquired property, yet admit that it is otherwise in equity, and that though that court recognizes the rule of the common law, yet it holds such conveyance operative as an executory agreement binding on the property when acquired, the mortgagor holding the property and equity enforcing the trust, and in some of the decisions the adjudications rest upon the ground of an equitable lien: *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 395; *Sillers v. Lester*, 48 Miss. 513; *Cayce v. Stovall*, 50 Miss. 396; *Keating v. Hannenkamp*, 100 Mo. 161, 13 S. W. 89; *National Sav. etc. Bank v. Small*, 7 Fed. 837. "At common law no mortgage was valid except upon property in existence and actually or potentially the property of the mortgagor when the mortgage is given. This doctrine has been modified to a varying extent in different jurisdictions. We need not consider the much discussed question whether a mortgage upon subsequently acquired property is valid as to third persons who have acquired rights by attachment or levy of an execution. The decisions on that point are diametrically opposed, and by courts of the highest dignity. In the present instance, the controversy is between the mortgagor and the assignee of the purchaser at the mortgage sale. No rights of third persons have intervened. In such cases the great weight of authority now is in favor of the validity of such contract in equity between the parties": *Perry v. White*, 111 N. C. 197, 16 S. E. 172.

b. **Mode of Construing and Giving Effect to.**—The rule in equity as to after-acquired property, when the mortgagee has not taken possession, and when the mortgagor has done no act to confirm the mortgage, is that, while such mortgage does not pass the title as to such property, it is operative as an executory agreement, which attaches to the property, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being regarded as a trustee for him. In equity the estate attaches as soon as the property is acquired by the debtor. At law property not existing, but to be acquired at a future time, is not assignable; in equity it is trans-

ferable. When the property is acquired by the mortgagor, equity will transfer it, and when, after such acquisition, it is taken into possession by the mortgagee, it is good at law against all persons, creditors, with liens attaching after such change of possession included: *Tennis v. Midkiff*, 55 Ill. App. 642. This rule was applied in *Perkins v. Loan etc. Bank*, 43 S. C. 39, 20 S. E. 759, where the court said that "it seems to us that the true rule is stated and the proper distinction is drawn in the following quotation from *Parker v. Jacobs*, 14 S. C. 112, 37 Am. Rep. 724: 'There can be no doubt that the rule at law is that it is necessary to the validity of the mortgage that the mortgagor should have a present property, either actual or potential, in the thing mortgaged, but in equity the rule is different.' As is said by Judge Story in *Mitchell v. Winslow*, 2 Story, 630: 'It seems to be the clear result of all of the authorities that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or personal property, whether then owned by the assignor or not, or, if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice, or in bankruptcy.' This doctrine is fully established by the case of *Holroyd v. Marshall*, 10 H. L. Cas. 191, and is recognized in *McCaffrey v. Woodin*, 65 N. Y. 459, 22 Am. Rep. 644. We take it, therefore, that a mortgage on personal property, in which the mortgagor has no present interest, either actual or potential, is ineffectual to transfer the legal title to such property when subsequently acquired by the mortgagor, unless, when acquired, possession thereof is given to the mortgagee, or taken by him under the mortgage: *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706; *Williams v. Briggs*, 11 R. I. 476, 23 Am. Rep. 518, and many cases there cited; but that in equity such a mortgage is effectual to charge the property as soon as it is acquired by the mortgagor, and before possession is obtained by the mortgagee, with an equitable lien which will prevail against a subsequent judgment or attaching creditor": *Perkins v. Loan etc. Bank*, 43 S. C. 39, 20 S. E. 759. Mortgages of future acquisitions of property are upheld in equity and liberally construed. Equity treats a mortgage of property to be subsequently acquired as a contract binding in conscience to execute a mortgage upon it the instant it comes into being and will enforce specific performance. It does more, and considers it as already done, if no specific performance is requested, and then binds everybody to respect the equitable lien who knows of it, or, without knowing of it, has got the property without valuable consideration: *Little Rock etc. Ry. Co. v. Page*, 35 Ark. 304. At common law things not having an existence, actual or potential, were not the subject of sale, assignment, or mortgage, but in a court of equity, such mortgage creates an equitable lien or interest which attaches to the property when it comes into existence, or is acquired, and which the court will protect and enforce against all other

persons than bona fide purchasers without notice: *Hurst v. Bell*, 72 Ala. 336; *Cummings v. Consolidated etc. Water Co.*, 27 R. I. 195, 61 Atl. 353; *Beall v. White*, 94 U. S. 382, 24 L. ed. 173. A mortgage of personal property to be subsequently acquired creates a lien on such property when acquired, which is valid in equity against the mortgagor or his voluntary assignee: *Williams v. Winsor*, 12 R. I. 9. Such equitable lien is valid as against the mortgagor and also as against a subsequent mortgagee with notice: *Keating v. Hannenkamp*, 100 Mo. 161, 13 S. W. 89. Some of the cases decide that as a general rule at law a mortgage of property to be acquired in future is void, and that if it can be upheld in equity, it is only valid as a contract to assign when the property shall be acquired, and not as an assignment of a present interest, and that if enforceable in equity at all, it can only be enforced as a right under a contract, and not as a trust attached to the property: *Ross v. Wilson*, 7 Bush, 29; *Otis v. Sill*, 8 Barb. 102. The true rule and the better doctrine is perhaps the best stated and most fully expounded in *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682, to the effect that at common law a chattel mortgage could only operate upon property in actual existence at the time, and was not valid as to goods not then in esse or which did not belong to the mortgagor actually or potentially. The legal consequence of the forfeiture of the condition of a chattel mortgage is to vest in the mortgagee the right to possession and an absolute right to the property. He may sell and pass the title without foreclosure, especially after notice to the mortgagor to redeem. But in modern times courts of equity, to give effect to contracts where public policy would not be contravened or fraud perpetrated, have imparted the virtue of securities by way of liens to many instruments which courts of law would not regard as operating as a grant or assignment of the thing. When it is said that a mortgage of a thing not in esse is void at law nothing more is meant than that the instrument does not pass the title to the after-acquired property.

III. Effect of Taking Possession.

In many jurisdictions a mortgage of personal property to be subsequently acquired is, of itself, ineffectual to vest in the mortgagee a legal title to the property, even after its acquisition without some further act on his part, and still in all of such jurisdictions it is decided that if after the acquisition of such after-acquired property, the mortgagee by delivery from, or by consent of, the mortgagor, takes possession of the property under the mortgage conveyance, the title thereto both in law and in equity vests in the mortgagee without further conveyance: *Burford v. First Nat. Bank*, 30 Ind. App. 384, 66 N. E. 78; *Cook v. Corthell*, 11 R. I. 482, 23 Am. Rep. 518. This is the rule in those states where it is squarely maintained that a mortgage of personal property to be after-acquired conveys no title to such property when acquired, which is valid at law as against the mortgagor, his assignee in insolvency, or his creditors.

unless after such acquisition possession of such property is given to or taken by the mortgagee under the mortgage: *Harriman v. Woburn Electric Light Co.*, 163 Mass. 85, 39 N. E. 1004; *Moody v. Wright*, 13 Met. 17, 46 Am. Dec. 706; *Chapman v. Weimer*, 4 Ohio St. 481; *Williams v. Briggs*, 11 R. I. 476, 23 Am. Rep. 518; *Farmers' Loan etc. Co. v. Commercial Bank*, 41 Wis. 207. The theory upon which these cases are decided is that a stipulation in a mortgage that it shall constitute a lien on property subsequently acquired by the mortgagor, while not creating a present lien, nor a lien when and as the goods are acquired by the mortgagor, yet constitutes a valid contract for a lien on such after-acquired property, and possession thereof lawfully taken by the mortgagee has the same effect of protecting it in his hands from the claims of the mortgagor's creditors, as has possession taken of the property owned by the mortgagor at the time of the execution of the mortgage: *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 495; *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711, 43 N. E. 1045. A stipulation in a chattel mortgage that it shall include subsequently acquired property is an executory agreement of such a character that the mortgagee may under it take the property into his possession when it comes into existence and hold it for his security, and if he reduces it to his possession before any other lien has attached, he will hold it clear of after-attaching liens: *Pinkstaff v. Cochran*, 58 Ill. App. 72. After-acquired property may be mortgaged, and it will be subject to the mortgage lien if the mortgage is properly executed, acknowledged, and recorded, and if possession is taken of the property before any other lien has attached: *Gregg v. Sanford*, 24 Ill. 17, 76 Am. Dec. 719, and extended note, pp. 723-732. A clause in a chattel mortgage that it shall cover all after-acquired personalty of the same nature as that mortgaged is valid, and the mortgagee acquires a valid lien by taking possession under the mortgage before the rights of other creditors intervene: *Petring v. Chrisler*, 90 Mo. 649, 3 S. W. 405; *Peabody v. Landon*, 61 Vt. 318, 15 Am. St. Rep. 903, 17 Atl. 781; *Barton v. Sitlington*, 128 Mo. 164, 30 S. W. 514; *Moore v. Byrum*, 10 S. C. 452, 30 Am. Rep. 58. A mortgage of personal property not yet acquired by the mortgagor will take effect as against him, and others not having acquired precedent rights, on the title becoming vested in the mortgagee by his having taken possession of such after-acquired property: *Walker v. Vaughn*, 33 Conn. 577. A mortgage upon chattels thereafter to be acquired by the mortgagor does not give title to those chattels to the mortgagee when they are acquired by the mortgagor, but if they are taken by the mortgagee into his possession before the intervention of any rights of third persons, he will hold them under a valid lien by operation of the provisions of the mortgage in regard to them: *Tennis v. Midkiff*, 55 Ill. App. 642. If a mortgage of a factory and its equipments embraces in its terms such machinery and stock as shall be afterward purchased and placed upon the premises, and the mortgagee afterward takes possession of the factory, together with such sub-

sequently acquired property, no matter what effect is to be given to the provision as to after-acquired property, in itself, it becomes operative upon possession being taken by the mortgagee so as to make him chargeable with the property in favor of later encumbrances, as to the surplus part of the mortgage fund: *Rowan v. Sharps' Rifle Mfg. Co.*, 29 Conn. 282. A chattel mortgage on after-acquired property, under which the mortgagee has taken possession with the mortgagor's consent, is valid against the mortgagor's trustee in bankruptcy, in the absence of an express finding that such possession was taken for the purpose of affording a preference to some creditor or creditors, although such possession was acquired within four months prior to the date of the mortgagor's petition in bankruptcy and with knowledge that the mortgagor was insolvent and contemplating bankruptcy proceedings. Nor is this result prevented by the fact that when the mortgagee took possession of the property it was subject to an attachment which was invalidated by the bankruptcy proceedings: *Thompson v. Fairbanks*, 75 Vt. 361, 104 Am. St. Rep. 899, 56 Atl. 11. To the same effect: *McLoud v. Wakefield*, 70 Vt. 558, 43 Atl. 179.

IV. After-acquired Stock of Goods.

a. **General Rule.**—Although the authorities are conflicting and irreconcilable, the greater number of cases maintain that a mortgage of a stock of goods, together with any additions made thereto, or other goods purchased and placed with the original stock by way of replenishing it, is valid not only as between the parties but also as to attaching or judgment creditors of the mortgagor. The ruling of these cases is that a chattel mortgage of all the goods or stock of merchandise then in a store or storehouse, including all additions thereto, and all that may at any time during the continuance of the mortgage be purchased or obtained to replenish or replace such stock, shows the intention of the parties to mortgage as after-acquired property the additions to, or stock purchased to replenish, the original stock on hand at the date of the mortgage, and that such mortgage is valid as between the parties and against attaching or judgment creditors of the mortgagor: *McKay v. Shotwell*, 6 Dak. 124, 50 N. W. 622; *Wardlaw v. Mayer*, 77 Ga. 620; *Scharfenburg v. Bishop*, 35 Iowa, 60; *Stephens v. Pence*, 56 Iowa, 257, 9 N. W. 215; *American Cigar Co. v. Foster*, 36 Mich. 368; *Cadwell v. Pray*, 41 Mich. 307, 2 N. W. 52; *Hudson v. McKale*, 107 Mich. 22, 61 Am. St. Rep. 310, 64 N. W. 727; *State v. Byrne*, 35 Mo. 147; *Page v. Kendig* (N. J. Eq.), 7 Atl. 878; *Hushkind v. Israel*, 18 S. C. 151; *Akers v. Rowan*, 33 S. C. 451, 12 S. E. 165, 10 L. R. A. 705; *Brett v. Carter*, 2 Low. C. C. 458, Fed. Cas. No. 1844. A chattel mortgage upon after-acquired goods, it has been decided, is valid as against a bona fide purchaser from the mortgagor with notice: *Robson v. Michigan Cent. R. R. Co.*, 37 Mich. 70.

b. **Modifications or Limitations of the General Rule.**—Other cases limit the rule by providing that a stipulation in a chattel mortgage

that it shall constitute a lien on any goods that the mortgagor may thereafter purchase, and place in stock as an addition thereto, and to supply the place of those sold, while not creating a present lien, nor a lien when and as the goods are purchased, constitutes a valid contract for a lien on such after-acquired property, and possession thereof lawfully taken by the mortgagee has the same effect of protecting it in his hands from the claims of the mortgagor's creditors, as has possession taken of the property owned by the mortgagor at the time of the execution of the mortgage: *Simmons v. Jenkins*, 76 Ill. 479; *Pinkstaff v. Cochran*, 58 Ill. App. 72; *Barton v. Sitlington*, 128 Mo. 164, 30 S. W. 514; *Gregory v. Tavenner*, 38 Mo. App. 627; *Chapman v. Weimer*, 4 Ohio St. 481; *Francisco v. Ryan*, 54 Ohio St. 307, 56 Am. St. Rep. 711, 43 N. E. 1045. The possession of after-acquired property, rightfully taken and maintained by a mortgagee under a mortgage purporting to cover it, gives him a title good, not only against the mortgagor, but even against an assignee in insolvency or an attaching creditor: *Bennett v. Bailey*, 150 Mass. 257, 22 N. E. 916. A provision in a chattel mortgage of a stock of goods that the mortgagee shall replenish the stock and that the lien of the mortgage shall extend to the after-acquired property is valid and effectual to vest in the mortgagee both a legal and equitable right in such after-acquired property, if possession is obtained before the liens of third persons attach: *Burford v. First Nat. Bank*, 30 Ind. App. 384, 66 N. E. 78. If a chattel mortgage is given upon a stock of goods providing for the payment of the mortgage indebtedness out of the proceeds of the sale of goods, and the mortgagee enters into possession of the stock for the purpose of controlling the application of the proceeds, the lien of the mortgage will apply to goods subsequently purchased and mingled with the stock for sale, although the mortgage does not in terms cover such after-acquired goods: *Armstrong v. Ford*, 10 Wash. 64, 38 Pac. 866.

c. Denial as Against Creditors.—On the other hand, a number of cases maintain the doctrine that a chattel mortgage of a stock of goods, purporting to embrace all other such property which may afterward, during the life of the mortgage, be substituted therefor or added thereto, is void as against creditors, as to the after-acquired property, although valid as to the stock of goods as it existed at the time of the execution of the mortgage. These cases hold that no lien on after-acquired goods is created by a provision in a mortgage of a stock of goods that all stock replaced after the sale of any stock shall be substituted for the stock originally covered thereby. Such a provision is at law a nullity, though it does not, of itself, render the mortgage void as fraudulent: *Chisolm v. Chittenden*, 45 Ga. 213; *Goodrich v. Williams*, 50 Ga. 425; *Hamilton v. Rogers*, 3 Md. 301; *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170; *First Nat. Bank v. Lindenstruth*, 79 Md. 136, 47 Am. St. Rep. 366, 28 Atl. 807; *Clary v. Lowry*, 51 Miss. 879; *Gardner v. McEwen*, 19 N. Y. 123; *Levy v. Welsh*, 2 Edw. Ch. 438; *Carpenter v. Simmons*, 1 Robt.

360, 28 How. Pr. 12; *Yates v. Olmstead*, 56 N. Y. 632. A mortgage of the whole of a stock of goods in the possession of the mortgagor, and also such additions thereto as might thereafter be made from time to time, it has been held, conveys only the stock on hand at the time of the execution of the mortgage: *Wagner v. Watts*, 2 Cranch C. C. 169, Fed. Cas. No. 17,040. It has also been held that a mortgage of a stock of goods, containing a clause that goods which might be purchased thereafter by the mortgagor, to replace those enumerated, as also all additions to the stock should be held for the payment of the notes recited, will not transfer to the mortgagee goods afterward purchased, and put in stock by the mortgagor: *Chapin v. Cram*, 40 Me. 561. Some of the cases also hold that a mortgage upon a stock of merchandise, under a general description, attaches only to such merchandise as was in the stock when the mortgage was executed, and not to any afterward purchased: *Rockford Watch Co. v. Manifold*, 36 Neb. 801, 55 N. W. 236; *Rhodes v. Stephens*, 61 Wis. 388, 21 N. W. 239.

V. Unplanted Crops.

a. **Validity and Operation of Mortgages When.**—Although there is some conflict, the rule as established by an overwhelming weight of authority is that a chattel mortgage of unplanted crops to be grown by the mortgagor on land owned by him or rightfully in his possession, as tenant or otherwise, is valid, and takes effect as a lien when the crop comes into existence, not only as between the parties to the mortgage, but also as against creditors of the mortgagor, or his subsequent mortgagee: *Cobb v. Daniel*, 105 Ala. 335, 16 South. 882; *Jarrett v. McDaniel*, 32 Ark. 598; *Bell v. Radcliff*, 32 Ark. 645; *Argues v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Wilkerson v. Thorp*, 128 Cal. 221, 60 Pac. 679; *Headrick v. Brattain*, 63 Ind. 438; *Wheeler v. Becker*, 68 Iowa, 723, 28 N. W. 40; *Norris v. Hix*, 74 Iowa, 524, 38 N. W. 395; *Wade v. Strachan*, 71 Mich. 459, 39 N. W. 582; *Minnesota Linseed Oil Co. v. Maginnis*, 32 Minn. 193, 20 N. W. 85; *Miller v. McCormick etc. Co.*, 35 Minn. 399, 29 N. W. 52; *Ambuehl v. Matthews*, 41 Minn. 537, 43 N. W. 477; *Simmons v. Anderson*, 44 Minn. 487, 47 N. W. 52; *Plano Mfg. Co. v. Hallberg*, 61 Minn. 528, 63 N. W. 1114; *Everman v. Robb*, 52 Miss. 653, 24 Am. Rep. 682; *McConn v. Mayer*, 65 Miss. 537, 5 South. 98; *Stadeker v. Loeb*, 67 Miss. 200, 6 South. 87; *Cotten v. Willoughby*, 83 N. C. 75, 35 Am. Rep. 564; *Harris v. Jones*, 83 N. C. 317; *Rawlings v. Hunt*, 90 N. C. 270; *Rountree v. Britt*, 94 N. C. 104; *Watkins v. Wyatt*, 9 Baxt. 250, 40 Am. Rep. 90.

A chattel mortgage covering a crop not yet planted may be filed in the office of the recorder of the county where the land described in the mortgage is situated, and such filing is constructive notice to third persons of the rights of the mortgagee. In such case the filing gives priority, and the lien will attach as soon as the crop comes into existence by the agency of the mortgagor: *Hostetter v. Brooks Elevator Co.*, 4 N. Dak. 357, 61 N. W. 49. If the vendor of

land retains a chattel mortgage on the future crop for the payment of the purchase money, and the title to the crop is to be absolute only when the conditions of the sale have been complied with, the mortgagee's right to the crop, until the purchase money is paid, is superior to that of beneficiaries under a trust deed, made subsequently to the registration of the mortgage, to secure them in the advancement of money to his vendee: *Polk v. Foster*, 7 Baxt. 98. A subsequent mortgage on the crop to secure advancements of supplies, there being nothing to show for what purpose the supplies were furnished, does not create a prior lien: *Brown v. Miller*, 108 N. C. 395, 13 S. E. 167.

The doctrine of the national courts is that although an instrument which purports to mortgage a crop, the seed of which has not yet been sown, cannot at the time operate as a mortgage of the crop, yet when the seed of the crop intended to be mortgaged has been sown and the crop grows, a lien attaches: *Butt v. Ellett*, 19 Wall. 544, 22 L. ed. 183; *Senter v. Mitchell*, 5 McCrary, 147, 16 Fed. 206.

The rule of some of the cases is that a mortgage in advance of a crop to be sown and raised on the land in possession of the mortgagor is valid and will be treated as an executory agreement to mortgage, which will take effect, if duly recorded, when the crop is sown and comes into existence, as against creditors and subsequent purchasers from the mortgagor: *Grand Forks Nat. Bank v. Minneapolis etc. Co.*, 6 Dak. 357, 43 N. W. 806; *Wood etc. Co. v. Minneapolis etc. Co.*, 48 Minn. 404, 51 N. W. 378.

It is one of the essentials to the validity of such a mortgage that the place where the crop is to be planted and produced be designated with sufficient certainty to identify it: *Wade v. Strachan*, 71 Mich. 459, 39 N. W. 582; *Wood etc. Co. v. Minneapolis etc. Co.*, 48 Minn. 404, 51 N. W. 378; *Rountree v. Britt*, 94 N. C. 104; *Brown v. Miller*, 108 N. C. 395, 13 S. E. 167.

Even in some states where a mortgage of an unplanted crop is deemed void at law, it is maintained that a lien attaches in equity under such a mortgage as soon as the crop comes into existence, and in a proceeding to foreclose will be enforced against the mortgagor and those holding under him with record notice: *Apperson v. Moore*, 30 Ark. 56, 21 Am. Rep. 170; *Driver v. Jenkins*, 30 Ark. 120; *Roberts v. Jacks*, 31 Ark. 597, 25 Am. Rep. 584.

The rule in Alabama is that at common law unplanted crops, not having an existence, actual or potential, are not the subject of a mortgage, but in a court of equity such mortgage creates an equitable interest, which attaches to the crop when it comes into existence, which such court will protect and enforce against all other persons than bona fide purchasers without notice, and for the conversion or illegal disposition of such property, with notice of the lien created by the mortgage, an action on the case may be maintained: *Hurst v. Bell*, 72 Ala. 336. Under such rule a mortgage of a crop which has not been planted, though valid as between the parties, does not

convey the legal title so as to enable the mortgagee, without having acquired possession of the crop, to maintain detinue or trover against third persons without notice: *Rees v. Coats*, 65 Ala. 256; *Wilkinson v. Ketler*, 69 Ala. 435.

b. **Potential Existence of Property is Essential.**—Under the principle of the common law that a chattel mortgage can only operate upon property having an actual or potential existence at the time of its execution, such mortgage can have no valid operation upon a crop given before, at, or about the time of planting it, and before it is up, or has any appearance of a growing crop. The property attempted to be mortgaged in such case cannot be said to be in existence, and not being in esse, there is nothing for the mortgage to operate upon, and it is void: *Hamlett v. Tallman* 30 Ark. 505; *Roberts v. Jacks*, 31 Ark. 597, 25 Am. Rep. 584; *Tomlinson v. Greenfield*, 31 Ark. 557; *Redd v. Burrus*, 58 Ga. 574; *Stowell v. Bair*, 5 Ill. App. 104; *Roy v. Goings*, 6 Ill. App. 162; *Hutchinson v. Ford*, 9 Bush, 318, 15 Am. Rep. 711; *Vinson v. Hollowell*, 10 Bush, 538; *Cudworth v. Scott*, 41 N. H. 456; *Milliman v. Neher*, 20 Barb. 37; *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 40 Am. St. Rep. 635, 37 N. E. 632; *Comstock v. Scales*, 7 Wis. 159; *Merchants' etc. Bank v. Lovejoy*, 84 Wis. 601, 55 N. W. 108.

In the application of the rule, as announced by the above-cited cases, it has been decided that a mortgage of a crop to be raised on a farm during a certain term, but which is not yet sown, passes no title, and the mortgagee has no claim against the purchaser of the crop for it or its value: *Hutchinson v. Ford*, 9 Bush, 318, 15 Am. Rep. 711. Nor can the landlord's lien for rent secured by such a mortgage avail against the exemption rights in favor of the tenant's family: *Vinson v. Hollowell*, 10 Bush, 538. Such a mortgage is void at law, but may, as between the parties, be regarded in equity as an executory agreement to give a lien when the property comes into existence, provided some further act is thereafter done to make the mortgage an actual and effectual lien as against creditors: *Rochester Distilling Co. v. Rasey*, 142 N. Y. 570, 40 Am. St. Rep. 635, 37 N. E. 632. A mortgage of an unplanted crop, though it conveys no legal title, is a valid executory contract as between the parties, and conveys an equity, and when consummated by delivery of the property, the legal title becomes vested in the mortgagee: *Marks v. Robinson*, 82 Ala. 69, 2 South. 292; citing *Rees v. Coates*, 65 Ala. 256. Unplanted crops to be raised in the future have no potential existence and do not pass under a mortgage thereof, and the mortgagee, without taking possession, cannot hold them as against an execution creditor of the mortgagor: *Stowell v. Bair*, 5 Ill. App. 104; but if the mortgagee obtains possession through the act or assent of the mortgagor or under the terms of the mortgage, before the rights of others have intervened, his title is perfect against them: *Roy v. Goings*, 6 Ill. App. 162; *Moore v. Byrum*, 10 S. C. 452, 30 Am. Rep. 58. A mortgage of a crop thereafter to be raised has been said to be void as against a subsequent purchaser from the mortgagor, unless

before such purchase the mortgagee takes actual possession of the property: *Lamson v. Moffat*, 61 Wis. 153, 21 N. W. 62.

In our judgment, however, it is not indispensable that a crop should be already planted before it can be subjected to a chattel mortgage. If the mortgagor is the owner or the lessee of the land upon which the crop is to be grown, it, as to him, may be regarded as having already a potential existence enabling him to subject it to the lien of the mortgage: *Adams v. Tanner*, 5 Ala. 740; *Robinson v. Mauldin*, 11 Ala. 977; *Brown v. Coats* 56 Ala. 439; *Robinson v. Kruse*, 29 Ark. 575; *Quiriauque v. Dennis*, 24 Cal. 154; *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718; *Headrick v. Brattain*, 63 Ind. 438; *Smith v. Atkins*, 18 Vt. 461; *Petch v. Tutin*, 15 Mees. & W. 110.

VI. Animals and Their Increase.

Undoubtedly a chattel mortgage in terms covering the increase of domestic livestock mortgaged is valid as to such increase: *Thompson v. Anderson*, 94 Iowa, 554, 63 N. W. 355; *Hopkins Fine Stock Co. v. Reid*, 106 Iowa, 78, 75 N. W. 656; *Corbin v. Kincaid*, 33 Kan. 649, 7 Pac. 145; *Cleveland v. Koch*, 108 Mich. 514, 66 N. W. 376; *Cox v. Beck*, 83 Fed. 269. And as a general rule under the doctrine that the incident covers the principal, a mortgage of domestic animals covers the increase of such animals and vests the title thereto in the mortgagee, though the mortgage is silent as to such increase; *Dyer v. State*, 88 Ala. 225, 7 South. 267; *Gundy v. Biteler*, 6 Ill. App. 510; *Forman v. Proctor*, 9 B. Mon. 124; *Cahoon v. Miers*, 67 Md. 573, 11 Atl. 278; *First Nat. Bank v. Western Mortgage etc. Co.*, 6 Tex. Civ. App. 59, 24 S. W. 691, 86 Tex. 636, 26 S. W. 488; *Gannaway v. Tate*, 98 Va. 789, 37 S. E. 768; *Northwestern Bank v. Freeman*, 171 U. S. 620, 19 Sup. Ct. Rep. 36, 43 L. ed. 307; *Pyeatt v. Powell*, 2 C. C. A. 367, 51 Fed. 551. This rule has often been applied to mares in foal, to the effect that if the owner of a mare gives a mortgage on her during the period of gestation, the mortgagee will, against the mortgagor, be entitled to the offspring when born: *Edmondston v. Wilson*, 49 Mo. App. 491; *Ellis v. Reaves*, 94 Tenn. 210, 28 S. W. 1089; *Latta v. Fowlkes*, 94 Tenn. 219, 29 S. W. 124. And as against attaching creditors a mortgage of a mare covers her colts subsequently foaled until they are weaned: *Rogers v. Highland*, 69 Iowa, 504, 58 Am. Rep. 230, 29 N. W. 429; *Darling v. Wilson*, 60 N. H. 59, 49 Am. Rep. 305. And it has been maintained that a colt brought forth while its dam is under mortgage passes immediately under the mortgage, and that the title of the mortgagee does not cease when the colt, increasing in strength and maturity, ceases to follow the dam: *Meyer v. Cook*, 85 Ala. 417, 5 South. 147. This, however, we believe to be opposed to reason and what appears to be the better rule, that as against innocent third persons, such as a bona fide purchaser or encumbrancer, a mortgage of a mare gives a lien upon her colt with which she is with foal only so long as is necessary for its suitable nurture: *Darling v. Wilson*, 60 N. H. 59, 49 Am. Rep. 305; *Enright v. Dodge*, 64 Vt. 502, 24 Atl. 768; *Funk v.*

Paul, 64 Wis. 35, 54 Am. Rep. 576, 24 N. W. 419. If a mortgage of domestic animals says nothing of the increase, a subsequent mortgage covering the increase of the animals described in the former mortgage will hold the increase as against the prior mortgagee if the animals named in the subsequent mortgage have passed beyond the period of nurture by their mothers: *Rogers v. Gage*, 59 Mo. App. 107. In order that a mortgage of domestic animals shall cover the increase thereof, it is incumbent upon the mortgagee to establish the fact that such increase were conceived prior to the date of the mortgage: *Thorp v. Cowles*, 55 Iowa, 408, 7 N. W. 677. In California the doctrine has been laid down that the rule that a chattel mortgage of domestic animals extends to the increase of the animals during the life of the mortgage, whether the terms of the mortgage includes such increase or not, can only apply where the mortgage passes title to the property mortgaged. It does not apply under a statute which provides that the mortgagor is not divested of the title to the mortgaged property by the execution of the chattel mortgage, but that he still remains the owner, while the mortgagee has only a lien thereon, and the mortgagor who retains possession remains the owner of the increase or offspring of the animals mortgaged which are begotten and born after the execution of the mortgage and before its foreclosure: *Shoobert v. De Motta*, 112 Cal. 215, 53 Am. St. Rep. 207, 44 Pac. 487.

A chattel mortgage of animals may be so drawn as to cover, as against subsequent purchasers from the mortgagor, animals acquired after the execution of the mortgage. Thus where the mortgagor includes in his mortgage "also all the stock I may own during the existence of this mortgage": *Hughes v. Wheeler*, 66 Iowa, 641, 24 N. W. 251. But a chattel mortgage upon a horse providing, "This mortgage to cover all earnings of the horse, whether by premiums or otherwise," does not include premiums earned after the execution of the mortgage: *McArthur v. Gannan*, 71 Iowa, 34, 32 N. W. 14. A chattel mortgage upon cattle described as owned by the mortgagor at the time the mortgage was given, and as being on a certain farm, does not cover cattle acquired by the mortgagor two months afterward, as against a subsequent bona fide mortgagee of the latter: *Iowa State Nat. Bank v. Taylor*, 98 Iowa, 631, 67 N. W. 677.

VII. Real Estate Mortgages.

Courts of equity extend the lien of a mortgage to after-acquired property upon the theory that, though ineffectual as a conveyance, it operates as an executory agreement attaching to the property when acquired. Hence a mortgage purporting to convey all after-acquired lands, and containing covenants for further conveyance and assurance of such after-acquired property is sufficient to cover the latter: *Grape Creek Coal Co. v. Farmers' etc. Co.*, 12 C. C. A. 350, 63 Fed. 891. An express statement, in a trust deed, following a description of the property conveyed to the effect that it conveys also all property of like kind, and character to that thereinbefore described, which

should thereafter be acquired, the deed covering both real and personal property, is sufficient to bring under the deed real estate subsequently acquired, and, although but an equitable mortgage, it will take precedence over subsequent judgment and execution liens as to such after-acquired property: *Hicks v. Frank*, 4 Wyo. 502, 35 Pac. 475, 1025. A mortgage of land with the after-acquired property clause in it embraces and creates a charge upon all property subsequently acquired by a corporation mortgagor which comes within the description of the mortgage, and this, not only as to the property to which the mortgagor acquires the legal title, but also as to that to which it acquires only an equitable title. The mortgage lien, however, upon the subsequently acquired property, only attaches from the time of the acquisition by the mortgagor and subject to all pre-existing liens thereon: *Brady v. Johnson*, 75 Md. 445, 26 Atl. 49, 20 L. R. A. 737; *Monmouth etc. Co. v. McKenna* (N. J. Eq.), 60 Atl. 32. Such a mortgage of real property to be thereafter acquired takes effect as a valid lien immediately when the property is acquired by the mortgagor, and as between successive mortgages of after-acquired property, priority of lien is determined by priority of time of the execution of the mortgages: *Boston etc. Co. v. Bankers' etc. Co.*, 36 Fed. 288; *Willink v. Morris Canal etc. Co.*, 4 N. J. Eq. 377. A mortgage of after-acquired property can only attach itself to such property in the condition in which it comes to the mortgagor's hands. If it is already subject to mortgage or other liens, the general mortgage does not displace them, though they may be junior in point of time. The mortgage only attaches to such interest as the mortgagor acquires: *Williamson v. New Jersey etc. R. R. Co.*, 28 N. J. Eq. 277, 29 N. J. Eq. 311. And when the legal title is in another, and the property is made subject to such a mortgage by a decree in chancery, by reason of equities of the mortgagor in the premises, the mortgagee takes subject to the rights of third persons, acquired before the property was subjected by such decree to the lien of the mortgage: *Williamson v. New Jersey etc. R. R. Co.*, 29 N. J. Eq. 311. If by the terms of a mortgage of a mill and the land on which it is situated, the mortgage is made a lien on the mill and the machinery therein until the payment of the mortgage notes, the mortgage will cover and embrace machinery placed in the building after the mortgage was given and before the notes were paid: *Johnston v. Morrow*, 60 Mo. 339; *Eason v. Miller*, 25 S. C. 555. A mortgage of land which includes "all the machinery now or hereafter to be placed" on the mortgaged premises covers subsequently acquired machinery under a contract of sale and placed on the premises as against a lease subsequently executed by the seller to the mortgagor, for the purpose of reserving title to the machinery until the purchase price was paid: *Knowles Loom Works v. Ryle*, 38 C. C. A. 494, 97 Fed. 730. But a provision in a trust deed that all machinery now upon, or which may thereafter be put upon said premises, whether attached or not, shall be covered by the deed, does not apply to machinery afterward put upon the land by a tenant: *Rolle v. Rouse*, 73 Miss. 713, 19 South.

481. If a mortgage of real estate and personalty provides that it shall embrace all property "now owned or hereafter to be acquired by the mortgagor," and no possession is taken by the mortgagee of any personal property acquired by the mortgagor after making the mortgage, the title to such after-acquired property passes to the assignee of the mortgagor in insolvency, and does not pass to the mortgagee: *Harriman v. Woburn Electric Light Co.*, 163 Mass. 85, 39 N. E. 1004.

BROWN v. GERALD.

[100 Me. 351, 61 Atl. 785.]

EMINENT DOMAIN—Power of the Legislature and the Courts. It is for the legislature, and not for the courts, to say whether there is any such demand or exigency in a locality for electric lights as will justify the exercise of the right of eminent domain. (p. 530.)

EMINENT DOMAIN.—When a corporation is authorized by the legislature to exercise the right of eminent domain for several purposes, some of which are constitutional and others not, with a discretion in the grantee to exercise the right when and where it chooses within a large territory, it must use its discretion in good faith. Its actual purpose is open to inquiry, and if it is not one of the constitutional purposes, the exercise of the right by it must be denied by the courts. (pp. 531, 532.)

EMINENT DOMAIN, Purposes for Which the Exercise of the Right of is Sought—Power of the Courts to Inquire into.—When a corporation seeks to exercise the right of eminent domain, it is within the power of the courts to inquire the purpose for which the right is actually sought, and to determine from evidence aliunde the actual business proposed to be conducted, and to deny the right if such business is not found to be one for which the power of eminent domain may be exercised. (p. 532.)

EMINENT DOMAIN, Exercise of Power of, when not Sought for Lighting Purposes.—A corporation which, though willing to furnish electricity for lighting purposes, has but one customer, and few or none in prospect, and which has contracted to deliver, to be used for power purposes, all the other electricity generated by its plant, must be held to be engaged in generating and distributing electricity for power purposes, and not for lighting, and hence is not entitled to exercise the power of eminent domain for lighting purposes. (pp. 532, 533.)

EMINENT DOMAIN, Public Use, What is not.—A public use such as justifies the taking of private property against the will of the owner may not rest merely on public benefit, or public interest, or great public utility. (p. 543.)

EMINENT DOMAIN—Public Use—Manufacturing Purposes.—There is nothing in the creation and distribution of power for manufacturing purposes, no matter how great their general utility, which makes it alike proper, useful, and needful for the government to provide it, and hence it does not justify the exercise of the power of eminent domain. (p. 544.)

EMINENT DOMAIN and Governmental Regulation.—When the legislature grants to a corporation the right of eminent domain, and the corporation accepts and exercises the grant, it thereby im-

pliedly comes under obligation to the public to perform all those duties in which the public are interested and to aid in the performance of which the right of eminent domain was granted. It can be compelled to perform them and at reasonable rates, and subjects itself to public regulation and control, and to the forfeiture of its charter for the failure to perform. (p. 545.)

EMINENT DOMAIN.—A Use is not Public Unless everyone who has occasion has the right to use. (p. 546.)

EMINENT DOMAIN.—Electric Lighting for the Public is a public use, and a corporation engaged in that business may properly be granted the right of eminent domain for that use. (p. 546.)

EMINENT DOMAIN.—A Use is not Necessarily Made a Public Use by Multiplying the Number of Persons Who may Have Occasion to Use.—Thus, if the business of generating, conducting, and selling electricity is carried on to promote manufacturing or mechanical purposes, it cannot be regarded as a public use because a large number of persons may desire to use such electricity for such purposes. (p. 547.)

EMINENT DOMAIN.—Corporation for Generating Electricity, When not Entitled to Exercise Power of.—A corporation authorized by its charter to manufacture, generate, sell, distribute, and supply electricity for lighting, heat, railway, manufacturing, or mechanical purposes in specified towns, but which in fact is only engaged in the business specified in so far as it relates to manufacturing and mechanical purposes is not entitled to exercise the right of eminent domain, though the statute purports to grant it that right, and it has by its vote recognized itself as a quasi public corporation and pledged itself to the performance of its duties as such in furnishing the public with electric light and power and to make all extensions necessary to meet the public demand for light and power. (p. 551.)

Brown & Brown, for the plaintiff.

Heath & Andrews, for the defendants.

²⁵³ **SAVAGE, J.** Bill in equity praying for an injunction to restrain the defendants from erecting a line of poles and wires across the plaintiff's farm in Benton. The case comes up on report. The defendants admit an intention to erect the line of poles and wires, but claim they have a right to do so under the charter of the Seabasticook Manufacturing and Power Company, one of the defendants, of which Mr. Gerald, the other defendant, is the president and general manager. It is therefore necessary to examine the charter of the defendant corporation, chapter 86 of the private and special laws of 1899, as amended by chapter 271 of the private and special laws of 1903, in order to ascertain its powers. Some question having been raised in regard to the proper construction of this charter, we will state, without much discussion, the construction we place upon so much of it as is involved in the consideration of the case before us. And this we do, at present, without any reference to the constitutionality of any of its provisions.

³⁵⁴ By the original charter the company was empowered to manufacture, generate, sell, distribute and supply electricity for lighting, heating, traction, manufacturing or mechanical purposes in the towns of Clinton, Benton and Albion, or for any or either of such purposes. The company therefore might generate, sell, distribute and supply electricity to others for electric lighting, or electric heating, or traction power for an electric railway, or for electric power for manufacturing or mechanical purposes, or for all of these purposes. But it is conceded that it could not use the electricity for these purposes on its own account. For instance, to suit the illustration to this case, it could not itself engage in manufacturing by electric power. It might sell such power to others. By the amendment of 1903 the right to manufacture, etc., electricity for lighting purposes in the town of Clinton was withdrawn. To accomplish its chartered purposes it was authorized to build and maintain a dam or dams on the Sebasticook river, in the town of Benton. By the original act the company was also authorized to take as for public uses—that is, by the exercise of the right of eminent domain—any water rights or land, and to flow any lands or other privileges, for the purpose of constructing and maintaining its dams, and the establishment of its plant, which includes, we think, its pole and wire lines. But by the amendment it was provided that it should have “no right to flow any mill privilege upon which a dam is now built without the consent of the owners thereof.” The company therefore might take land for the erection of its lines of poles and wires. Certain street rights in Benton were given by the charter, by which poles could be set and wires extended for the purpose of electric lighting, in the towns named, subject to the permission of the municipal officers, and subject to the general laws regulating the erection of poles and wires for electrical purposes. And the company was also empowered specifically to transmit electric power within said towns, for lease or sale, “in such manner as may be expedient,” and, subject to the general laws, to erect poles and wires for that purpose. The towns and the corporation were authorized to make contracts for public lighting.

Prior to the bringing of this bill, the company had constructed a ³⁵⁵ dam on the Sebasticook river in Benton, capable of developing twelve hundred and fifty-eight horse-power of water-power. It had erected a station and was installing an electrical plant, to be connected with the water-wheels. It

had contracted to deliver to the Hollingsworth & Whitney Company, of Winslow, the entire electrical current or energy developed by water-power on the dam for a period of ten years. The electrical current was agreed to be delivered at a point in Benton, near the Winslow line, where the Hollingsworth & Whitney Company was to take it and transmit it by lines of its own to its mill in Winslow for use as power in manufacturing pulp and paper. By a supplemental agreement made after this controversy arose, the defendant company reserved the right to take from the wires so much electricity as might be required to enable it to perform its duties as an electric light company. To transmit the current from the station to the point of delivery at or near the Winslow line required a line of poles and wires nearly six miles long. This had nearly all been erected. The line was practically straight. It did not follow the roads in any place, but crossed twenty-four farms, including the plaintiff's. It did not pass in proximity to many buildings. The testimony of the defendant Gerald shows clearly that there is now no demand for public or municipal lighting in Benton, that there are no large villages which require lighting, that one man, and one only, had agreed to take domestic lights, though he (Gerald) had talked frequently with people about it, and that between plaintiff's farm and the end of the line, about two miles, with the exception of the last house in Benton, there is no call for lights whatever. Mr. Gerald said that he did "not know of a thing from the power station to the end of the line that would call for power." Being asked about the development of electricity for people that live along the line, he answered, "I don't know anyone that lives along the line that wants it." Of course these things are quite collateral in some aspects of the case, as will appear when we discuss what constitutes a public use. But in other aspects they seem to us to be material and important, as we shall attempt to show presently.

It is contended that the defendant company, under its charter, has the power to exercise constitutionally the right of eminent domain for ³⁵⁶ each of its four chartered purposes—furnishing an electrical current for lighting, for heating, for traction, and for power for manufacturing or mechanical uses. But it makes the point that if for any reason this power cannot be exercised within constitutional limits for all of these purposes, it can certainly be used so far as electric lighting

is concerned, and perhaps for other uses, and therefore that if the company had the right of eminent domain for lighting purposes, and exercised it in this instance for those purposes among others, the taking would be valid, even if it could not be sustained were it dependent upon power purposes alone. It says it had a right to take the plaintiff's land and erect pole lines upon it for the purpose of furnishing an electric current for lights, and that that affords a complete justification, whether it could exercise the eminent domain for supplying power for manufacturing or not: *Cole v. County Commrs.*, 78 Me. 532, 7 Atl. 397. It says, and justly in this aspect, that it is for the legislature, and not the court, to say whether there is any such demand or exigency in that locality for electric lights as to justify the exercise of the right of eminent domain.

We assume in this case that the taking of the defendants was in form for all of its chartered purposes. We also assume, but do not decide, that, under the authority of *Cole v. County Commrs.*, a taking may be sustained, even if some of the uses are extra-constitutional, that the bad may be rejected, and the good may stand. Some courts have held to the contrary: *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522, 63 L. R. A. 582; *Attorney General v. City of Eau Claire*, 37 Wis. 400. But see 15 Cyc. 579. We think it should be conceded that the taking of land for the purpose of supplying the public, or so much of the public as wishes it, with electric lighting is for a public use. But even so, it does not necessarily follow that this taking can be sustained as a taking for that purpose. The charter unquestionably gives the company the right of eminent domain for the purpose of supplying a current for electric lighting. It places no limitations or restrictions upon the exercise of this right. The company may go when and where it chooses. It may take whose land it chooses. It may use its discretion as to these things. But if the company seeks to justify on the ground that the taking was for lighting purposes, it must³⁵⁷ appear that it exercised the right actually for lighting purposes. If it did so, it might also use the property thus obtained for other incidental purposes, as has many times been held: See *Attorney General v. City of Eau Claire*, 37 Wis. 400. But to support the taking under the lighting feature of the charter, it is necessary that it should actually have been made for that purpose. If the legislature had authorized the

taking of this particular land for lighting purposes, and nothing else, it would probably have been a conclusive determination of the use for which it is intended to be taken. But when the legislature grants the right of eminent domain for several purposes, for some of which the grant would be constitutional, and for others not, with the discretion in the grantee to exercise the right when and where it chooses, within the confines of a large territory, we think it must use that discretion in good faith, and the taking must actually be for the constitutional purpose in order to be valid. And we think, further, that the actual purpose is open to judicial inquiry: *Randolph on Eminent Domain*, 47. Suppose a company were chartered to do an electric light and a banking business, and had given to it generally the right of eminent domain. Could it condemn a lot for a banking-house under guise of its right to condemn for lighting purposes? And if it should in terms condemn land for lighting purposes, when the real and only purpose was to secure a lot for a banking-house, would the public, or the owner of the land taken, be concluded? We think not. And if it did, under its general powers, condemn land for lighting purposes, and use it solely for a banking-house, would not the presumption be strong that it was not actually condemned for lighting purposes? Certainly it would. The condemnation proceedings afford, of course, *prima facie* evidence of the purposes of the taking, but we think this ought not to be, and is not, conclusive. "The existence of the power to take private property for public use by right of eminent domain excludes the idea that it may be taken for private use, or under semblance of a public use and immediately or ultimately be converted and appropriated to private uses": *Dunham v. Williams*, 36 Barb. 136. "In determining the question of public use, courts are not confined to, and it is not to be tested exclusively by, the description of those objects and purposes as are set forth in the 358 articles of association, but evidence aliunde showing the actual business proposed to be conducted may be considered": *In re Niagara Falls Ry. Co.*, 108 N. Y. 375, 15 N. E. 429. And we think it equally so when a company attempts to exercise the right of eminent domain for several purposes, some of which are for public uses and some not. The law seeks the truth. It finds it sometimes under many disguises. It is particularly necessary to administer it in a proceeding by which one person seeks to obtain the property of another by eminent

domain, which has often been said to be in derogation of common right: *Chicago etc. R. R. Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Bangor etc. R. R. Co. v. McComb*, 60 Me. 290; 15 Cyc. 567. It is not necessary to say, and it may not be true, that the provision in this charter for supplying currents for electric lighting were purely colorable and were never intended to be used: *In re Eureka Basin Warehouse etc. Co.*, 96 N. Y. 42. But in view of the surrounding situation, in the sparsely settled town of Benton, in view of the absence of any call for electric lighting in that town, and of the large expense of installing an electric plant, if the promoters had any real intention of doing anything toward electric lighting in the lifetime of their charter, their hopes were highly illusory.

But when we come to consider this particular case, we cannot doubt. We start with a dam and station erected, and electrical apparatus installed, all at a cost of eighty thousand dollars, with one electric light customer for twelve lights secured, with one at the Winslow end of the line who "suggests" that he may take lights, with no other takers of light, actual or prospective, between plaintiff's land and the Winslow line, two miles, with no knowledge otherwise of anyone along the line who wants or will take light or power, but, on the other hand, with a contract to deliver the entire electrical power product of the dam to a manufacturing company for its own purposes for ten years, at a gross rental of about twenty thousand dollars a year. Under these conditions the company starts to locate its line of poles and wires. Metaphorically speaking, and practically so, in fact, it goes straight as an arrow to the point of delivery to the manufacturing company. When it reaches the plaintiff's land, it has seemingly gone beyond the area of possible electric lighting. Whatever ³⁵⁹ reasons there may have been for taking other lands before that, we must now inquire for what was the intended taking of the plaintiff's land? Can a reasonable man doubt? We think not. Everything in the case shows that the plaintiff's land was being taken to enable the company to deliver electrical power to the Hollingsworth & Whitney Company, according to contract. A purpose to use the line for electric lighting was wanting. It is not discoverable. "The use of a franchise granted for public purposes as a mere cover for a private enterprise is contrary to public policy," said the court in *Fanning v. Osborne*, 102 N. Y. 441, 7 N. E. 307.

It is, however, suggested that this conclusion of fact ought not to be reached, because the company should not be judged by its beginnings, and because it is ready to furnish electricity for lighting to all along the line who wish it and are desirous of using it, and that the future may develop a call for lighting. We do not think this is a sufficient answer in this case. We are satisfied from the whole case that the company, however willing it might be, did not expect or contemplate transmitting a current for electric lighting along the line on land taken from the plaintiff. The possibility of such a use for the public is too remote for consideration. We think it must be held that the land of the plaintiff was actually and primarily taken for the purposes of the Hollingsworth & Whitney Company contract.

We are therefore brought to inquire whether a taking for that purpose can be sustained. In other words, can lands be taken by the eminent domain for a line of poles and wires on which is to be transmitted an electric current for manufacturing or power purposes? The charter of the defendant company confers authority as broad as that, if it can be held to be constitutional. It should be borne in mind that the defendant corporation has no authority by its charter to use the electric current generated by it for manufacturing purposes on its own account. It does not propose to do so. It merely intends to generate and sell an electric current, and it claims the right of eminent domain to enable it to do such a business, irrespective of the use to which the current is ultimately put. Of this we shall speak later. The ultimate uses to which the electric current is to be put must, however, affect the application of the right ³⁶⁰ of eminent domain, and we must consider the question with those uses in mind.

The constitution of this state, article 1, section 21, in the Declaration of Rights, provides "that private property shall not be taken for public uses, without just compensation, nor unless the public exigencies require it." And it is held to be necessarily implied that private property cannot be taken for private uses, without the consent of the owner, with or without compensation. And it is objected here that where one man is permitted to take another's property for the purpose of thereby transmitting an electric current for manufacturing or mechanical purposes, it is subjecting the property to a mere private use.

All property is held subject to that sovereign power which is called the eminent domain, or superior dominion: *Cottrill v. Myrick*, 12 Me. 222. It is derived from the ancient *jus publicum* by which all property was held subject to the will of the sovereign. The constitutional provision referred to did not create the power, but is a limitation upon its exercise. Private property can be taken only for public uses, and then only in case of public exigency. Whether there is such an exigency—whether it is wise and expedient or necessary, that the right of eminent domain should be exercised, in case the use is public—is solely for the determination of the legislature. The legislature, however, cannot make a private use public by calling it so: 15 Cyc. 580. Whether the use for which it is granted is a public one must in the end be determined by the court: *Kennebec Water Dist. v. City of Waterville*, 96 Me. 234, 52 Atl. 774. The right of the state to condemn property for public uses may of course be exercised through the agency of private corporations, formed for private gain: *Riche v. Bar Harbor Water Co.*, 75 Me. 91. So that the real question before the court now is this: Is manufacturing, generating, selling, distributing and supplying electricity for manufacturing or mechanical purposes a public use for which private property may be taken by the strong hand of the state? It has been pressed upon us with great force and ability that the great public benefit and utility of manufacturing enterprises in this state are such as of themselves to give to the creation or development of ³⁸¹ power for their benefit the character of a public use. We must therefore inquire to what extent public benefit and utility may be regarded as controlling in determining what is a public use. The term “public use” is difficult of exact definition, and most courts have avoided giving one. Public benefit is, however, one of the essential characteristics of a public use. There is no doubt that the conception of public benefit and public utility, and the general welfare of the state, even indirectly promoted, has had much to do in tempering the opinions of the courts. The term is a flexible one, and necessarily has been of constant growth as new public uses have developed: *Randolph on Eminent Domain*, 35. And it has been said that what is a public use under eminent domain statutes may depend somewhat upon the nature and wants of the community for the time being: *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756. It is beyond question

that any instrumentality which tends to promote the manufacturing industries of a state, to furnish labor for its mechanics, to create the need of markets for its products, and to develop and utilize its natural advantages, is of great public benefit. And our attention has been called to many cases where this court, in discussing the doctrine of public use, has used expressions similar to those which we have used above: *Spring v. Russell*, 7 Me. 273; *Lawler v. Baring Boom Co.*, 56 Me. 443; *Riche v. Water Co.*, 75 Me. 91; *Hamor v. Bar Harbor Water Co.*, 78 Me. 127, 3 Atl. 40; *Farnsworth v. Lime Rock R. R. Co.*, 83 Me. 440, 22 Atl. 373; *Ulmer v. Lime Rock R. R. Co.*, 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387. But it is to be observed that in none of these cases was any question like the precise one before us under consideration. In each the question concerned a use which was public even by the narrowest definition of a public use—a use in which the public had not only an indirect benefit, but in which the public had a right to participate directly. These cases relate to railroads, water companies, boom companies, canals, and the improvement of public streams. As to such cases there is now no doubt. Their uses are rightly deemed public. The public, or such part of the public as has occasion to, may directly enjoy them. Such uses are of great public benefit.

362 When, however, we leave those classes of cases which are universally regarded as public, and come to those which stand on debatable ground, we find that the doctrine that public benefit and utility is a justification for the exercise of the right of eminent domain has been asserted more especially in four classes of cases: those relating to the development of water-power for mills under general or special mill or flowage acts; those arising under drainage acts for the reclamation of wet and marshy lands; those relating to the irrigation of arid lands, and those relating to the promotion of mining. Of the mining acts, outside of states whose constitutions in terms recognize mining as a public use, it may be said that the authorities differ as to the effect of the mere public benefit: *Overman Silver Min. Co. v. Corcoran*, 15 Nev. 147; *Consolidated Channel Co. v. Central Pac. R. R. Co.*, 51 Cal. 269. And it was held in *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. ed. 369, that the irrigation acts of the western states are sustainable on the ground of a regulation of the common interests of the owners, a doctrine applied elsewhere to drainage acts.

It is in the early cases in Massachusetts that we find that mill acts, giving the right to flow the lands of others for the purpose of creating a water-power for mills, and drainage acts for the reclamation of waste lands, were first sustained under the eminent domain clause of the Bill of Rights. And it would seem that the doctrine has been accepted in most of the states where it is now in vogue on the authority of the Massachusetts decisions. The history of those decisions is instructive. In *Fiske v. Framingham Mfg. Co.* (1831), 12 Pick. 68, it was declared that the mill acts, by which the owner of a mill privilege was authorized to build a dam on his own land for the purpose of creating a water-power, and thereby flow the water of the stream back upon the land of an upper proprietor, rest only partly for their justification upon the interest which the community at large has in the use and employment of mills, and partly upon the nature of the property which is often so situated that it could not be beneficially used without the aid of this power: See *Veazie v. Dwinel*, 50 Me. 479. In *Boston etc. Corp. v. Newman* (1832), 12 Pick. 467, 23 Am. Dec. 622, it was held that the construction under legislative authority of a dam across a navigable arm of the sea for the purpose of obtaining ³⁶³ a head and fall of water, whereby to work grist-mills, run manufactories, and other mills for other useful purposes, and also to make an avenue or highway over the dam, was an appropriation to public uses within the provision of the tenth article of the Bill of Rights. The court, *arguendo*, said: "Here was a creation of an immense perpetual mill-power, as well as a safe and commodious avenue. . . . We should be at a loss to imagine any undertaking . . . in which the public had a more certain and direct interest and benefit." The court cited the mill acts as analogous, on the ground that they were "greatly beneficial to the public." In *Hazen v. Essex Co.* (1853), 12 Cush. 475, the declared purposes of the defendant corporation were to improve the navigation of the Merrimack river, and to construct a dam across it for the purpose of creating a water-power to be used for mechanical and manufacturing purposes. The court, speaking of the latter purpose, said: "The establishment of a great mill-power for manufacturing purposes as an object of great public interest, especially since manufacturing has come to be one of the great public industrial pursuits of the commonwealth, seems to have been regarded by the legislature and sanctioned by the jurisprudence of the common-

wealth, and in our judgment rightly so, in determining what is a public use, justifying the right of eminent domain." This was affirmed in *Commonwealth v. Essex Co.* (1859), 13 Gray, 239. In *Talbot v. Hudson* (1860), 16 Gray, 417, a large area of land in different towns and owned by many owners was overflowed by water raised by a dam, which it was sought, under legislative authority, to remove, for the purpose of reclaiming the land. It was held that the dam could be taken as for a public use. This language was used: "In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the state, or which leads to the growth of towns and the creation of new sources for the employment of capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." The mill acts were cited as examples of a ³⁶⁴ public use, and it was declared that "if it is lawful and constitutional to advance the manufacturing or mechanical interests of a section of the state, by allowing individuals acting primarily for their own profit to take private property, there would seem to be but little, if any, room for doubt as to the authority of the legislature, acting as the representatives of the whole people, to make a similar appropriation by their own immediate agents in order to promote the agricultural interests of a large territory." The general drainage act for the improvement of meadows was also cited as providing for an analogous public use. But in *Murdock v. Stickney* (1851), 8 Cush. 113, and *Bates v. Weymouth Iron Co.*, 8 Cush. 548, it was held that the principle on which the mill acts "are founded is not, as has sometimes been supposed, the right of eminent domain, the sovereign right of taking private property for public use." The mill acts were said to be only a slight modification of the rule of the common law for regulating the rights of proprietors on one and the same stream, from its rise to its outlet, in a manner best calculated, on the whole, to promote and secure their common rights in it. "Whether," the court say in *Murdock v. Stickney*, 8 Cush. 113, "if this were an original question, this legislation [a mill act] would be considered as trenching too closely upon the great principle which gives security to private rights, it seems now too late to inquire."

Later the Massachusetts court, in *Lowell v. City of Boston* (1873), 111 Mass. 454, 15 Am. Rep. 39, said that the doctrine of public use asserted in *Hazen v. Essex Co.*, 12 Cush. 475, rested upon the improvement of navigation provided for, and not upon the general benefit flowing from the establishment of mills. And the court in that case said that the mill acts and drainage acts, as in *Talbot v. Hudson*, 16 Gray, 417, were not to be justified under the right of eminent domain, and that they involved no other governmental power than that "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances," as the general court "shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same": Mass. Const., art. 4, c. 1, sec. 1. In the same case, speaking of *Dorgan v. Boston*, 12 Allen, 223, and *Dingley v. City of Boston*, 100 Mass. 544, in which ³⁶⁵ the right of eminent domain for certain public improvements was contested, the court used this significant language: "This benefit [the promotion of the general prosperity and public welfare] was anticipated, and doubtless was one of the influential inducements to the adoption of the statutes giving authority for the improvements. It was not in this general advantage, however, that the justification, under the constitution, for such an exercise of power was found, but in the direct and special public service." And finally in *Turner v. Nye* (1891), 154 Mass. 579, 28 N. E. 1048, 14 L. R. A. 487, where the court sustained the constitutionality of an act authorizing the flowing of flats for the raising of a pond for the culture of fishes, but expressly on the "good and welfare" clause of the constitution cited by us, and not on the right of eminent domain, the court said: "It is upon this provision [the "good and welfare" clause] that the mill acts have been placed finally in this state, after what appear at times to have been somewhat conflicting views. It may be doubted whether, as new legislation, they could be sustained as an exercise of the right of eminent domain." If we understand the purport of the later Massachusetts decisions, it is to the effect that the earlier cases of *Boston etc. Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622, *Hazen v. Essex Co.*, 12 Cush. 475, and *Talbot v. Hudson*, 16 Gray, 417, are no longer authority for the doctrine that either the general mill acts, or special legislation for taking private property for the purpose of creating a water-power for manufacturing purposes can be

sustained as involving public uses, on the ground of great public benefit or utility. We have no such broad and comprehensive "good and welfare" provision in our constitution as the one referred to in the constitution of Massachusetts, and if we had, it is difficult to see why such a legislative authority would not be limited by the necessarily implied provision that private property shall be taken only for public uses. Besides, it is held, and we think properly, that the term "public use" cannot be construed to be the equivalent of general welfare or public good. It must receive a more restricted definition: *Kinnie v. Bare*, 68 Mich. 625, 36 N. W. 672; 1 Lewis on Eminent Domain, sec. 163.

But following the earlier Massachusetts cases, in time, at least, it was held in *Great Falls Mfg. Co. v. Fernald* (1867), 47 N. H. 444, ³⁶⁸ that the legislature had power to authorize a corporation established for manufacturing purposes, to flow back water onto the land of another, without his consent, in order to create the water power used in carrying on their works. This was held to be a public use, on the ground that it was for general public utility, and *Boston etc. Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622, and *Hazen v. Essex Co.*, 12 Cush. 475, were cited as authorities to that effect. The court also cited the "general welfare" clause in the New Hampshire Bill of Rights, similar to that in Massachusetts. The court in New Hampshire did not waver from this public use doctrine (*Ash v. Cummings*, 50 N. H. 591; *Amoskeag Mfg. Co. v. Head*, 56 N. H. 386; *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522), except to say that the flowage act went to the verge of constitutional power (*Salisbury Mills v. Forsaith*, 57 N. H. 124), until *Rockingham County Light etc Co. v. Hobbs*, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581, in which case the court said of *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 44: "That case is sui generis, and is limited to flowage rights. That and other cases cannot be regarded as deciding the 'public use' in the Bill of Rights is synonymous with public benefit, public advantage, or any use that is for the benefit and welfare of the state." Nevertheless the court said that the conclusion that the use of land for the production and distribution of power may be a public use is shown by the mill acts and the decisions respecting them, citing the *Fernald* case in Massachusetts, and its own case of *Amoskeag Co. v. Head*.

In Vermont the ruling has been the other way. The court there declined to follow Massachusetts and New Hampshire,

and held that under a mill flowage act, the exercise of flowage rights for the benefit of mills, even of grist-mills, was not for a public use: *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398. In *Re Barre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195, it was held that a water company having authority to take private waters for the extinguishment of fires and for domestic, sanitary and other purposes cannot use the water of a private stream for private manufacturing purposes. And in *Avery v. Vermont Electric Co.* (1903), 75 Vt. 235, 98 Am. St. Rep. 818, 54 Atl. 179, 59 L. R. A. 817, it was held that the generation of electricity by an individual for the purpose of supplying a railroad company with power to operate its road is not a public use. The court in Rhode Island, we ³⁶⁷ think, inclines the same way: In *re Rhode Island Suburban Ry. Co.*, 22 R. I. 457, 48 Atl. 591, 52 L. R. A. 879. On the other hand the court in Connecticut, in *Olmstead v. Camp* (1866), 33 Conn. 532, 89 Am. Dec. 221, holding a flowage act for the benefit of mills constitutional, as authorizing a taking for public use, declared that it is the settled law of the country that the flowing of lands for mill purposes is a taking for a public use. The court defined public use to be public usefulness, utility or advantage, or what is productive of general benefit, and said that any taking by the state for purposes of great advantage to the community is a taking for a public use, citing *Fiske v. Framingham Mfg. Co.*, 12 Pick. 68; *Boston etc. Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Talbot v. Hudson*, 16 Gray, 417. In *Miller v. Troost* (1869), 14 Minn. 365, the court felt constrained to hold a mill act constitutional, purely on the authority of the cases decided elsewhere; citing *Olmstead v. Camp*, 83 Conn. 532, 89 Am. Dec. 221, and *Fiske v. Framingham Co.*, 12 Pick. 68. But the court said: "It is difficult to reconcile these statutes, upon principle, with the constitutional rights of the citizen." In *Newcomb v. Smith* (1849), 1 Chand. 71, a majority of the court held a mill dam and a flowage act constitutional on the authority chiefly of the prior decisions in Massachusetts and New Hampshire. The same court, in *Fisher v. Horicon Iron & Mfg Co.* (1860), 10 Wis. 351, said: "We are free to confess that if the question as to the constitutionality of the mill dam act was now for the first time presented to this court, and we were not embarrassed by former adjudications upon it, we should doubtless come to a different conclusion upon the question from that arrived at by the majority of the court in *Newcomb v. Smith*." That a

great public benefit justifies the exercise of the right of eminent domain, as for a public use, in creating or improving water power for manufacturing purposes, is supported on the ground of public benefits, in *Scudder v. Trenton Delaware Falls Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756, *Hankins v. Lawrence*, 8 Blackf. (Ind.) 266, and perhaps in other states. It is noticeable that the mill acts generally, when sustained, have been sustained under protest: See note to *Turner v. Nye*, 14 L. R. A. 487.

In *Varick v. Smith*, 5 Paige, 137, it was held that water could not be diverted for the purpose of creating water-power to ³⁶⁸ lease, because it was not a public use. In *Hay v. Cohoes Co.*, 3 Barb. 42, it was denied that the legislature could exercise the right of eminent domain for mills of any kind: See *In re Eureka Basin Warehouse etc. Co.*, 96 N. Y. 42. See, also, *In re Tuthill*, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303, 49 L. R. A. 781, holding a drainage act unconstitutional. In *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522, 63 L. R. A. 582, the court held that a mill act with accompanying right of eminent domain could be sustained for public grist-mills, but not for other mills. The same doctrine is supported in *Harding v. Goodlet*, 3 Yerg. (Tenn.) 41, 24 Am. Dec. 546. A mill act was held unconstitutional as not being for public uses in *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564, in an able and exhaustive opinion prepared by Judge Cooley, in which he analyzed nearly all the authorities: See *Southwest Missouri Light Co. v. Scheurick*, 174 Mo. 235, 73 S. W. 496. When the case of *Amoskeag Mfg. Co. v. Head*, 56 N. H. 386, was before the supreme court of the United States on error, that court declined to express any opinion as to whether the creation of water power for manufacturing purposes was a public use, but rested its decision, sustaining the judgment of the supreme court of New Hampshire, on the ground that a statute that authorized the building of dams and the raising of water, thereby causing it to flow back upon lands of another, might be considered as regulating the manner in which the rights of proprietors of lands adjacent to a stream may be asserted and enjoyed, with due regard to the interests of all and to the public good: *Head v. Amoskeag Co.*, 113 U. S. 9, 5 Sup. Ct. Rep. 441, 28 L. ed. 889. See *Wurts v. Hoagland*, 114 U. S. 606, 5 Sup. Ct. Rep. 1086, 29 L. ed. 229. This is the doctrine, as we have pointed out, of the later Massachusetts cases. In *Kaukauna Water Power*

Co. v. Green Bay Co., 142 U. S. 254, 12 Sup. Ct. Rep. 173, 35 L. ed. 1004, the court sustained the taking in that case, on the ground that it was for the improvement of the navigation of a river, but said also: "It is probably true that it is beyond the competency of the state to appropriate to itself the property of individuals for the sole purpose of creating a water power to be leased for manufacturing purposes. This would be a case of taking the property of one man for the benefit of another, which is not a constitutional exercise of the right of eminent domain."

It is suggested by counsel that in this state the court has already, by implication at least, sustained the doctrine that the creation of ³⁶⁹ power for manufacturing, either as electrical-power or water-power, may be regarded as a public use. But that position cannot be sustained. Two cases are cited. In *Edison Co. v. Farmington Electric Light etc. Co.*, 82 Me. 464, 19 Atl. 859, although the word "power" appeared in the corporate name of the defendant, the case does not show what authority it had or claimed as to the creation or distribution of electric power. That question was not discussed in the opinion of the court. The defendant was treated as an electric light company. In *Rockland Water Co. v. Camden etc. Water Co.*, 80 Me. 544, 15 Atl. 785, 1 L. R. A. 388, the right to the exercise of eminent domain for creating water-power was not under consideration.

But *Jordan v. Woodward* (1855), 40 Me. 317, was a case arising under our mill act. Its constitutionality was sustained, but only on the ground of its great antiquity and the long acquiescence of our citizens in its provisions. The court said that it pushed the power of eminent domain to the very verge of constitutional inhibition, and added: "But the reasons in which this policy originated have long since ceased to exist. Private capital has largely accumulated, and now seeks investment in mills of various descriptions, or in other enterprises for private gain. That the existence of water-mills is a matter of public convenience at this day is undeniable; so too is the existence of the shop of the smith, the store of the grocer, the house of the innholder, and a great variety of business enterprises in which our citizens employ their labor and capital. In fact, there is no branch of lawful business which may not contribute to the public good, and for which there may, to a certain extent, exist a public necessity. Yet to authorize the appropriation of private property for all these

various purposes would be destructive of private rights and unsettle the tenure by which property is holden." These general views were emphasized in *Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185, and they have continued to express the law of this state until the present time. The doctrine of *Jordan v. Woodward*, 40 Me. 317, basing the constitutionality of the mill act upon "great antiquity and long acquiescence" and not upon "public benefit," has never been extended, and we think it should not be. Mr. Lewis in his work on Eminent Domain, after reviewing the cases, says (section 181): "Sawmills and grist-mills, ³⁷⁰ carding-mills and fulling-mills, cotton-gins and other mills which are regulated by law, and obliged to serve the public, are undoubtedly a public use. But, as respects all other kinds of mills, although they may be a public benefit, they are not a public use within the meaning of the constitution": *State v. Edwards*, 86 Me. 102, 41 Am. St. Rep. 528, 29 Atl. 947, 25 L. R. A. 504.

Taking the decided cases generally, we think that the weight of authority does not sustain the doctrine that a public use such as justifies the taking of private property against the will of the owner may rest merely upon public benefit, or public interest, or great public utility. This was, no doubt, the early doctrine in Massachusetts, as applied to mill acts and drainage acts, and we think the cases show that the doctrine was adopted in other states largely on the authority of the Massachusetts decisions. But, plainly, it has since been repudiated by Massachusetts herself. Something more than mere public benefit must flow from the contemplated use: *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522, 68 L. R. A. 582. Public benefit or interest are not synonymous with public use: *In re Niagara Falls Ry. Co.*, 103 N. Y. 375, 15 N. E. 429; *Avery v. Vermont Electric Co.*, 75 Vt. 235, 98 Am. St. Rep. 818, 54 Atl. 179, 59 L. R. A. 817. Neither mere public convenience nor mere public welfare will justify the exercise of the right of eminent domain: *Kinnie v. Barr*, 68 Mich. 625, 36 N. W. 672. If the doctrine of public utility were adopted in its fullest extent, there would practically be no limit upon the exercise of this power: See *Beekman v. Saratoga etc. R. R. Co.*, 22 Am. Dec. 688, 704, note.

Judge Cooley, in his work on Constitutional Limitations, sixth edition, 653, says: "Nor could it be of importance that the public would receive incidental benefits, such as usually

spring from the improvement of lands or the establishment of prosperous private enterprises. The public use implies a possession, occupation and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it." And again on page 655: "That only can be considered a public use where the government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience ³⁷¹ or welfare which, on account of their peculiar character and the difficulty—perhaps impossibility—of making provisions for them otherwise, is alike proper, useful and needful for the government to provide." There is perhaps no general definition more satisfactory than this one. And we think there is nothing in the creation and distribution of power for manufacturing enterprises, no matter how great their general utility, which makes it "alike proper, useful and needful" for the government to provide for it. They are clearly private enterprises, built up by private capital, for private gain. They are not subject to governmental regulation as public enterprises. Their promoters and owners manage them to suit themselves, so long as they do not interfere with the rights of others. The history of water-power development in this state shows that private enterprise has been amply able to overcome all obstacles. It is not enough to say that by converting water-power into electric-power it can be carried great distances, and applied more economically and profitably. In that way the use of power may be made more convenient. It may tend to the building of more mills, or larger ones. It may be incidentally a public benefit. But it is nevertheless, in its legal aspect, merely an aid to private enterprise. To enable the right of eminent domain to be exercised in such behalf would be taking the property of one private person for the use of another private person, and this has been denominated "not legislation, but robbery": *Coster v. Tidewater Co.*, 18 N. J. Eq. 54. We think it cannot be done without an entire disregard of the constitutional limitation: *Allen v. Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185.

So far we have considered the general question whether the development of power for manufacturing purposes is a public

use, because we have deemed it essential to the correct consideration of the remaining position of the defendants. It is contended that, granting that the manufacturing uses of the current of electricity proposed to be developed are private, nevertheless the powers granted to this corporation are for public uses. The defendant corporation claims that it is a quasi public corporation, charged with the performance of public duties, and subject to governmental regulation, and that it possesses the rights of quasi public corporations, among which may be, if a ³⁷² statute authorizes it, the right of eminent domain. It says the uses of property taken by it under the right of eminent domain for the purpose of performing its public duties are public uses.

It is generally well settled now that when the legislature grants to a corporation the right of eminent domain, or public rights, like street rights, for public uses, and the corporation accepts and exercises the grant, it thereby impliedly comes under obligation to the public to perform all those duties in which the public are interested, and to aid in the performance of which the right of eminent domain was granted. It can be compelled to perform them, and at reasonable rates. It subjects itself to public regulation and control, and to forfeiture of its charter for failure to perform. It devotes its property to public use, and in a way the public have acquired an interest in the use of the property: *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Kennebec Water Dist. v. Waterville*, 97 Me. 185, 54 Atl. 6, 60 L. R. A. 856. The public has a definite and fixed right to the use of the property, independent of the will of the owner: *In re Mayor of New York*, 135 N. Y. 253, 31 Am. St. Rep. 825, 31 N. E. 1043; *Varner v. Martin*, 21 W. Va. 534; 15 Cyc. 583; *Jordan v. Woodward*, 40 Me. 317. "Property is devoted to a public use when, and only when, the use is one which the public in its organized capacity—to wit, the state—has a right to create and maintain, and therefore one which all the public has a right to demand and share in": *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. Rep. 468, 36 L. ed. 247. In a broad sense it is the right in the public to an actual use, and not to an incidental benefit. If it be a railroad company, the public have a right to be transported, and to have their goods carried from place to place, upon payment of reasonable tolls. The company must accommodate them, whether it will or no. If it be a canal or turnpike or

bridge, all may travel thereon. If it be a boom company, all who have logs in the river are entitled of right to have the booms used for them. If it be a telephone or telegraph company, its privileges are open to, and compellable by, all. If it be a water company, the entire public has, and must have, a right to the use of the water. These are the more ordinary kinds of quasi public corporations, and they illustrate better perhaps than any definition can express, the particular personal quality of the use which the public as individuals have by right in the ³⁷³ property of such corporations. It is the right of the public as individuals to use when occasion arises. The use must be for the general public, or some portion of it, and not a use by or for particular individuals: *McQuillen v. Hatton*, 42 Ohio St. 202; *Coster v. Tidewater Co.*, 18 N. J. Eq. 54; *O'Reiley v. Kankakee Valley Draining Co.*, 32 Ind. 169; *Pocantico Waterworks Co. v. Bird*, 130 N. Y. 249, 29 N. E. 246; 15 Cyc. 581. It is not necessary that all of the public should have occasion to use. It may suffice if very few have, or may ever have, occasion: *Riche v. Bar Harbor Water Co.*, 75 Me. 91. It is necessary that everyone, if he has occasion, shall have the right to use: *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 57 Atl. 1001, 66 L. R. A. 387. It must be more than a mere theoretical right to use. It must be an actual, effectual right to use: 15 Cyc. 581.

But this public character of a corporation does not follow merely because it has accepted a grant of the right of eminent domain, unless it was granted for public uses. For unless the grant was for public uses, it was unconstitutional and void, and the company by accepting it obtained no rights as a public instrumentality, and came, thereby, under no obligations to the public. Because the legislature assumed to grant the right of eminent domain, and the grant was accepted, it does not follow that the corporation is a quasi public corporation. As we have said, the legislature could not make a use public by declaring it such. The question, after all analyses, must come back to the inquiry whether the declared uses are in law public uses.

Now, we have taken it for granted that some of the ultimate purposes expressed in the defendant corporation's charter are public ones. We repeat that we think that no one would now deny that electric lighting for the public is a public use, and that a corporation engaged in that business may properly be granted the right of eminent domain for that use. And we

have no occasion at this time to deny that the right of eminent domain might properly be granted to a corporation to enable it to generate, sell and distribute electricity for public lighting, though not a lighting company itself. We are now concerned with the right, under eminent domain, to generate, sell and distribute electricity for power for manufacturing purposes. We suppose that a corporation may be a quasi public one as to ³⁷⁴ electric lighting for instance, and not as to other, though chartered, purposes, just as, to use a former illustration, a company may be chartered to build and operate an electric light plant, and to run a bank, or cotton-mill, or shoe factory. The question now is, Was this defendant a quasi public corporation, as respects creating, selling and distributing electric-power for manufacturing or mechanical purposes? Because, as we have found, that is the use for which this taking is to be made, if at all. We think that the ultimate use of the power is an important consideration. If that use is essentially a private use, in a private business, will it become a public use by merely multiplying the number of persons who may have occasion to use the power? If it would not be a public use to supply power for one mill, would it be such to supply for two mills, or for six or twelve? We think not. In each individual case it would be supplying the power for a private use. If the state cannot take the property of one and give the use of it to another for private use, can it give the use to that other in order that in the form of electric-power he may distribute the use to a dozen others for their private business purposes? We think not. There is no underlying necessity or peculiarity in the business of distributing electric-power which requires any such enlargement of the power of eminent domain. There seems to be such a necessity in the cases of all the quasi public corporations which we have mentioned. Railroads, telegraphs, telephone and water companies cannot be built and maintained by individuals for their several use, each one for himself. There is an "impossibility," to use Judge Cooley's words, "of making provisions for them otherwise" than through the power of eminent domain. But every man can, if he wishes, have a mechanical power of his own, either steam, or water, or electric. He can serve himself, without the intervention of the state. Not so conveniently or advantageously perhaps, as it would be to be served by others. But mere convenience and advantage in private business must yield to the property rights of citizens sacredly

guarded by the constitution. We cannot find any ground for sustaining the defendant's contention, except that of "public benefit," or general utility, and we think that is not sufficient.

³⁷⁵ There is, however, one other consideration which we deem to be of weight, though perhaps not conclusive, in determining whether the creation and distribution of electric-power is a public use. In all the other public uses which have been referred to, the supplying of them to some does not disable the company to supply to others. The use is not exhausted by using. If the railroad carries one, it is not thereby made less able to carry others. It is simply a matter of more trains. In a telegraphic or telephonic service it is simply a matter of more posts and wires. The capacity is practically unlimited. In water services, the calls in those public services for which the right of eminent domain is given is usually infinitesimal, in comparison with the supply. It is practically the same in electric lighting. The units of service are small ordinarily in comparison with the total capacity for service. It is practicable to serve all the public.

But a power service is entirely different. By every unit used the capacity to serve others is by so much exhausted. It cannot be used again. To be useful, power must be constant and steady during all the working hours of the day. Unless the purchaser can be assured of a definite and stable power, it is of little value. What he contracts for another cannot have. Moreover, it is said that the larger the unit, the more economical and profitable. Counsel for the defendants argues that the best and cheapest service is obtained with the largest possible units. And further that all power contracts must be time contracts. Suppose, as in this case, the first customer agrees to take it all; what is the next customer to do? There is nothing left for him. But has not the company the right to sell it all? And may it not sell it all to the only customer in sight at that time? Must it reserve a part of its product for contingent later customers? And may it not contract for long periods of time? Purchasers will not buy, ordinarily, if they are subject to the necessity of dividing the power with later customers, unless the danger is as remotely contingent as electric lighting seems to be in this case. When a purchaser contracts for power, he is likely to expend large amounts to enable himself to use it. It is said in argument that the Hollingsworth & Whitney Company have so spent one hundred thousand dollars in this instance. The sum of it is that elec-

tric-power, generated for sale for manufacturing ³⁷⁶ purposes, is not ordinarily adaptable to public uses, as legally defined. This company expects to have it for sale, and when it is sold it is gone. It is no longer for public use.

But the defendant company says it can generate more power for the public, and that it must do so if the public calls for power. No doubt its public duty, if any, is coextensive with those means which the state has given to it to enable it to perform those duties. The state has given to it the use of the water in the Sebasticook river within certain limits to create power. That is the scope of the charter so far as the creation of power by means of the right of eminent domain is concerned. And if it be a quasi public corporation, for the production of power, when it has fully used the supplies given to it, it can be under no further public duty. No trust is impressed upon the property for any further use, and that is one of the tests of a public use: *Twelfth St. Market Co. v. Philadelphia etc. R. R.*, 142 Pa. St. 580, 21 Atl. 902, 989. But suppose it does create more power, the old customer or the first new one may take it all. Really the right of the public to be served, under such conditions, in any event is purely theoretical, and not effectual. "A particular improvement palpably for private advantage only will not become a public use because of the theoretical right of the public to use it": *De Camp v. Hibernia R. R. Co.*, 47 N. J. L. 43. "A use is not made public by the fact that the public has a theoretical right to use it, or that the public will receive incidental or prospective benefit therefrom": 15 Cyc. 581. The case at bar lacks one of the essential conditions of a public service by a quasi public corporation—namely, the right of the public, or so much of it as has occasion, to be served as a matter of right, and not of grace: *Olmstead v. Morris Aqueduct*, 47 N. J. L. 311; *Gaylord v. Sanitary Dist.*, 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522, 63 L. R. A. 582. "A use which may be monopolized or absorbed by the few, and from which the general public may and must ultimately be excluded, is in no sense a public use": *Board of Health v. Van Hoesen*, 87 Mich. 533, 49 N. W. 894, 14 L. R. A. 114.

The recent case of *Fallsburg Power etc. Co. v. Alexander*, 101 Va. 98, 99 Am. St. Rep. 855, 43 S. E. 194, 61 L. R. A. 129, holds that the development of water-power by a corporation for the purpose of generating electric-power, light and

³⁷⁷ heat for its own use, or for the use of other individuals and corporation, except so far as directly imposed by statute, arise

Our attention has been called to the recent case of Rockingham Light etc. Co. v. Hobbs, 72 N. H. 531, 58 Atl. 46, 66 L. R. A. 581, as an authority directly in point, and fully sustaining the defendant's contentions. In that case the company was organized for the purpose of creating, furnishing and selling electricity, among other things, for the propulsion of cars, and for all mechanical, commercial and business purposes. The right of eminent domain was granted to it. Under this it took pole and wire rights on the defendant's land. The real purpose of the taking was to furnish power for the operation of lines of electric railway, and also, if it had occasion, to furnish power for any of the purposes authorized by its charter. It may be observed that one of the ultimate purposes of the taking was to furnish power to corporations engaged in a quasi public business, but the court does not rest its decision upon that ground: And see Avery v. Vermont Electric Co., 75 Vt. 235, 98 Am. St. Rep. 818, 54 Atl. 179, 59 L. R. A. 817. It likens the purposes of the power company to those of an aqueduct company, and reaffirms the doctrine of Great Falls Mfg. Co. v. Fernald, 47 N. H. 444, that the use of land for the production and distribution of power may be a public use. This latter doctrine has never been accepted as the law in Maine, and we think that there are vital distinctions between power companies and water companies.

The New Hampshire court uses this language: "The demand for power is of a public character. Like water, electricity exists in nature, in some form or state, and becomes useful as an agency of man's industry only when collected and controlled. It requires a large capital to collect, store and distribute it for general use. . . . It may happen that the business cannot be inaugurated without the aid of the power of eminent domain for the acquisition of the necessary land, or rights in land. All these considerations tend to show that the use of land for collecting, storing and distributing electricity, for the purpose of supplying power and heat to all who may desire it, is a public use, similar in character to the use of land for collecting, storing and distributing water for public needs, a use that is so manifestly public that it has seldom been ³⁷⁸ questioned and never denied." It is, perhaps, sufficient to say that we are unable to concur in the reasoning of the New Hampshire court, for reasons already fully stated. The

defendants also cite Salt Lake City v. Salt Lake City Water etc. Co., 25 Utah, 456, 71 Pac. 1069. That case involved an appropriation of water by a power company, which was a riparian proprietor, and the questions considered in the case at bar were not discussed.

The record of the case before us shows a vote of the corporation whereby, "in view of the litigation now pending," it recognized itself as a quasi public corporation, and pledged itself to the performance of its duties as such in furnishing the public with electric light and power, and to make all extensions necessary to meet the public demand for light and power. We do not think this vote can make any difference. In a constitutional sense, a use cannot be enlarged; it cannot be made any more public by a vote. The public duties of a quasi public corporations, is a private and not a public use.

by implication of law. If a corporation is not a quasi public one, it cannot make itself such by voting to perform the duties of a quasi public corporation.

Our conclusion is that the acts threatened by the defendants will be an invasion of the plaintiff's constitutional rights, and that he is entitled to a perpetual injunction as prayed for. A decree to that effect will be signed by a single justice.

Bill sustained with costs. Decree for a perpetual injunction to issue.

For Recent Authorities Bearing upon the decision in the principal case, see Avery v. Vermont Elec. Co., 75 Vt. 235, 98 Am. St. Rep. 818; Fallsburg Power etc. Co. v. Alexander, 101 Va. 98, 99 Am. St. Rep. 855; Gaylord v. Sanitary Dist., 204 Ill. 576, 98 Am. St. Rep. 235; Berrien etc. Power Co. v. Berrien Circuit Judge, 133 Mich. 48, 102 Am. St. Rep. 438. The whole question of uses for which the power of eminent domain cannot be exercised is discussed at length in the monographic note to Zircle v. Southern Ry. Co., 102 Am. St. Rep. 809-839.

In Harmony with the Decision in the principal case is that of State v. White River Power Co., 39 Wash. 648, 82 Pac. 159, in which it was held that the right of eminent domain cannot be exercised in favor of an electric light and power company organized for the purpose of diverting water power to generate electricity to be sold commercially to manufacturers, railways, and cities, in the absence of statutory regulation and guaranties of the public use and enjoyment of the property, because such corporation is not a public service corporation, nor does public necessity require it.

CASES
IN THE
SUPREME COURT
OF
MARYLAND.

RICHARDSON v. SMITH.

[101 Md. 15, 60 Atl. 612.]

STATUTE OF FRAUDS—Acceptance of Sample.—A verbal sale is not removed from the operation of the statute of frauds by the purchaser receiving and taking away a sample which is not a part or portion of the goods sold. (p. 557.)

John S. Young and Boarman & Lindsay, for the appellant.

D. G. McIntosh and Thomas H. Robinson, for the appellees.

¹⁵ **BOYD, J.** The appellant sued the appellees to recover a balance which was alleged to be due him for six hundred and thirty-three cases of tomatoes purchased of him by them. The declaration contains most of the common counts, a bill of particulars was demanded and filed, and issue was joined on the general issue pleas. At the conclusion of the plaintiff's testimony the court below granted two prayers taking the case from the consideration of the jury. One of them instructed the jury that ¹⁶ the plaintiff had offered no legally sufficient evidence entitling him to recover, and the other that there was no legally sufficient evidence of a sale and delivery of the goods sued for to gratify the statute of frauds. Judgment having been entered on the verdict, rendered in accordance with the instructions, this appeal was taken.

The principal question is whether there was such an acceptance and receipt of part of the goods sold as to take the contract of sale out of the operation of the seventeenth section of the statute of frauds. It is conceded that nothing was given in earnest to bind the bargain or in part payment, and that no note or memorandum in writing of the bargain was made. It must, of course, be admitted that if there was any legally sufficient evidence of the acceptance and receipt of

part of the goods sold, it should have been submitted to the jury, and it must likewise be conceded that ordinarily that is the tribunal to pass upon such questions.

For a compliance with this requirement of the statute, the appellant relies upon the delivery to, and the acceptance by, Mr. Smith, one of the appellees, of two or three cans of tomatoes given to him by the appellant at the store of the latter, at the time the alleged sale was made; while the appellees contend that those cans were only samples of the tomatoes to be sold, and were not in fact, or intended to be, included in the sale. Mr. Richardson owned a farm, on which he had a cannery, a short distance from Churchville, Harford county, Maryland. He also carried on a general merchandise business at Churchville. On the day of sale he had between three and four hundred cases of tomatoes at Aberdeen, a station on the P. B. & W. R. R., about seven miles from his store, and had several hundred more cases at his cannery on his farm—there being altogether six hundred and thirty-three cases of the kind sold. After some communication by telephone, Mr. Smith went from Belair to see Mr. Richardson at Churchville with reference to the tomatoes. The latter testified: “He came in and I got some tomatoes I just took out of the warehouse, and got them down for him to sample; he said, ‘I will take these with me and I will see ¹⁷ about them,’ and I said, ‘You are a member of the firm and know what a good can of tomatoes are. Sample it here and if they are all right say so’; he hemmed and hawed awhile and did open the can and said they were a good sample of goods.” Mr. Smith endeavored to get him to give an option until the next morning, but he declined and finally Mr. Smith said he would take them. Mr. Richardson then said, “Understand it is a dollar and forty cents a dozen f. o. b. Aberdeen sight draft bill of lading attached, because I won’t ship them any other way; and he said ‘All right, you will ship them out all right,’ and I said if I could get a car to Aberdeen I will ship them.” He then ascertained that there was a car there and commenced the next morning to load those at Aberdeen and to haul the others there from his cannery.

Mr. Richardson was afterward asked, “Did you deliver to him any goods? If so state what they were.” To which he replied, “He took two cans with him; yes, sir.” Again: “You delivered to him two cans?” and he replied, “Yes, sir.” He also said the samples Mr. Smith got came off the shelf at

his store. Mr. Hawkins, a clerk at appellant's store, then gave his version of what took place between them at the time of the purchase. He said, "Mr. Smith came in the store and there were three cans of tomatoes taken down as samples." He was afterward asked, "Now, were the goods after that delivered to Mr. Smith?" to which he replied, "Two cans he took with him," and again: "Did he take them away with him?" to which he replied, "Yes, sir."

His cross-examination was as follows on that subject: "Q. Mr. Hawkins, I think it was stated yesterday substantially that Mr. Richardson was expecting Mr. Smith, and as soon as he arrived he went in and got these two cans, or rather the samples off his shelf and put them down; is that correct? A. Three cans; yes, sir; that is right. Q. That is correct, then, that he went and got them off his shelf himself and put them down? A. Yes, sir. Q. He got them as samples, did he? A. Yes, sir, I suppose. Q. That was the first thing that was done, was it? A. Yes, sir. Q. When he got these two or three cans down off the ¹⁸ shelf they were examined before there was any contract as you think made? A. Yes, sir. Q. Now, when you say he got them down as samples, Mr. Hawkins, of course he got them down to see what sort of goods they were, you could not tell them from the outside of the cans, could you? A. Of course not. Q. When a man buys tomatoes in cans he can't judge them until he opens a can, that is the universal way of judging the goods? A. I suppose so; I have not had much experience in that. Q. You said a moment ago that Mr. Smith said he wanted to take these samples to Belair? A. Yes, sir."

The testimony also shows that the appellant knew the appellees were brokers in canned goods, and Mr. Morgan, a broker called by the plaintiff, said on cross-examination that it was the universal rule in the sale of canned goods to have samples; that the seller always furnishes the broker with samples and the broker often forwards them to the buyer. The day after the conversation referred to Mr. Smith telephoned to the appellant that the party would not take the goods with a sight draft attached to the bill of lading. He replied that he had sold them to him (Smith) and knew no one else in the transaction. The appellant then continued to load the car with the goods, and the appellees having refused to take them, he sold them to different persons at what he claims to have been the market prices at the time of sale. In the bill of par-

particulars filed he charges the appellees with six hundred and thirty-three cases sold to them on June 24, 1902, and credits them with proceeds of sales, at different times between July 2d and September 12th, of six hundred and thirty-three cases, leaving a balance of three hundred and eighty-seven dollars and ten cents, which he claims with interest—thus showing that he did not include the two sample cans, even in his bill of particulars filed in this case.

Without quoting further from the evidence, it is perfectly manifest that the samples were not a part of the six hundred and thirty-three cases. Although the appellant and his clerk said, in answer to the questions whether he had delivered any part of the goods, that Mr. Smith took two of the cans with ¹⁹ him, the testimony of both of them shows conclusively that they were the samples, and there is not a particle of evidence to show that they were intended to be or were treated by either party (much less both) as any part of the goods sold. Mr. Hawkins testified that Mr. Smith said he wanted to take the samples to Belair, while the goods sold in this transaction were to be delivered f. o. b. Aberdeen, and, according to the appellant, were delivered there.

We have thus stated at some length the material parts of the testimony because it is mainly a question of fact, and we will now briefly refer to the authorities on the subject. In 29 American and English Encyclopedia of Law, second edition, 993, it is said: “The receipt and acceptance of the buyer of samples of the goods are held to be a compliance with the statute when the samples are considered and treated *by both parties as constituting a part of the goods sold and as diminishing the quantity or weight of such goods* to the extent of their own bulk, otherwise the taking of samples has no effect upon the validity of the contract.” (Italics are ours.) That is a plain, reasonable and just statement of what the law should be, and is amply supported by the authorities cited in that volume. The distinction is clearly made in some of the early English cases: *Klinitz v. Surry*, 5 Esp. 267; *Hinde v. Whitehouse*, 7 East, 558; *Gardner v. Grout*, 2 Com. B., N. S., 340, 89 Eng. Com. L. 340. Cockburn, C. J., likewise pointed it out. The same principle is announced in *Browne on Statute of Frauds*, fourth edition, section 334. See, also, *McCormick Harvesting Co. v. Cusack*, 116 Mich. 647, 74 N. W. 1005; *Remick v. Sandford*, 120 Mass. 309; *Dierson v. Petersmeyer*, 109 Iowa, 233, 80 N. W. 389, and cases cited in them.

While this precise question has not been heretofore determined in this state, the principles applicable have often been announced. As early as *Belt v. Marriott*, 9 Gill, 331, our predecessors quoted with approval from 2 Starkie on Evidence, 490, that, "In order to satisfy the statute, there must be a delivery of the goods with intent to vest the right of possession in the vendee, and there must be an actual acceptance by the latter, with intent to take possession as owner." In *Jones²⁰ v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533, we repeated that, and said that "while there can be no acceptance under the statute without delivery by the seller, yet there must be both delivery and acceptance in order to sustain an action upon the contract." It was held in that case "that the mere designation of a carrier by the vendee, and delivery of the goods to, and receipt of them by, him as carrier, does not operate such acceptance and receipt as the statute requires," and that the fact that the purchaser sold, or offered to sell, the goods in anticipation of their arrival did not amount to such assumption of authority, or assertion of ownership over them, as to constitute an acceptance and receipt within the requirements of the statute. Judge Miller said that, "in the earlier decisions slight acts were considered as sufficiently evidencing acceptance and receipt, but later cases are much more strict, evincing a commendable determination by the courts to give full effect to the design and spirit as well as the letter of the statute." The court also held in that case, as was done in this, that as there was no evidence from which a jury could properly draw the inference of such acceptance and receipt of the goods as the statute requires, a prayer was properly granted taking the case from the jury. In *Hewes v. Jordan*, 39 Md. 472, 17 Am. Rep. 578, we held there was sufficient evidence on the subject to go to the jury, but there the purchasers not only had the opportunity to inspect the grease purchased, but gave a written order to the vendor to deliver it to a drayman by whom it was taken to the store of the purchasers and there received. In that case Judge Alvey pointed out with his usual clearness the distinction between an acceptance and a receipt, and showed that both were necessary, "with the intention of the parties that the vendee shall take possession of the goods under the contract as owner." The same doctrine was announced in *Cooney v. Hax*, 92 Md. 134, 48 Atl. 58, and *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088.

It will be seen that there is not only nothing in this state which in any way conflicts with the doctrine announced by other courts, as above stated, but, on the contrary, our decisions ²¹ are in exact accord with it. For after all the question is, whether anything has been done which shows, or from which it can be fairly inferred, that the parties intended to vest the right of possession in the vendee, and that he received and accepted the goods with intent to take possession as owner—that is to say, either all or some portion of the goods purchased, not some other goods which were not included in the sale. The statute itself says “part of the goods so sold,” and does not mean a sample which is merely used for the purpose of showing the quality, etc., of the goods which are offered for sale, but which is not itself to be sold.

Another reason assigned by the appellees strengthens their position. The appellant was very emphatic in his statement that he refused to ship the tomatoes in any way other than what we have stated—“f. o. b. Aberdeen sight draft bill of lading attached,” and that Mr. Smith agreed to that. The appellant refused to deviate from these terms the next day, and that was the cause of the refusal of the appellees to finally complete the bargain. He knew, as he testified, that the goods could not be delivered when shipped in that way until the draft was paid, and yet it is contended for him that Mr. Smith’s taking the two cans given him as samples was an acceptance by and delivery to him of the whole. While it is true that there may be such an acceptance and receipt of a part as will be a compliance with the statute of frauds as to the whole of the goods, it is difficult to understand how it can be said that these samples are to be taken as a symbolical delivery, acceptance and receipt of the goods bargained for, when the appellant announced as his ultimatum that he would sell the tomatoes on no other terms than that they should be paid for before delivery by taking up the draft with the bill of lading. The property in goods shipped as these were to be not only does not pass to the buyer until the draft is paid (*Hopkins v. Cowen*, 90 Md. 152, 44 Atl. 1062, 47 L. R. A. 124), but when so shipped there is no such delivery as is necessary to comply with the statute of frauds, as was expressly decided in *Fort Worth Co. v. Consumers’ Meat Co.*, 86 Md. 635, 39 Atl. 746. If, therefore, it be conceded that there may be ²² cases in which it may be a compliance with the statute of frauds for the vendor to deliver, and the pur-

chaser to accept and receive a sample, although all the rest of the goods are shipped with a draft attached to the bill of lading, which is only to be surrendered on payment of draft, there must at least be some evidence of an intention on the part of both vendor and vendee that the sample shall have such effect. There is no such evidence in this case, and hence we do not deem it necessary to pursue that question further, or to determine what the law should be, if there was.

So without extending this decision further, we are of the opinion that the appellant was not entitled to recover, and the judgment will be affirmed.

Judgment affirmed, the appellant to pay the costs.

The Delivery and Acceptance of goods sold, as satisfying the statute of frauds, are discussed at length in the monographic note to Devine v. Warner, 96 Am. St. Rep. 215-229.

HANDY v. STATE.

[101 Md. 39, 60 Atl. 452.]

JUROBS—Examination with View to Peremptory Challenge.—After a juror in a criminal case has been sworn on his voir dire and declared competent by the court, counsel for the defense cannot, as a matter of right, interrogate him in order to determine the expediency of making a peremptory challenge. (p. 561.)

HOMICIDE—Condition of Defendant's Mind.—If a homicide is admitted to have been premeditated, and the defense of insanity is not set up, evidence of the defendant's feelings and condition of mind on the day of the killing is not admissible in evidence on his trial for murder. (p. 563.)

James E. Ellegood, Clarence P. Lankford and H. B. Freeny, for the appellant.

William S. Bryan, Jr., attorney general, Joseph L. Bailey, state's attorney, and John H. Handy, for the appellee.

⁴⁰ PEARCE, J. Henry J. Handy shot and killed his wife under circumstances, disclosed in the record, of extraordinary deliberation and set purpose, and being convicted of murder in the first degree by a jury in the circuit court for Wicomico county, and being sentenced to death, has brought this appeal from rulings of the court made in the course of the trial.

The first exception arose in this way, as stated in the record: "J. Cleveland White, being called and examined by the court

and sworn on his voir dire, and after the usual questions were propounded by the court, declared by the court to be a qualified juror, the prisoner's counsel then proposed to ask the juror questions, but the court declined to allow them to do so, but ruled that the questions could be propounded to the court for the court to repeat to the respective jurors, to which ruling the prisoner excepted."

The second exception was taken to the refusal of the court to propound to Charles Workman, also sworn on his voir dire, a question proposed by the prisoner's counsel, viz., whether the juror was a married man, the counsel stating that they desired to enlighten themselves as to the propriety of exercising the right of peremptory challenge.

These two exceptions will be considered together.

The right claimed under the first exception is the absolute and unqualified right of the prisoner's counsel, after a juror upon his voir dire has been by the court declared to be competent, to interrogate him at pleasure, and without the intervention of the court, for the purpose of determining whether the right of peremptory challenge shall be exercised; while under the second exception the claim is that the court is bound to put to the juror any question which counsel may request the court to put, under the ruling on the first exception.

There is no statute in this state upon the subject, and we⁴¹ have been referred to no case in this state in which either of these questions has been decided or presented. The decisions in other states are conflicting, but in 12 American and English Encyclopedia of Law, first edition, page 358, it is said: "In the absence of statute, the true conclusion in regard to such questions seems to be that it lies in the discretion of the court either to put the questions or to allow the counsel to examine." And on page 359: "The control of the trial of challenges, and of all the proceedings by which a jury is finally selected from those summoned and from the bystanders, is committed to a wide discretion of the court." The same doctrine is stated in Thompson and Merriam on Juries, sections 241-243. The practice in the courts of England is well settled. In *Rex v. Edmonds*, 4 Barn. & Ald. 490, one of the motions for a new trial was made on the ground of opinions supposed to have been expressed by jurors hostile to the defendant's cause. Chief Justice Abbott said: "There was no offer to prove such an expression by any extrinsic

evidence, but it was proposed to obtain the proof by questions put to the jurymen themselves. The lord chief baron refused to allow such questions to be answered, and in our opinion he was right in his refusal."

. In *Regina v. Stewart*, 1 Cox C. C. 174, the headnote is as follows: "Where a party has the right of challenge, he is not entitled to ask a jurymen questions for the purpose of eliciting whether it would be expedient to exercise such right." The defendants were indicted for larceny of goods from tradesmen; the prisoner's counsel, as each jurymen came to the box, asked him whether he was a member of an association for the prosecution of parties committing frauds on tradesmen. Baron Alderson said: "It is quite a new course to catechise a jury in this way." Counsel said: "I have a right, my Lord, to challenge; and I submit that I am entitled to ask for information that is necessary for the effective exercise of that right"; to which Baron Alderson replied: "I cannot allow you to cross-examine the jury. If you like to challenge absolutely, you may do so."

⁴² In *Regina v. Dowling*, 3 Cox C. C. 509, "the prisoner's counsel, upon a juror being called to the box, required him to be sworn on the voir dire in order that he might examine him with a view to a challenge, if necessary." Erle, J., said: "You cannot do that without first stating some ground for the proceeding"; to which counsel replied, "I cannot say I have any instructions with regard to this particular individual," and the judge said, "Then I must refuse your application unless indeed you can quote some authority upon the subject. I think it a very unreasonable thing that a jurymen should be cross-examined without your having received any information respecting him."

From the courts of this country the following cases may be cited.

In *Bales v. State*, 63 Ala. 30, Chief Justice Brickell said: "The proposed examination of Smith, Tucker and Strange, to ascertain whether they were subject to a challenge for cause, after they had been examined by the court, was properly refused. We know of no authority, and we perceive no reason for any such speculative, inquisitorial practice, consuming needlessly the time of the court, and offensive to the persons subjected to it."

In *State v. Creaseman*, 10 Ired. 395, a juror tendered was challenged by the prisoner for favor, and the state admitted

the cause, and the court allowed it, but the prisoner insisted he still had a right to examine him on oath, and if he appeared indifferent, to elect to take him; but the court refused to allow the examination, Chief Justice Ruffin saying: "A party has no right to examine the juror, or any other person, by way of fishing for some ground of exception. A specific cause must be assigned, and that cause be denied on the other side, before evidence can be heard, for until that be done there is no issue for the decision of triers, or of the court in their stead."

In *Powers v. Presgroves*, 38 Miss. 227, the court said: "The court may propound to the jurors returned not only such interrogatories as are required to ascertain their competency, ⁴³ but also in its discretion may ask such other questions, not tending to degrade or render the juror infamous, as may test their impartiality, prejudice, or bias. In this mode of investigation counsel have no right to interpose and interrogate jurors themselves, except by direction of the court, but the whole matter must be left to the sound judgment and judicial discretion of the presiding judge."

In *State v. Zellers*, 7 N. J. L. 220, the same ruling was made, based upon *Rex v. Edmonds*, and in *Matilda v. Mason*, 2 Cranch C. C. 343, it was held that in suits for freedom the court will not question jurors as they are called up to be sworn as to their prejudices or prepossessions in favor of freedom, but leave the parties to their challenge. We are aware that there are decisions to the contrary in other courts of equal authority and reputation, but such knowledge as we possess of the experience in practice under those decisions does not commend them to our adoption. We agree with the view expressed by the Texas court of appeals in *Stagner v. State*, 9 Tex. App. 440, where it is said: "The judge should either himself conduct the examination, or at least so far conduct it as to confine it to the point under examination, and not permit it to take so wide a range as to entrap an unwary juror into letting fall some expression not seriously and understandingly made, and from which it may be afterward argued that he was not an impartial juror in the case. The juror should be treated with the utmost fairness in the examination, and not be subjected to the rigid cross-questioning sometimes indulged in in cross-examining a witness who is testifying in the case." If the whole course of such exam-

ination is in the discretion of the court, there would, of course, in no event be any appeal from rulings made therein, but apart from that view, it would be sufficient upon the first exception to say that as no specific question was propounded, and as counsel failed to declare the character and purpose of the undisclosed questions which they wished to ask, there could be no error in the ruling, unless it were in requiring all questions to be addressed to the court, and by them put to⁴⁴ the juror, and we have already said we are of opinion this was clearly in the discretion of the court. If, however, this exception was intended to raise the same question as the second, viz., the right to cross-examine the juror in order to determine the expediency of a peremptory challenge, the views we have expressed upon that question are applicable to both exceptions. But as to the second exception, there was another all-sufficient reason for the ruling. It was susceptible of only two answers—either that he was, or was not, a married man—and in either event the answer is clearly immaterial: *Gillespie v. State*, 92 Md. 171, 48 Atl. 32. The record shows that the traverser killed his wife because he believed she allowed and encouraged improper attentions from one Thomas, but neither in law nor in common sense can it be supposed that competency to judge of the effect of such provocation is found exclusively in married men, and if we may indulge in speculation as to the reason behind this question, imagination can suggest none more substantial than that we have hazarded.

We have examined all the Maryland cases referred to in the appellant's brief in connection with these exceptions, and we find in them nothing decided in conflict with the views we have here expressed.

The third exception was taken to the refusal of the court to allow Captain Hoffman, who had known the prisoner ten years intimately, and was with him on the prisoner's boat when he went ashore declaring that he was going to kill his wife, to state what was the condition of his mind at that time, counsel saying that they did not intend to set up insanity, but only to show a condition of the mind.

Certain letters which were found by the prisoner in his wife's trunk, and which he testified he knew were written to her by Thomas, were read to the jury while he was on the stand, and he was asked, "What were your feelings and the condition of your mind that morning?" meaning the day he

killed his wife. The court refused to allow an answer to this question, and the fourth exception was taken to this ruling.

Another witness, Carl Hoffman, after testifying that he was⁴⁵ on the prisoner's boat the Friday morning before the shooting, and took him ashore, was asked, "What was the manner and conduct of the prisoner at that time?" and the fifth exception was taken to the refusal to allow this to be answered. These three exceptions are not distinguishable. None of the testimony thus excluded tended to show insanity or any degree of irresponsibility for the prisoner's act, nor was it offered for that purpose.

In *Garlitz v. State*, 71 Md. 293, 18 Atl. 39, 4 L. R. A. 601, it was proposed to ask a witness the following questions: "1. What was the demeanor, appearance, conduct and bearing of the prisoner on that evening"; "2. What was the temperament and disposition of the prisoner"; both of which were refused by the court, and in affirming the judgment in that case this court said: "It would be difficult to suggest any object for which such evidence would be admissible."

In *Spencer v. State*, 69 Md. 28, 13 Atl. 809, where there was evidence of deliberation and premeditation in the killing, and where the prisoner charged that the murdered man had committed a felonious assault upon his wife, causing her death, his counsel asked him when on the stand as a witness whether there was any change in his mental condition after the death of his wife, and if so, what the change was and how it affected him, but refused to follow this up with other proof tending to show that he was insane or irresponsible at the time of the killing. The court refused this question, and that ruling was affirmed, this court saying it was neither admissible to prove insanity, nor, in the face of the undisputed evidence of deliberation and premeditation, to affect the degree of crime. These cases are quite conclusive upon these exceptions.

Judgment affirmed.

RIGHT OF COUNSEL TO EXAMINE A JUROR ON HIS VOIR DIRE FOR THE PURPOSE OF DETERMINING WHETHER TO EXERCISE THE RIGHT OF PEREMPTORY CHALLENGE.

I. Absolute Character of the Right.

- a. In Criminal Prosecutions, 564.
- b. In Civil Actions, 566.

II. Extent and Scope of the Examination.

- a. In General, 566.
- b. In Criminal Prosecutions, 567.
- c. In Civil Actions, 567.

I. Absolute Character of the Right.

a. In Criminal Prosecutions.—The right to interrogate a juror on his voir dire in order to determine whether it is expedient to challenge him peremptorily, and the proper scope and limits of such an interrogation, if demandable at all, are questions upon which widely varying opinions have been entertained. Some courts have reached the conclusion that counsel for the defendant in a criminal prosecution cannot insist, as a matter of right, upon interrogating a juror on his voir dire, or upon having the judge interrogate him, for the purpose of ascertaining the advisability of interposing a peremptory challenge, but that the court may or may not, in its discretion, permit or conduct such an examination. This, it will be noted, is the doctrine announced by the Maryland court in the principal case. The courts of Alabama and New Jersey have laid down a similar doctrine: *Lundy v. State*, 91 Ala. 100, 9 South. 189; *Jarvis v. State*, 138 Ala. 17, 34 South. 1025; *Parrish v. State*, 139 Ala. 16, 36 South. 1012; *Clifford v. State*, 61 N. J. L. 217, 39 Atl. 721.

The theory upon which these decisions proceed appears to be, that the jury system, with the right of peremptory challenge and challenges for cause, the necessity of a unanimous verdict for a conviction, and the like, affords adequate protection to persons on trial for the commission of a crime; that jurors are entitled to some consideration, and should not be liable to an inquisition without any ground or reason therefor being first assigned; and that the time of the court should be economized.

Most of the authorities, however, so far at least as they have come under our observation, take a different view of this question, and declare that the defendant in a criminal prosecution is entitled to make reasonable and pertinent inquiries of a juror on his voir dire, so that he may exercise intelligently and wisely his right of peremptory challenge: *Donovan v. People*, 139 Ill. 412, 28 N. E. 964; *State v. Mann*, 83 Mo. 589; *Territory v. Campbell*, 9 Mont. 16, 22 Pac. 121; *Basye v. State*, 45 Neb. 261, 63 N. W. 811; *State v. Steeves*, 29 Or. 85, 43 Pac. 947; *Commonwealth v. Brown*, 23 Pa. Super. Ct. 470; *State v. Morgan*, 23 Utah, 212, 64 Pac. 256; *State v. Godfrey*, Brayt. (Vt.) 170. The state, too, may make pertinent inquiries for a like purpose: *State v. Dooley*, 89 Iowa, 584, 57 N. W. 414; *State v. Foster*, 91 Iowa, 164, 59 N. W. 8.

“By the laws of this state,” said Justice Shope, in *Donovan v. People*, 139 Ill. 412, 28 N. E. 964, “the right of peremptory challenge in criminal cases is given to the people, equally with the defendant; and its exercise by the people is frequently as important and quite as necessary to the due administration of justice as it is to the defendant for his protection. In either case it is often indispensable to an intelligent selection of a fair and impartial jury that the occupation, habits, associations, and predisposition of the juror should be known, so far as they might tend to bias or pervert his judgment. To deprive a party, whether the people or the

defendant, of an intelligent exercise of the right, is practically to take away the right; and every lawyer experienced in the trial of causes knows that to its intelligent exercise a reasonable examination of the juror is absolutely necessary. If this may not be done, people and the defendant alike must take all who are not subject to challenge for cause, or resort to peremptory challenge indiscriminately, and without that knowledge, easily within reach if reasonable examination is permitted, which would enable them to exercise the right intelligently. . . . Such reasonable examination by counsel should always be allowed as will enable the court to see that the jurors stand indifferently between the parties, and are possessed of the requisite qualifications, and also to enable counsel to challenge for cause, if cause exists, or to exercise the right of peremptory challenge when in their judgment it is deemed necessary or advisable."

And in *Hale v. State*, 72 Miss. 140, 16 South. 387, Justice Woods said: "We are clear that when the full panel had been procured, pronounced competent, passed upon by the state, and presented to the defendant for acceptance or peremptory challenge, he was entitled to all fair and reasonable means of ascertaining who, and what character of men, he was thus called upon to accept or challenge. It was his right to make such examination as would enable him to decide if there was ground for exercising his great right to peremptory challenge. This right, conferred upon him by law, could be intelligently exercised only after a full and fair inquiry of each juror as to the exact state of his mind and feeling, not only as affecting the defendant personally and primarily, but as likely to affect his action as a juror even, and perhaps unconsciously to himself. The office of the peremptory challenge is to protect the defendant against those legally competent, but morally or otherwise unfit or unreliable, to try the particular case; and to deny a full and fair examination of a juror in order to wisely exercise the peremptory challenge would be practically to nullify the right, for of what avail would a peremptory challenge be if exercised at random or blindly and without reason? The right to peremptory challenge is the last precious safeguard of a fair trial left to one capitally charged, before he puts his life and liberty in the keeping of his sworn triers. It is not enough that a court, honest, able, impartial, has pronounced the twelve competent and qualified. . . . It is not enough, even after this, that the defendant may further challenge any of the competent twelve for cause. It is enough only when he has been permitted to challenge peremptorily within the limits of the law, when, in his judgment, it is admissible or expedient to do so. And that his right to challenge peremptorily may be a real instrumentality in his hands for securing a fair and impartial jury, he must not be required to exercise it blindly, and without due opportunity for determining upon what juror wisdom indicates he should employ it."

In California, the language of the earlier decisions is to the effect that questions may be put to a juror to determine, not only that there exist proper grounds for a challenge for cause, but to elicit facts to enable a party to decide whether he will make a peremptory challenge: *Watson v. Whitney*, 23 Cal. 375; *People v. Car Soy*, 57 Cal. 102. But the doctrine of these cases seems somewhat limited by later decisions: *People v. Plyler*, 126 Cal. 379, 58 Pac. 904. "It has never been declared," to quote from *People v. Hamilton*, 62 Cal. 377, "in any case where such declaration was necessary to the decision, that a person summoned as a juror may be questioned for the mere purpose of ascertaining whether the questioner shall determine to challenge him peremptorily. . . . While, therefore, a defendant may, when the opportunity to interpose a peremptory challenge arises, have the benefit of any information acquired during the trial of a challenge for implied or actual bias, he cannot embark in a general exploration for the sole purpose of satisfying himself whether it will be safe to be tried by a juror against whom no legal objections can be raised": See, in this connection, *State v. Bresland*, 59 Minn. 281, 61 N. W. 450.

b. *In Civil Actions.*—Our research has disclosed a number of authorities recognizing, and none denying, the right of either party in a civil action to question jurors, within reasonable limits, on their voir dire for the purpose of determining whether or not he will interpose a peremptory challenge: *Watson v. Whitney*, 23 Cal. 375; *Chicago etc. R. R. Co. v. Buttolf*, 66 Ill. 347; *American Bridge Works v. Pereira*, 79 Ill. App. 90; *Iroquois Furnace Co. v. McCrea*, 91 Ill. App. 337; *Chicago City Ry. Co. v. Fetzer*, 113 Ill. App. 280; *Spoonick v. Backus-Brooks Co.*, 89 Minn. 354, 94 N. W. 1079; *Tarpey v. Madsen*, 26 Utah, 294, 73 Pac. 411. "A party has a right to a certain number of peremptory challenges, and in order to exercise this right understandingly, it is proper for him to ascertain, as nearly as practicable, the disposition of the juror toward him, and toward the subject matter in controversy; and any inquiry within reasonable limits which tends to bring to light any bias or prejudice entertained by a juror is proper": *Monaghan v. Agricultural Fire Ins. Co.*, 53 Mich. 245, 18 N. W. 797.

II. Extent and Scope of the Examination.

a. *In General.*—Considerable latitude is allowed in the examination of jurors on their voir dire with a view of eliciting facts to enable a party to decide whether he will make a peremptory challenge. The examination, however, should be by pertinent questions and within reasonable bounds. Irrelevant questions, or questions the answers to which will introduce extraneous matter of a character that may improperly influence the verdict or tend to disgrace or incriminate the juror, should not be allowed: *City of Vandalia v. Seibert*, 47 Ill. App. 477; *Swift v. Platte*, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635; *State v. Mann*, 83 Mo. 589; *State v. King*, 174 Mo. 647, 74 S. W. 627. Said

Justice Hamersley in *State v. Cross*, 72 Conn. 722, 46 Atl. 148: "Undoubtedly a party may question jurors for the purpose of obtaining information necessary to the intelligent use of his right of peremptory challenge; but the questions must be pertinent, and proper for testing their capacity and competency, and the trial court has some control over the character and extent of such examinations." Whenever there is a fair doubt as to the propriety of a question, it is better to allow it: *State v. Tighe*, 27 Mont. 327, 71 Pac. 3.

b. **In Criminal Prosecutions.**—In a prosecution for murder, counsel for the defendant should be permitted to ask a juror when sworn on his voir dire, whether he is a member of certain secret societies, for the purpose of determining the propriety of a peremptory challenge, counsel first having stated that the deceased had probably been a member of them: *State v. Tighe*, 27 Mont. 327, 71 Pac. 3. So, in a prosecution for unlawfully selling liquor, the defendant may ask the jurors whether they are members of a society organized to prosecute offenders under the temperance laws of the state: *Lavin v. People*, 69 Ill. 303. And in a murder trial, it seems that the accused has a right to ask jurors on their voir dire if they belong to an association having for its object the prosecution of crimes or to aid the authorities in enforcing the criminal laws: *State v. Mann*, 83 Mo. 589; but he has no right, either for the purpose of showing actual bias or for the purpose of determining whether to challenge peremptorily, to ask a juror how many murder cases he has sat on as a juror (*People v. Brittan*, 118 Cal. 409, 50 Pac. 664), or whether he is a married man: See the principal case, ante, p. 558. In a murder trial the state has a right, with a view of exercising its right to make a peremptory challenge, to examine a juror as to his preconceived opinion on capital punishment: *State v. Foster*, 91 Iowa, 164, 59 N. W. 8.

c. **In Civil Actions.**—In a civil action it has been held that a party may ask a juror on his voir dire, in order to determine whether to exercise the right of peremptory challenge, whether he is a man of family: *Union Pac. Ry. Co. v. Jones*, 21 Colo. 340, 40 Pac. 891; or whether he has prejudices against the defense of the statute of limitations: *Towl v. Bradley*, 108 Mich. 409, 66 N. W. 347. In an action for damages sustained from an explosion of adulterated kerosene sold by the defendant, the court has a discretion to allow the plaintiff to ask a juror if he would consider it negligence to extinguish a lamp by blowing down the chimney: *Stowell v. Standard Oil Co.* (Mich.), 102 N. W. 227. In a will contest the proponent may ask jurors if, without reference to other facts, the fact that a testatrix gives nothing to some of her children would influence their verdict: *In re Goldthorp's Estate*, 115 Iowa, 430, 88 N. W. 944. In an action by an employé for personal injuries, it is proper for the court to allow the plaintiff to inquire of the jurors on their voir dire if they are in any way connected with insurance companies which indemnify employers against liability for personal injuries to their employés, and, in case such indemnity exists, if it would influence their verdict: *Foley v.*

Cudahy P. Co., 119 Iowa, 246, 93 N. W. 284; Swift & Co. v. Platt, 68 Kan. 1, 72 Pac. 271, 74 Pac. 635; Spoonick v. Backus-Brooks Co., 89 Minn. 354, 94 N. W. 1079. In Michigan, counsel may ask a juror on his voir dire which side he would be inclined to favor if the evidence were evenly balanced between the parties: Monaghan v. Agricultural Fire Ins. Co., 53 Mich. 238, 18 N. W. 797; Township of Otsego Lake v. Kirsten, 72 Mich. 1, 16 Am. St. Rep. 524, 40 N. W. 26. This view of the law at one time prevailed in Illinois: Chicago etc. R. R. Co. v. Buttolf, 66 Ill. 347. But it appears to have been repudiated in Chicago etc. R. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406.

EVANS MARBLE COMPANY v. INTERNATIONAL TRUST COMPANY.

[101 Md. 210, 60 Atl. 667.]

MECHANIC'S LIEN—Labor and Materials—Entire Contract.—Under a statute allowing a mechanic's lien for work done upon a building, but not for materials furnished, a person who does work on a building and also furnishes materials under an entire contract, the consideration being a lump sum for both, is not entitled to a lien. (p. 574.)

MECHANIC'S LIEN.—A Subcontractor Who has Work done on a building for the contractor, although he does not perform the work personally, is entitled to a mechanic's lien, under a statute providing that buildings shall be subject to liens for the payment of all debts contracted for work done on them. (p. 577.)

MECHANIC'S LIEN—Work not Done on Premises.—One who does work in his shop on materials to be used in the construction of a building, and so used, is entitled to a mechanic's lien. (p. 578.)

George R. Willis, E. A. Sauerwein, Charles W. Heuisler, Richard Bernard & Son and Ferdinand C. Dugan, for the appellants.

Edgar H. Gans and W. C. Chestnut, for the appellee.

212 JONES, J. There are four appeals brought up in this record. The appellants are asserting mechanics' lien claims against a certain building located in the city of Baltimore constructed for the defendant corporation, the International Trust Company. Edgar M. Noel was the contractor with this defendant for the construction of the building and the appellants all had with him subcontracts with reference to its construction. The proceedings below were begun by a bill filed by George T. Rosensteel, in circuit court No. 2, of Baltimore City, to enforce a claim for work done by him in connection with the erection of the building in question in pursuance of

his subcontract ²¹³ with Noel. The executrix of Rosensteel, he having died since the institution of his suit, is the appellant here in such suit. Others of the appellants were made parties defendant in the proceeding instituted by Rosensteel—all of these having at the time filed claims for lien against the building in question based upon their several contracts. The court below, after testimony and hearing, denied the relief sought in this proceeding and decreed that the liens asserted by the appellants were invalid and that their claims did not attach as liens against the building in question under the mechanics' lien law as applicable to the city of Baltimore. From that decree these appeals were taken.

The questions decided by the court below and presented for our consideration here arise out of the defenses set up against the enforcement of the claims of lien in question by the answer of the International Trust Company. The ground of defense which will be first noticed is one which is urged as applicable alike to all of the lien claims here in controversy, and is that they all arose out of "entire and indivisible" contracts between the claimants and the said Noel for furnishing labor and materials for one entire consideration—that is, one lump sum to be paid as the price of both labor and materials. The contention as to this is that, inasmuch as the mechanics' lien law in its application to the city of Baltimore provides no lien for materials furnished for the erection of buildings therein, but only for "debts contracted for work done on or about the same," the contracts in question embrace for one entire consideration both lienable and nonlienable items, and as a consequence no lien attaches under them.

The law providing for mechanics' liens and regulating their enforcement as to the city of Baltimore, which was in force at the time of the erection of the building here in question and the making of the contracts in connection therewith, is the act of 1898, chapter 502, the first section of which reads as follows: "Every building erected and every building repaired, rebuilt or improved to the extent of one-fourth its value shall be subject to a lien for the payment of all debts contracted for ²¹⁴ work done on or about the same." Prior to this act our statute law had provided for a lien for materials furnished for any of the purposes indicated in this section of the statute of 1898 as well as for work and labor done, etc. The purpose of the last-mentioned statute was, on account of possible and actual abuse of the right, to eliminate from the mechanics'

lien law all right of lien for materials furnished for any of the said purposes, as respected its operation in the city of Baltimore.

The question raised by the contention of the appellee corporation now under consideration has never before been presented for adjudication in this court. It has, however, been so presented in other jurisdictions; and courts of the highest repute have maintained the proposition asserted in such contention. There is also an agreement in the text-books as to the principle involved. In 2 Jones on Liens, section 1323, it is said: "When matters for which there may be a lien are mingled with others for which no lien is given, they cannot be separated by a jury in accordance with oral evidence. It is not sufficient that the amount of the lien can be ascertained by extrinsic evidence, but the owner of the property is entitled to be informed of that fact from the account or statement of the lien filed in accordance with the statute. If a contract be made to do the carpenter's work on certain houses and to superintend such work for a sum named, and there be no specification of the sum to be paid for work or of the sum to be paid for superintending the work, no lien can be acquired under the contract. The objection is not obviated by filing an account for work alone without mentioning the matter of superintendence, for when the contract is put in evidence it will appear that the entire charge was not for work but a part of it for superintendence, and that there is no means of determining how much is due for work for which there might be a lien and how much is due for superintendence for which there can be no lien." In Phillips on Mechanics' Liens, third edition, section 296, the same doctrine is expressed in the following: "When the contract is for an entire sum to be paid for various services, some of which are not ²¹⁵ lien-able, no lien can be maintained for any of the work. . . . Under a statute which gave a lien for the performance of labor or furnishing of materials actually used 'by virtue of any agreement with or consent of the owner thereof,' etc., . . . 'provided that no lien for material furnished shall attach unless the person furnishing the same shall before so doing give notice to the owner of the land, if such owner be not the purchaser of the materials, that he intends to claim such liens,' . . . if labor and materials have been furnished by a subcontractor and used in the erection of a building under an entire contract, with no stipulation for any separate

price for either, and it was impossible to determine what part of the contract price was to be applied to either, and there was no mechanics' lien for the whole, for want of notice to the owner, it was held there could be no lien for any part." In 20 American and English Encyclopedia of Law, second edition, 359, it is said: "When lienable and nonlienable items are included in one entire contract for a specific sum, and the value of the lienable and nonlienable items is not apportioned, but is made the basis of a lumping charge, no lien can be enforced." The authors support the text by the citation of authorities illustrating the application of the doctrine there enunciated. These are reproduced in the brief of the appellees.

Of the cases to which reference is thus made none, perhaps, more distinctly affirm the proposition for which the appellees contend than those of *Morrison v. Minot*, 5 Allen, 403, and *Graves v. Bemis*, 8 Allen, 573. A statute of Massachusetts, under which these cases arose, provided that no lien should attach under the law for materials furnished for any building when the same were not purchased by the owner of the land, unless, before they were furnished, notice was given to such owner that the person furnishing them intended to claim a lien therefor. In the case of *Morrison v. Minot*, 5 Allen, 403, certain subcontractors agreed with the principal contractor, who had made a written contract to build a block of stores for the defendant, to do the carpenter and plumbing work on the same. Their contract was a verbal one to do the whole work and furnish the materials for the lump sum of six thousand seven hundred dollars. ²¹⁶ They proceeded to perform their contract and had partly performed the same and received payments on account when they gave notice to the defendant that they intended to claim a mechanics' lien for all labor and materials which they should thereafter furnish. No account was kept of the amount or value of materials or labor furnished before notice was so given so as to distinguish these from such as had been furnished after the notice except by way of "estimate and approximation." The trial court held upon these facts that the claimants were not entitled to a lien, and they excepted to this ruling. The exceptions were overruled in the supreme court, which said that the facts showed conclusively that the "petitioners" (claimants) could not maintain their suit; that the claimants had no lien for materials furnished prior to the notice given to

the owner; that "the debt due to them was for an entire sum, on the completion of their contract"; that the "contract included materials for which there never was any lien; and it was an entire contract"; that there had "therefore never been any debt due to them for labor or materials for which they could have a lien, unless the lien extended to the whole contract"; that no sum whatever had been or was then due to them for labor, or for materials furnished since the notice to the owner; that no such separate demand could be ascertained or stated.

This case was followed by that of *Graves v. Bemis*, 8 Allen, 573, in which a contractor agreed in writing to build a house for the defendant according to specifications for which defendant agreed to pay him the sum of six thousand four hundred dollars—of which one thousand dollars was to be paid when the brick work was done; one thousand dollars when the building was ready to plaster; and the balance on the completion of the contract. A lien claim was set up by a subcontractor who had agreed with the principal contractor to do all mason work for the house for two thousand five hundred and fifty dollars—to be paid one thousand dollars when the plastering was done, and the balance on the 1st of July, 1863; and who fulfilled his contract—performing certain work described in his bill of particulars and furnishing certain materials for which he was not entitled to a lien. It ²¹⁷ was agreed in the case, provided evidence to prove the same would be competent, that the contract was a profitable one; that the profit consisted in the furnishing of the labor; that the bricks furnished had a definite market value; and that the prices named in the lien claimant's bill of particulars fairly denoted the value of the labor over and above the market value of the materials furnished at the price fixed by the contract. The trial court gave judgment for the defendant. Upon exceptions alleged, the supreme court sustained the judgment below; and said "the petitioner [the lien claimant] has never been entitled to any payment for labor either by express contract or by an implied contract on quantum meruit. The contract was entire for labor and materials, and there being no lien for the materials, there is none for the whole or any part."

The contracts involved in this controversy need not be here set out. They will sufficiently appear in the report of the cases in this record and will be found, as respects the features

which affect our inquiry here (with the exception of that in No. 16 of these appeals, to which more particular reference will be made), to be identical with those dealt with in the cases just reviewed. These have been cited and approved in later cases in the same jurisdiction, and elsewhere as well. There are a number of authorities that maintain the propositions they lay down, and none have been cited nor have any been found that go to deny the principle that controlled their decision. Some of the cases in point are *Mulrey v. Barrow*, 11 Allen, 152; *Angier v. Bay State Distilling Co.*, 178 Mass. 163, 59 N. E. 630; *Baker v. Fessenden*, 71 Me. 292; *Kelley v. Kelley*, 77 Me. 135; *Adler v. World's Pastime Exposition Co.*, 126 Ill. 373, 18 N. E. 809; *Allen v. Elwert*, 29 Or. 428, 44 Pac. 823, 48 Pac. 54; *Rinzel v. Stumpf*, 116 Wis. 287, 93 N. W. 36; *Peatman v. Centerville Light etc. Co.*, 105 Iowa, 1, 67 Am. St. Rep. 276, 74 N. W. 689; *Nelson v. Withrow*, 14 Mo. App. 270.

The contention of the appellees which has been under consideration seems to have the support of the authorities, where the question thereby raised has come up for adjudication. We think it is also supported by reason and a proper construction ²¹⁸ of the statute of this state under which the cases at bar arise. The lien which the statute gives is of itself "a peculiar, particular and special remedy," and is "bounded and circumscribed by the terms of its own creation": 13 Ency. of Pl. & Pr., 942. In the case of *Sodini v. Winter*, 32 Md. 130, it is said "this peculiar lien does not originate in contract; it is purely a creature of positive statutory enactment, to be maintained and enforced to the extent and in the mode which the statute prescribes." This was again affirmed in *McLaughlin v. Reinhart*, 54 Md. 71, *Wehr v. Shryock*, 55 Md. 334, and *Wilson v. Simon*, 91 Md. 16, 80 Am. St. Rep. 427, 45 Atl. 1022. In *McLaughlin v. Reinhart*, it is also said: "It is a purely statutory lien. It presupposes a contract, express or implied, which existing, the law affixes a lien to secure the payment of the mechanic or materialman, for what is done and furnished. The right to compensation must exist or there can be no lien." The plain interpretation of the foregoing expressions of views by this court is that to create a right to the lien there must be a contract for the doing of that for which the statute gives the lien, and that what the lien is designed to secure is the compensation provided in the contract for the doing of that for which the lien is provided.

As the right to the lien depends entirely on the statute, logically there can be no lien for what does not fall within the statutory provision. Now, the statute here in question gives a lien to secure compensation for labor only. The contracts in the cases at bar, with the exception mentioned, are for the furnishing of both labor and materials. The compensation to be paid therefor is one entire price or lump sum for both labor and material so as to make it indistinguishable what is intended to be paid for labor and what for materials. In a contract of this nature the profits arise out of the whole contract. No specific or definite part of the compensation is earned by the performance of labor alone; nor by the furnishing of materials alone. In the contemplation of the parties it is the inseparable intermingling of both that earns the compensation. Each dollar of the compensation provided for is to be paid, and when ²¹⁹ paid, is for labor and materials so intermingled. How can such a contract be said to fall within the scope and meaning of a statute giving a lien for labor only, and it may be said, one passed with that specific design? It seems clear that such a contract does not gratify the terms of a statute which provides only for "a lien for the payment of all debts contracted for work done." For the courts to enforce a lien upon such a contract by undertaking, by extrinsic evidence, to fix a definite price for labor performed thereunder, apart from its connection with the materials provided for, would be for them to make a contract for the parties which they had not made for themselves; or would be to allow one of the parties to the contract, by undertaking to assign by "estimate and approximation," a definite price for the labor disconnected with the obligation to furnish materials in connection with it, to enforce a contract which he had not made and to which the other party never assented. In consequence of the views expressed, the action of the trial court will be affirmed in the appeals Nos. 14, 15 and 17—being those of the Evans Marble Company, Rosensteel, executrix, and Culver and Fitzpatrick, copartners.

What has been said does not apply to the lien claim of Bevan & Son, appellants in No. 16 of these appeals. The claim in this case seems to be within the statute and it is not obnoxious to any of the objections which the appellees have urged against it. This claim arose in this way: Noel, the contractor for the erection of the building against which the

liens here in question were filed, made with the Atlanta Marble Company, a corporation, a contract by which the said company was to furnish the material and labor for doing the exterior marble work of the building. This was an entire contract for both labor and materials. The marble company then made with Bevan a contract which provided that Bevan should "cut, carve, furnish the models and completely erect in place and finish all the exterior marble work" for the said building—the marble company "to deliver all the stock, sawed to dimensions, as directed by" Bevan at "his switch, at 220 Waverly, Baltimore." Then, after other provisions not material to be mentioned here, the contract provided that "for the faithful performance of the foregoing agreements, the party of the first part (the marble company) agrees to pay to the party of the second part (Bevan) the sum of fifteen thousand dollars (\$15,000)"—seventy-five per cent of this to be paid monthly, etc., and the balance "within thirty (30) days after the completion" and acceptance of the work.

It appears from the evidence that this contract was not carried out by Bevan with the marble company, because "within a few weeks after the beginning of the contract the marble company failed to deliver the stone," and Noel "undertook to furnish the stone to be cut for the building and then agreed with" Bevan "to continue the work at the price originally agreed with" the said company. Bevan then performed the work, for which the contract provided, in pursuance of the agreement with Noel and received from the latter certain payments on account. As one of the defenses to the claim of Bevan it is urged that he was a subcontractor of a subcontractor and therefore not entitled to a lien. We pass over, without discussion, the proposition of law asserted in this contention because the basis of fact assumed therein is shown by the evidence in the case not to exist. When the Atlanta Marble Company, which had the contract with Noel which has been referred to, failed, and could not or did not go on with the performance of the contract, it, in effect if not formally, abandoned it; and both Noel and Bevan treated the contract as rescinded and not existing, as they had a right to do; and in legal effect entered into a contract between themselves to be performed according to the terms and stipulations contained in the contract which Bevan had made with the Atlanta company. In substance and effect, and in law as well, Bevan had

the contract, under which he here makes his claim for a lien, with Noel and performed the work for which he claims the lien upon the faith of such contract.

It is also claimed that the contract of Bevan embraced materials as well as work to be furnished, in that it provided that ²²¹ he should furnish models for the work to be done thereunder. The furnishing of these models, however, was not a furnishing of materials for the building. These were not material to go, or to be incorporated, therein. They were intended as a means of guiding and fashioning the work to be done and as an aid to the proper execution of the work; and could therefore be properly taken into account in fixing a suitable price for the same. The contract was for work only. The models were but an instrumentality for its accomplishment.

Again, it is insisted that under the act of 1898 a subcontractor who furnishes work but does not personally do the work is not entitled to a lien. The cases which have been cited in support of this view, as far as they have been brought to the attention of the court, construe laws which in terms define who are to be entitled to the lien and have, of course, excluded from the benefit of the lien those who did not fall within the descriptions contained in the statute. The case of *Winder v. Caldwell*, 14 How. 434, 14 L. ed. 487, is an illustration of this. It has been held that "where statutes provide for a mechanic's lien in favor of persons furnishing materials or performing labor in the construction of buildings without qualifications with regard to the persons to or for whom the materials are furnished or the labor performed, . . . a person furnishing materials to or performing labor for a contractor was entitled to a lien": 20 Am. & Eng. Ency. of Law, 332. While this is not directly to the point made by the appellee's contention now under consideration, it declares a principle of construction which may be applied here. That is, that the law may be held to give a lien in a case falling within its general scope and reason where there is no attempt to define specifically the persons entitled to a lien. The act of 1898 in its sections 11 and 14 employs the term "furnishing" work; and in section 11 expressly recognizes the right of a person "furnishing" work under a "contract with any architect or builder or any other person except the owner" to a lien upon compliance with the provisions of that section. Bevan was not a mere procurer of labor, nor a mere superintendent or ²²² manager of laborers. He was employed for the work speci-

fied in his contract because of his skill and knowledge in that class of work; and he did the work in the sense of giving it intelligent direction and being responsible for its due execution. His contract of employment brings him within the terms and the reason of the statute as one furnishing work.

It is also objected against this claim for lien that a large part of the work to be done under the Bevan contract was to be done on materials and not on or about the building. This is answered by a simple reference to the contract and to the evidence showing how the work was performed and its connection with the actual construction of the building. The contract provided that Bevan should "cut, carve, furnish the models and completely erect in place and finish all the exterior marble work for" the building. What was done in carrying out this contract and the process in executing the work is described by Bevan in his testimony as follows: "The cars would be placed on the switch in my yard, they would be unloaded, the men hoist them out of the cars and unload them in the yard, if they came to the proper size there would be no sawing on them but they would be lifted by the derricks or by hand, as the case required, into the workshops, there the stonecutters would be put to work on them shaping them for the special place and into the specific form required, after finished by the stonecutters they would be loaded on the cars and transported to the side of the building for erection, there they would be handled by the setter and his helpers and hoisted from the sidewalk or unloaded from the wagon first and then hoisted from the sidewalk into the building in proper place."

This needs no comment; it was as much work for the building and about its erection to thus prepare the marble and adjust it to its proper place, as in the carpenter's work to saw the plank and timbers to the requisite lengths and sizes and adjust them to the proper place and position in the course of building.

The last ground of objection to the claim under consideration ²²³ to be noticed is no more tenable than those to which reference has already been made. This is that there can be no lien by Bevan for work done at his shops as described in his evidence and not done at or on the building or premises. There can be no good reason for this contention. It will often contribute to economy as well as convenience in the construc-

tion of a building that necessary work in the preparation of materials for use in the course of such construction be done away from the premises. This would be especially so as to a building of the size and character of the one here in question.

The authorities are in accord with this view. In 2 Jones on Liens, section 1324, it is said: "A lien may sometimes be established for work done away from the premises, if it be done upon articles which are intended for use in the building and are actually used in its construction and repair." In 20 American and English Encyclopedia of Law, 340, there is this statement of what the authorities hold: "It is not essential that the work or labor for which the lien is claimed should have been performed at the site of the building upon which the lien is claimed. Thus work done in the workshop of the contractor in fitting materials for use in the building is labor or work performed in the erection of the building": See, also, *Wilson v. Sleeper*, 131 Mass. 177; *Dewing v. Congregational Soc.*, 13 Gray, 414; *Jones v. Keen*, 115 Mass. 170.

In this connection it is suggested there is significance in the use of the word "on" in the act of 1898, section 1, in the provision that there shall be a lien for "debts contracted for work done on or about" a building. The effect suggested ought not to be given to the use of this word. It would be against reason; but aside from this if the word be used in the statute in the sense of contract or propinquity, the words immediately following "or about" give a less restricted operation to the statute in the view in which we are now considering it. Among the meanings of the word "about" as given in Webster are "concerning; with regard to; on account of; touching." Whatever is to be the signification, therefore, to be attached to the word "on" as used in the statute, the use of the word²²⁴ "about" in immediate connection with it relieves the statute of the restricted operation contended for in the last-mentioned objection urged to the validity of the Bevan lien. The evidence shows that the Bevan claim is not entitled to the item of two hundred and forty-six dollars and sixty-three cents, but after allowing credit generally on the account for what are shown to be proper credits he is entitled to a lien for the balance of the price of the labor performed under his contract as provided for therein. The decree below in No. 16 of these appeals must, therefore, be reversed.

Decree below reversed in part and affirmed in part, costs to be paid in equal portions by appellants in appeals Nos. 14, 15

and 17, and by the appellee in No. 16, the International Trust Company, and the cause remanded.

The Benefit of a Mechanic's Lien is lost where lienable and non-lienable items are included in one contract for a specified sum, or are made the basis of a lumping charge, so that it cannot be seen from the contract or account what properly is charged to each: *Getty v. Ames*, 30 Or. 573, 60 Am. St. Rep. 835; *Wharton v. Real Estate Inv. Co.*, 180 Pa. St. 168, 57 Am. St. Rep. 629; *Peatman v. Centerville Light etc. Co.*, 105 Iowa, 1, 67 Am. St. Rep. 276; *Williams v. Toledo Coal Co.*, 25 Or. 426, 42 Am. St. Rep. 799.

STATE v. WILLIAMS.

[101 Md. 529, 61 Atl. 297.]

STATE—Claim for Insurance—Priority.—A state's claim under fire insurance policies, sought to be enforced against an insolvent insurance company in the hands of a receiver, is not entitled to priority over the claims of other creditors. (p. 583.)

STATE.—Costs cannot be Awarded against a state in a civil action, in the absence of express statutory authority. (p. 583.)

William S. Bryan, attorney general, for the appellant.

Charles Heuisler and E. A. Sauerwein, Jr., for the appellee.

530 PEARCE, J. As a result of the great fire in the city of Baltimore on February 7 and 8, 1904, the Home Fire Insurance Company of Baltimore became insolvent, and upon a bill filed in circuit court No. 2 of Baltimore City by Bernard Wiesenfeld, a stockholder, and Lloyd Wilkinson, state insurance commissioner of Maryland, G. Harlan Williams was, with the consent of said company, appointed receiver to settle and close up its business.

Subsequently, the state of Maryland by its attorney general, Honorable William S. Bryan, Jr., filed a petition in that cause showing that on April 4, 1902, said insurance company issued a policy of insurance to the state of Maryland, insuring certain public buildings described in said policy, in the amounts specified therein, from noon of April 9, 1902, to noon of April 9, 1907, in consideration of a premium of one thousand and fifty-two dollars and eighty-two cents paid by said state to said company; that among the public buildings so insured were three of the State Tobacco Warehouses, all of

which were destroyed in said fire, and upon which the aggregate insurance under said policy was seventeen thousand five hundred dollars, that the state had furnished due proof of loss to said receiver, who had accepted the same, that upon the appointment of said receiver, on the ground of admitted insolvency, all the outstanding policies of insurance issued by said company were rescinded and annulled, and the state of Maryland became entitled to the return to it by said receiver of the unearned premium paid by it upon the policy upon said State Tobacco Warehouses, and that the amount of said unearned premium was the sum of six hundred and sixty-one dollars and ten cents; that there was due the state of Maryland from the said company in addition to the above unearned premium, the sum of seventeen thousand five hundred dollars, being the amount insured, aggregating eighteen thousand one hundred and sixty-one dollars and ten cents, with interest until paid, for which amount the state was entitled to a preference over any and all creditors of said company; and the prayer of the petition was that the receiver be ordered to pay the same out of the first funds coming into his hands as such receiver.

The receiver answered this petition, admitting all the allegations ⁵³¹ of fact therein, except that he alleged the correct amount of the unearned premium was seven hundred and forty-seven dollars and sixty-three cents, but did not admit that the indebtedness carried interest until paid, or that the state was entitled to a preference over any creditor of said company, but submitted these questions to the court.

The court, upon consideration, dismissed this petition with costs, and this appeal is taken from that order. An auditor's account was subsequently stated, in which the state was allowed only a pro rata dividend on this claim with other creditors, to the ratification of which account the state excepted, and said account was ratified except as to this dividend allowed the state, the question of the state's priority being reserved by the order of ratification, and the receiver having in his hands sufficient funds to pay said claim in full, if finally allowed as a preferred claim. Two questions arise upon this appeal: 1. Is the state entitled to the preference claimed? 2. If not so entitled, was it error to award costs against the state?

We think the case of *State v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561, is decisive against the preference of the state. In that case the general principles upon which the

preference or priority of the state over other creditors, as against the property of a common debtor, were very carefully considered in an elaborate opinion by Chief Justice Buchanan. The Bank of Maryland, being insolvent, conveyed all its property, funds, rights and credits to trustees for the benefit of its creditors. Before, and on the date of this conveyance, the treasurer of the Western Shore of the state of Maryland had on deposit in said bank the sum of fifty thousand and eighty-nine dollars and ninety-six cents of the public moneys of the state, and after the date of said conveyance filed a bill in equity against the bank and its said trustees, claiming to be preferred in payment of said sum out of the funds in the trustee's hands, but this preference was denied and the bill was dismissed. The court said: "In *State v. Rogers*, 2 Har. & McH. 198, *Murray v. Ridley*, 3 Har. & McH. 171, and *Contee v. Chew's Exr.*, 1 Har. & J. 417, it was held that at common law the state had a preference, and a right to ⁵³² be first paid out of the estates of deceased persons, where no liens stood in the way. These cases were decided in the late general court and were not appealed from, but acquiesced in by the parties contesting the right. And in *State v. Buchanan*, 5 Har. & J. 317, 9 Am. Dec. 534, and *Dashiel v. Attorney General*, 5 Har. & J. 392, 9 Am. Dec. 572, it was decided by this court that the common law was adopted by the third article of the Bill of Rights 'so far at least as it was not inconsistent with the principles of that instrument and the nature of our political institutions.' It is too late, therefore, at this day, to deny the state's right, at common law, to have its debt first paid out of the property of its debtor remaining in his hands, and no lien standing in the way. For notwithstanding all that has been said in disparagement of this right of priority, it is not perceived to be inconsistent with the principles or spirit of our political institutions. It does not indeed exist here with all the incidents to the royal prerogative right in England. We have not the writ of protection nor the extent in chief, or in aid. And the priority of the state is a rule only in the distribution of the property of the debtor, requiring the debt due to the state to be first paid, where the individual creditor has no antecedent lien overreaching it." Judge Buchanan then proceeded to inquire whether that was a case in which the state's priority attached, or whether it had been defeated by the act of the bank, and in considering that question said: "The debt due from the bank to the state is a debt on simple contract only and not a

lien, as must be conceded. The state, therefore, having no lien on the property covered by the deed of trust, but a priority only in the payment of its claim, if that priority has not been lost, it is subject, claiming under the common law, to the same common-law rule applicable to the royal prerogative right of priority in England, of the same description. That right in England is enforced by the process in the writ of extent in chief, or in aid, according to circumstances, and may be here by proceedings known to our courts. But in either case to make it available, the proceeding must be resorted to, before other vested rights to the property sought to be ⁵⁸³ subjected to the claim are acquired." In support of this statement of the law he cites 2 Tidd's Practice, 1098, 1099, where it is said: "When goods are bona fide sold, or fairly assigned by the king's debtor to trustees for the benefit of his creditors, before the teste of the extent, they cannot be taken under it, even though in the latter case the debtor was a trader within the bankrupt laws, and the assignment was an act of bankruptcy." And Mr. Tidd is sustained by the cases of *Braddock v. Watson*, 2 Ex. 6, and *Giles v. Grover* (H. L. Cas.) 1 Clark & F. 72, cited and commented on by Justice Buchanan. In the latter case Lord Chief Justice Tindal states the controlling principle thus: "The actual sale of the property seized under the writ issued at the suit of the subject forms the dividing line, so that where the sale is complete before the awarding of the crown process, the property is protected therefrom, but where it is not completed, the property may be seized thereunder."

This language is in exact accord with the careful and accurate expression of Judge Buchanan when in the passage above quoted he limits the state's priority to "the property of its debtor remaining in his hands," and where in a later passage in the same opinion, he says: "If the property be fairly and bona fide changed, or the right of the individual creditor be completed before the extent, either by sale under a fi. fa or a valid conveyance to him, or to a trustee for his benefit, the extent coming afterward will be unavailing, there being no point of time at which the two rights were in conflict, and nothing for the extent to act upon, after the property ceases to be the property of the debtor."

There is no conflict or inconsistency between that case and any of the cases cited by the learned attorney general in his argument in this case.

The case of *Davidson v. Clayland*, 1 Har. & J. 546, was not a case of preference or priority generally, but of a statutory lien, and that lien restricted to the debtor's lands, and not extended to his personal property as well.

In *State v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561, the court ⁵³⁴ points out the futility of attempting to assimilate the condition of the bank in that case, after the execution of the deed, to that of a deceased debtor, where the executor or administrator takes the funds of the deceased to be distributed according to law, subject to such preferences as the law allows.

Nor is there any conflict with the law as stated by Mr. Alexander in his note on page 13 of Alexander's British Statutes, in which he says: "It was an established rule of the common law that where the king's right and that of a private subject met at one and the same time, the king's should be preferred"; nor with the case of *Green's Estate*, 4 Md. Ch. 349, in which two judgments were rendered against Green in his lifetime on April 17, 1837, one at the suit of the state, the other at the suit of Nicholas Watkins, and the state was held entitled to priority of payment out of the proceeds of sale of his real estate. The entry of these two judgments on the same day and while the property remained the property of the common debtor clearly illustrates what is meant by the meeting of two conflicting rights at the same time.

We do not perceive any reason why any distinction should be made between the effect of such a conveyance as was made in the case of *State v. Bank of Maryland*, 6 Gill & J. 205, 26 Am. Dec. 561, and the decree in this case, passed upon a bill praying the dissolution of an insolvent corporation, in which cases the receivers appointed by a court under section 382 of article 23 of the Code are vested with all the estate and assets of every kind belonging to such corporation from the time of their qualifying as receivers, and shall be trustees thereof for the benefit of the creditors of such corporation and its stockholders. For the reasons given we are of opinion the priority of the state was properly denied.

An examination of the authorities has satisfied us that costs cannot properly be awarded against the state in civil actions, in the absence of a statute giving express authority to render such a judgment: *State v. Greenwall*, 4 Gill & J. 407; *United States v. Barker*, 2 Wheat. 395, 4 L. ed. 271; *The Antelope*, 12 Wheat. 546, 6 L. ed. 723; *Stanley v. Schwalby*, 162 U. S. 255,

16 Sup. Ct. Rep. 754, 40 L. ed. 960; Sandberg v. State, 113 Wis. 578, 89 N. W. 504, declaring that the doubt expressed in Noyes v. ⁵³⁵ State, 46 Wis. 250, 32 Am. Rep. 710, 1 N. W. 1. as to civil actions to be unfounded. We have been referred to State v. Maryland Agricultural Assn., 98 Md. 216, 56 Atl. 484. as authority for the allowance of costs against the state. The bill in that case was dismissed by the circuit court without giving costs against the state, and their allowance in this court upon affirming the decree was through inadvertence. This opinion, however, will remove any question as to the propriety of such allowance in future cases.

The order appealed from is modified by striking therefrom the award of costs, and as so modified is affirmed.

The Priority of a Claim of a state or of the United States over the claims of other creditors is considered in Lenoir v. Winn, 4 Desaus. 65, 6 Am. Dec. 597; State v. Bank of Maryland, 8 Gill & J. 205, 26 Am. Dec. 561; Jones v. Jones, 1 Bland. Ch. 443, 18 Am. Dec. 327; Farmers' Bank v. Beaston, 7 Gill & J. 321, 28 Am. Dec. 226.

CONSOLIDATED GAS COMPANY v. MAYOR AND COUNCIL OF BALTIMORE.

[101 Md. 541, 61 Atl. 532.]

FRANCHISE—Nature and Definition.—A franchise is a special privilege conferred by the government on individuals; it is not real estate nor an interest in land. (p. 587.)

EASEMENT.—An Easement is an Interest in land; it is an estate—a dominant estate imposed upon a servient tenement. (p. 587.)

FRANCHISE—Easement.—The Right of a Gas Company to occupy the public streets with its pipes and mains is a franchise; the actual occupation of the thoroughfare in that manner, pursuant to the franchise, is the acquisition of an easement. (p. 588.)

TAXATION—Franchise and Easement.—The use to which a franchise permits an easement to be put is an essential element to be considered in placing a valuation on the easement for purposes of taxation. (p. 590.)

TAXATION.—The Value of the Easement of a Gas Company in the public streets is rightly included as an element in fixing an assessment on the tangible property employed in availing of that easement. (p. 590.)

TAXATION.—The Easement Acquired by a Gas Company in its occupancy of the public streets with its pipes and mains may be properly assessed as real estate. (p. 591.)

TAXATION—Bonded Indebtedness of Corporation.—Under the statutes of Maryland, assessors are not authorized to measure the

valuation of a corporation's property for purposes of taxation, by adding thereto and including therein the bonded indebtedness due by the company. (p. 597.)

TAXATION—Appeal from Arbitrary Assessment.—The supreme court cannot be required to sit as a board of review to revise the valuation placed by assessors on property for purposes of taxation; but when the record shows that a valuation has been imposed on property in a capricious, whimsical, or unwarrantable manner, instead of by the exercise of judgment, then such valuation is not an assessment at all. (p. 598.)

TAXATION—Validity of Assessment—Presumption.—While there is generally a presumption in favor of the correctness of an assessment, this is not true of an assessment which is arbitrarily made, and which is therefore really no assessment. (p. 599.)

Edgar H. Gans and W. C. Chestnut, for the appellant.

W. C. Bruce and Sylvan H. Lauchheimer, for the appellee.

543 McSHERRY, C. J. The Consolidated Gas Company of Baltimore is a corporation duly formed under the laws of Maryland. In the year 1904 it was assessed by the appeal tax court of Baltimore City, for the purposes of taxation, with sundry parcels of real estate valued at \$2,697,791; with seventy-nine thousand services at \$158; and with four hundred and fifty-five and a half miles of gas mains at \$1,131,640; making a total of \$3,987,431. This total was increased for 1905 to \$4,026,997. On September 23, 1904, the following notice was sent to the company by the appeal tax court: "This is to notify you that it is the purpose of the appeal tax court to increase the assessment on your mains, pipes and other construction located in, on, under or over the public highways of Baltimore City, so as to include the value of the easement enjoyed by you in said highways, and that on Thursday, September 29, 1904, at 12 o'clock, you will be given an opportunity to make such statements and present such proofs as you may desire, to show why an additional assessment of \$6,000,000 should not be placed on said real property. Thereafter the court may enter an increased assessment thereof, according to its best judgment and information in the premises." The company appeared by its counsel. No evidence was adduced by either side, but the company's counsel insisted that the contemplated or projected assessment of six millions of dollars could not be legally made in the form or by the method proposed. On the day following, the appeal tax court entered its conclusions in these words: "Additional assessment on mains, pipes, and other construction located in, on, or over public highways of Baltimore City, so as to include the valuation of the easements

enjoyed by said company in said highways, \$6,000,000.” From that action or determination the gas company appealed to the Baltimore City ⁵⁴⁴ court. Upon the trial of that appeal evidence was offered with respect to the method pursued by the appeal tax court in arriving at the sum of \$6,000,000 as “the valuation of the easements enjoyed by said company in said highways”; and propositions of law, embodied in prayers, were presented, with a view of raising the question as to the right and authority of the city to tax the particular easement involved; and the further question as to the regularity of the mode adopted by the appeal tax court in reaching the result to which it came. The Baltimore City court rejected all the prayers of the gas company, but granted four out of the eight prayers presented by the city. The court, sitting without a jury, passed an order sustaining the action of the appeal tax court; and from that order this appeal was taken.

There are two questions in the case: 1. Had the city the power to increase the prior assessment on the mains, etc., by the addition of \$6,000,000 so as to include by that addition the taxable value of what the appeal tax court describes as the easements enjoyed by the company in the highways; and 2. If it did have that power, has it properly and lawfully exerted it?

It is not denied by the appellant that the legislature could make provision for an independent assessment of the intangible, incorporeal right called by the company a franchise, but claimed by the city, in view of the facts, to be an easement—the right to occupy a certain space beneath the surface of the streets with gas mains and service pipes; but it is maintained on behalf of the appellant that the general assembly did not intend by existing enactments to allow the appeal tax court to assess as real property the right, privilege or franchise to occupy the streets with gas mains; because that right, by whatever name you call it, like the franchise to carry on business, forms part of the value of the company’s capital and is taxable only through its shares of stock. It is obvious, when these two contentions are brought into juxtaposition, that, in order to determine the first inquiry with which we have to deal, the exact nature of the right in question, under existing ⁵⁴⁵ conditions, must be definitely ascertained. It must be ascertained, however, not as a mere abstraction nor purely from a philosophical standpoint, but especially and specifically with reference to, and in the light of, previous adjudications by this

court as applied to the actual facts in evidence. It is a question of taxation which is before us.

“An easement is a liberty, privilege or advantage without profit which the owner of one parcel of land may have in the lands of another. An easement, although only an incorporeal right and appurtenant to another, the dominant, tenement, is yet properly denominated an interest in land which constitutes the servient tenement, and the expression, ‘estate or interest in lands,’ when used in a statute is broad enough to include such rights, for an easement must be an interest in or over the soil”: 14 Cyc. 1139. In every instance of a private easement—that is, an easement not enjoyed by the public—there exists the characteristic feature of two distinct tenements—one dominant and the other servient. On the other hand, a franchise is a special privilege conferred by government on individuals, which does not belong to the citizens of the country generally by common right: 2 Washburn on Real Property, 303. A franchise does not involve an interest in land—it is not real estate, but a privilege which may be owned without the acquisition of real property at all. The use of a franchise may require the occupancy, or even the ownership, of land; but that circumstance does not make the franchise itself an interest in land. To define the nature of a thing by the accidents which are employed in its use is to confound the thing itself with the agencies applied in its adaptation. Because land may be required in putting a franchise into effective operation, it does not follow that the franchise is land, or an interest in land. But an easement is quite a different thing. It is essentially and inherently an interest in land. It is an estate—a dominant estate imposed upon a servient tenement. To which of these two distinct and dissimilar classes does the right of the gas company to occupy with its mains the subsurface ⁵⁴⁶ of the streets belong in the contemplation of the revenue and tax laws of Maryland?

It will be found upon examining some of the cases that there is occasionally, in the arguments of counsel, a want of exactness in the use of terms, and now and then the right to do a particular thing—which is the franchise—is confused with the results achieved in the exercise of the right, and those results are inaccurately spoken of as the franchise. The right to occupy the streets with gas mains is a franchise—the actual occupation of them in that way pursuant to the franchise is the acquisition of an easement. You must distinguish between

the right to do the thing, and the interest acquired in the soil by the exercise of that right. The right of a railroad company to be and to build a road is a franchise from the state; the roadbed acquired by purchase or condemnation is an easement altogether distinct therefrom, though obtained as a result of the exercise of that pre-existing franchise. It is strictly accurate to say: "The right of a gas company to lay its pipes and to use the streets of a city for the purposes of laying pipes to convey gas is a franchise, and can only be conferred upon a corporation by the legislature": *State v. Cincinnati etc. Co.*, 18 Ohio St. 262. It is equally correct to declare, "The right to use the public streets of a city for the purpose of laying gas pipes therein is, in my opinion, a franchise which alone the state can confer": *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242. In each of these cases, and in many more that might be cited, the right to do the thing spoken of is the franchise. And so in *Tuckahoe Canal Co. v. Tuckahoe etc. R. Co.*, 11 Leigh (Va.), 42, 36 Am. Dec. 374, it was said: "Now, I take a franchise to be (1) an incorporeal hereditament; and (2) a privilege or authority vested in certain persons by grant of the sovereign (with us, by special statute) to exercise powers or to do and perform acts which without such grant they could not do or perform. Thus, it is a franchise to be a corporation, with power to sue and be sued, and to hold property as a corporate body. So it is a franchise to be empowered to build a bridge or keep a ferry over a public stream, with a ⁵⁴⁷ right to demand tolls or ferriage; or to build a mill upon a public river, and receive tolls for grinding, etc. But the franchise consists in the incorporeal right; the property acquired is not the franchise. A bank has a right to purchase a banking-house; when purchased is the house a franchise? Surely not, for it is corporeal, whereas a franchise is incorporeal." In *City of Bridgeport v. New York etc. R. Co.*, 36 Conn. 255, 4 Am. Rep. 63, it was held that a franchise does not include property gained by the exercise thereof.

The distinction is clear between a franchise, as such, and the property acquired for the use of the franchise. The naked, unused, slumbering franchise is property, but it is property concerning the assessment of which in that condition for purposes of taxation the statutes do not make provision, otherwise than by including it as an element which enhances the value of the shares of the capital stock. But when the fran-

chise is brought into activity and is availed of to accomplish the ends it was designed to effect, the property acquired under it becomes amenable to the tax laws apart from the tax on the stock and its value, as an easement, if an easement it be, may be largely augmented by the use to which the franchise enables that property or easement to be put. "They," said the court of appeals of New York in *People v. Tax Commrs.*, 174 N. Y. 417, 67 N. E. 69, "they [tangible chattels in the public highway] have no assessable value worthy of notice except through the actual and constant use made of them as incidental to the special franchises. The value of either resides in the union of both, and can be practically ascertained only by treating them as a unit. Unless assessed together, both cannot be adequately assessed. A man of judgment in valuing a wagon, and especially in estimating its earning capacity, does not pass upon the body, wheels, top and tongue separately. We regard the tangible property as an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which as a going concern can neither be assessed nor sold to advantage except as one thing, single and entire." We cite this to show, if precedent be needed to support such ⁵⁴⁸ a self-evident proposition, that the use to which a franchise permits an easement to be put is an essential element to be considered in placing a valuation on that easement for purposes of taxation.

What, then, is the thing assessed and taxed in this case? Is it the mere right to occupy the streets below the surface with mains and pipes—which is the franchise, or, is it the easement acquired, through the franchise, by the actual occupancy of the highways in that manner? Ostensibly it is the latter; and the right to include the value of that easement as an element in fixing an assessment on the tangible property employed in availing of that easement is, we think, no longer an open question in this state since the decision in *Appeal Tax Court v. Union R. Co.*, 50 Md. 274. In that case it appeared that the tracks of the Union Railroad Company, within the city of Baltimore were, to a considerable extent, constructed in a tunnel under the bed of Hoffman street, a public highway of the city, and another portion of the road within the city, not in a tunnel, was also to a considerable extent, within the limits of public highways. The company asked that the assessments of the roadbed in the tunnels be stricken from the property valued to it. The court below granted

the relief asked, and the appeal tax court appealed. The specific contention was made in the argument here as to the tracks located in the tunnel and on the streets that the railroad company did not own the property—that is, the roadbed—and ought not to be assessed for it, as though it was seised of it. It had only the right to make use of the streets and the soil beneath the streets, and to receive the tolls authorized by its charter. But in disposing of that contention our predecessors said: “We do not concur in the position of the appellee that it should only be assessed with the superstructures on the bed of the road, irrespective of the roadbed itself, or any right or interest therein, because the road occupies a tunnel under a public street, or runs along the highways of the city. The appellee has an easement in the way occupied by its road, and whether that easement be under or over the public street it is ⁵⁴⁹ an element of value to the road, and, as such, should be included in the valuation of the road itself. But few of the railroad companies of the country have anything more than a mere easement in the ways occupied by their roads, and we are not aware that it has ever been held that, because the company did not own the freehold estate in the bed of the road, nothing but the mere superstructures thereon could be assessed to the company. The rule would seem to be clearly otherwise, and that an easement enjoyed in the bed of a public street may be assessed and taxed as real estate: *People v. Cassity*, 46 N. Y. 46; *Appeal of N. B. etc. R. R. Co.*, 32 Cal. 499; *Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 Am. Dec. 621.” The last case cited (*Providence Gas Co. v. Thurber*, 2 R. I. 15, 55 Am. Dec. 621) is peculiarly apposite. The supreme court of Rhode Island there said: “What, then, is the nature of the right which the plaintiffs, the gas company, take under their charter? We think, when exercised, it is an easement—an incorporeal hereditament—like the right of a railroad company to build and occupy their road, or a canal company their canal, under the provisions in their charter which grant the power to take the land upon rendering compensation to the owners.” Here is a specific decision that the right conferred by the charter—the franchise—becomes, “when exercised,” an easement.

But it is not necessary to go beyond Maryland in search of adjudged cases to support the proposition that the easement possessed by a corporation in a public thoroughfare may be assessed and taxed as real estate owned by the corporation.

Appeal Tax Court v. Union R. R. Co., 50 Md. 274, expressly so rules, as already indicated, and that case, though referred to as supporting various propositions, in eight subsequent decisions has never been doubted, questioned or even distinguished in any particular: *Swan v Kemp*, 97 Md. 686, 55 Atl. 441; *Dundalk etc. Ry. Co. v. Smith*, 97 Md. 177, 54 Atl. 628; *United Ry. Co. v. City of Baltimore*, 93 Md. 630, 49 Atl. 655, 52 L. R. A. 772; *State v. Northern Cent. Ry. Co.*, 90 Md. 447, 45 Atl. 469; *Smith v. School Commrs.*, 81 Md. 513, 32 Atl. 193; *State v. Falkenham*, 73 Md. 463, 21 Atl. 370; *State v. Yewell*, 63 Md. 120; *Philadelphia etc. R. R. Co. v. Appeal Tax Court*, 50 Md. 397. It is true that in only ⁵⁵⁰ one of the above eight cases was the inquiry with which we are now concerned under discussion; but the frequent reaffirmance of the judgment in *Union R. Co v. Appeal Tax Court*, 50 Md. 274, as to other propositions covered by it, so thoroughly engrafts it, in its entirety, on the Maryland system of taxation, that nothing short of a legislative enactment can now disturb or qualify it.

Can anyone doubt that if the Consolidated Gas Company, by purchase or condemnation, had secured the right to lay its mains through private property, instead of under the streets, lanes and alleys of the city, it would have acquired an easement—an interest or estate in land—with which it could have been properly assessed as an owner of real estate? Surely, no one would seriously contend that such a right of way through private property was a mere franchise to be considered, in fixing the company's taxable basis, as included in the value of its capital stock. In what respect, looking alone to its legal attributes, would an easement of the kind supposed differ from the one actually enjoyed by the company? The fact that the pipes are laid in the bed of the street without compensation having been paid for the use of the ground occupied cannot change the nature of the estate held by the company, nor convert the thing done—which is an easement—into a mere right to do the thing—which is the franchise.

From the views thus far expressed it follows, we think, that the property or estate which the gas company has in the highways of Baltimore is an easement which may be properly assessed to the company as real estate; and hence there was no error committed by the city court in rejecting the appellant's first prayer, nor in granting the appellee's first and second instructions.

We come next to the second inquiry, namely: Did the appeal tax court properly and lawfully exert the power which we hold that it possessed, to tax the easement in question? Before that question can be intelligently answered, the method actually pursued must be closely and critically examined. Now, what did the appeal tax court do?

⁵⁵¹ First, as will be remembered, the appeal tax court sent the notice of September 23, 1904, giving the company an opportunity "to show why an additional assessment of \$6,000,000 should not be placed" on its real property. So, in advance of any hearing, the appeal tax court apparently fixed upon a sum to be added to the company's assessment unless the company could show that such an increase would be wrong. The amount of \$6,000,000 was arrived at by the following process: The appeal tax court acted on the theory that the entire assets and property of the company and its securities, capital stock and obligations on which it was able to earn a dividend and to pay interest respectively, constituted the value of its total holdings. The stock was then selling at eighty dollars a share—the par being one hundred—but in the calculation it was put at seventy dollars. There are one hundred and seven thousand shares. At seventy dollars a share the appeal tax court carried out the aggregate as \$7,500,000. In addition the company owed several millions of dollars, represented by outstanding bonds which were valued at \$7,700,000. Then the company owed a million and a half in certificates which were put down at \$1,350,000. Still another item was a million of dollars of four and a half per cent general mortgage bonds, which were included at par. The aggregate of all these items footed up \$17,550,000, of which \$10,050,000 represented debts due by the company on bonds and certificates held by creditors of the company. Then from this total aggregate the appeal tax court deducted the assessed value of the company's real estate, namely \$4,300,000, and there remained the sum of \$13,250,000. The company was assessed with \$150,000 of personal property, but in deducting that personal property from the above-mentioned sum total the appeal tax court increased the valuation of the same personal property ⁵⁵² to \$1,500,000, from which they at once subtracted \$250,000 and took the remainder—\$1,250,000—from the \$13,250,000; leaving exactly \$12,000,000, which sum, it is insisted, represents the value of the company's franchise derived from the state, and also the increased value of its mains by reason

of the enjoyment of the easements in the streets. This result was then divided by two, and \$6,000,000 were added to the assessed value of the mains and pipes to include the value of the easement enjoyed by the company in the highways. Was that process a lawful method, under existing statutes, to reach a valuation of the street easements for taxation purposes? The city contends that it is, and relies in support of that contention on the case of *Simpson v. Hopkins*, 82 Md. 478, 33 Atl. 714.

It must be borne in mind that there are two distinct elements which enter into the question as to whether the method pursued by the appeal tax court in making the assessment now under review was lawful; and they are, first, the right of the assessors, under the Maryland statutes, to measure the value of a corporation's property for the purposes of taxation, by adding thereto and including therein and charging against the company the bonded indebtedness due by the corporation; and secondly, the peculiar, and apparently arbitrary, as distinguished from juridical, ascertainment of the values apportioned amongst the component factors reckoned and comprised in the sum total of the assessment. The case of *Simpson v. Hopkins* does not deal with or pass upon either of these two elements, because neither of them was then before the court for decision. These are the facts: Hopkins, the collector of state and city taxes, sued Mrs. Simpson and her husband to recover the amount of taxes levied for the years 1891, 1892 and 1893 upon twelve bonds of the Consolidated Gas Company owned by Mrs. Simpson. Three grounds of defense were relied on, namely: 1. That section 88 of article 81 of the Code, as then in force, and under which the tax was levied, was in conflict with article 15 of the Declaration of Rights, and ⁵⁵³ unconstitutional, because it subjected to taxation in the hands of the holders all bonds of a corporation, even though the bonds were secured by a mortgage on real property wholly within the state, whilst section 4 of the same article of the code exempted from taxation similar mortgages and mortgage debts due by individuals; 2. That by reason of the facts just stated, section 88 of article 81 was void under the fourteenth amendment to the federal constitution; and 3. That by the above-named section 88, bonds of the description held by Mrs. Simpson were declared to be liable to assessment and taxation to the owners thereof in the same manner as like

bonds secured by a mortgage on land partly in this state and partly beyond it, and that as there was no provision for the assessment of the last-named class of bonds there could be no taxation on those owned by Mrs. Simpson. There was no question raised as to whether the gas company should have been assessed with the bonds. Dealing with the first and second of the three defenses, and with a view of showing that there was no unreasonable discrimination made between the bonds issued by a corporation and the mortgage debt created by an individual, this court said: "An individual's true worth for the purposes of taxation consists of his real and personal property; but in the case of a corporation its franchise, its borrowing power, its earning capacity its real worth are not represented merely by its visible property and shares of stock. The taxable value of a corporation is its bonded indebtedness, together with its stock. In support of this Justice Miller, in *State Tax Cases*, 92 U. S. 605, 22 L. ed. 670, said: 'It is, therefore, obvious that when you have ascertained the current cash value of the whole funded debt and the current cash value of the entire number of shares, you have, by the action of those who, above all others, can best estimate it, ascertained the true value of the road, all its capital stock and its franchises; for those are all represented by the value of its bonded debt and the shares of its capital stock.' " We then added: "It is quite apparent, then, that this exemption of the mortgage debt of an individual and taxation of the mortgage bonds of a corporation ⁵⁵⁴ in the hands of the respective creditors is not an arbitrary and unreasonable discrimination between the same classes of property." Whilst we thus quoted from the *State Tax Cases*, which concerned and interpreted the Illinois system of taxation that differs from ours, the citation was made, not as referring to our tax system in its application to corporations, but to show that there was no unreasonable or arbitrary discrimination involved in the exemption of individual mortgage debts, under section 4, article 81, of the Code, and the taxation of corporate bonds under section 88 in the hands of the owners thereof; but we did not say or imply that under the Maryland statutes the indebtedness of a corporation formed an assessable part of its taxable value or could be included in the assessment of its property. That question was not involved. It may not be amiss to note, in passing, the view entertained of the Illinois system by Judge Cooley, though the supreme court

reached a different conclusion. In a note to page 136 of *Cooley on Taxation*, evidently written before the State Tax Cases were decided by the supreme court, Judge Cooley said: "A franchise may have a distinct value by itself irrespective of any debts that may be owing by the corporation or persons possessing it, as a farm may have irrespective of the mortgage upon it; but there is certainly some difficulty in understanding how the capital stock of a corporation can be valued without taking into account its indebtedness, or how, if the corporation owes so much that its capital stock is absolutely worth nothing and could be sold for nothing, it could have for any legal purposes a fair cash value given it by taking as the measure of its value that which renders it valueless? It may be that if, by enforcing the debt, the capital stock should become the property of the creditors, it would then have a value equal to the previous value of the debt; but this would be by the substitution of one thing for another. Before that time, certainly, the debt is no part of the capital stock." However this may be, it is perfectly apparent that *Simpson v. Hopkins*, 82 Md. 478, 33 Atl. 714, did not hold that the bonded indebtedness of a corporation might be added to the market value of its ⁵⁵⁵ stock in order to ascertain, by that process, the corporation's actual worth for the purposes of taxation, under the then existing laws of Maryland. The opinion does say: "The taxable value of a corporation is its bonded indebtedness, together with its stock," but it does not say the corporation may be taxed on account of that indebtedness. Doubtless the General Assembly could prescribe such a rule. The question is, not can it validly do so, but has it done so.

The answer to that question must be sought in the provisions of the code relating to assessments and taxation; and to those provisions we now turn. Naturally, the first inquiry which suggests itself in this connection is, What are the statutory requirements with regard to the valuation of bonds which constitute the indebtedness of a corporation, and to whom, by the declared will of the legislature, are such bonds directed to be assessed for the purposes of taxation? To the corporation? To the bondholder? Or to both? Let us see. Section 2 of article 81, Code of 1904, among other things provides: "All bonds made or issued by any corporation whatsoever belonging to the residents of this state . . . shall be valued and assessed for state, county and municipal taxation to the owners thereof in the county or city in which such own-

ers may respectively reside." Further on the same section also declares: "All bonds and certificates of indebtedness bearing interest, issued by any railroad or other corporation of this state secured by mortgage of property wholly within this state, belonging to residents of this state, shall be subject to valuation, assessment and taxation to the owner or owners thereof, in the same manner as like bonds or certificates of indebtedness bearing interest and secured by mortgage of property partly in this state and partly in some other state or states are now subject to valuation and assessment under the laws of this state." Section 92 of article 81 is in almost the same language as the above quotation, but it concludes with these words: "And it shall be the duty of the county commissioners of the several counties and the appeal tax court of Baltimore City to assess all such bonds or certificates of debt to the ⁵⁵⁶ owner or owners thereof resident in several counties, or in the city of Baltimore, respectively." The plain and explicit terms of these sections of the code make it the imperative duty of the county commissioners and the appeal tax court to assess to the holders thereof the bonds and certificates of indebtedness issued by the Consolidated Gas Company. The holders, therefore, are to be assessed with them. Now, section 210, article 81, declares: "All bonds, certificates of indebtedness or evidence of debt in whatsoever form made or issued by any public or private corporation, owned by residents of Maryland, shall be subject to valuation and assessment to the owners thereof in the county or city in which such owners may respectively reside, . . . upon such valuation the regular rate of taxation for state purposes shall be paid, and there shall also be paid on such valuation thirty cents (and no more) on each one hundred dollars for county, city and municipal taxation in such county or city of this state in which the owner may reside." This section distinctly limits the amount which may be exacted on each one hundred dollars of the assessed value of such bonds. By the prior sections the bonds are to be assessed to the owners thereof, and by this section the rate is restricted, outside the state tax, to thirty cents "and no more," on each one hundred dollars of their assessed value. Primarily, therefore, the creditor, who owns the bonds and not the debtor company which issued them pays the tax on them, and unless there is some explicit and unequivocal provisions of law subjecting the same bonds to an additional imposition as part of the taxable value

of the assets of the indebted corporation, the appeal tax court was without authority to charge the Consolidated Gas Company with \$10,050,000 of the company's own outstanding obligations. Is there any such provision to be found upon the statute book? A diligent search has failed to discover it, and in the admirable and instructive arguments at the bar it was not even suggested that an enactment of that kind existed in Maryland. Very cogent reasons were assigned and dwelt on with great force to sustain such a scheme of assessment. Those reasons ⁵⁵⁷ would doubtless have much weight with the legislative department of the state government; but we have no right or power to supply by judicial interpretation measures of administrative detail or systems of valuation which the legislature has not yet seen fit to adopt. "A distinction must be noticed," said the supreme court, "between the construction of a state law and the power of a state": *Adams Exp. Co. v. Ohio State Auditor*, 166 U. S. 221, 17 Sup. Ct. Rep. 604, 41 L. ed. 978. We are dealing now with the construction of our existing statutes and not in anywise with the power of the state to enact in this particular a different scheme of taxation. In the case last cited the supreme court, after illustrating the inequality resulting from the imposition of a tax on only the tangible assets of a corporation, whilst its intangible and perhaps most valuable property was suffered to escape, observed: "Accumulated wealth will laugh at the credulity of taxing laws which reach only the one and ignore the other, while they who own tangible property, not organized into a single producing plant, will feel the injustice of a system which so misplaces the burden of taxation. . . . But what a mockery of substantial justice it would be for a corporation, whose property is worth to its stockholders for the purposes of income and sale \$16,800,000, to be adjudged liable for taxation upon only one-fourth of that amount. The value which property bears in the market—the amount for which its stock can be bought and sold—is the real value. Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for the purposes of sale." The power of the state to levy taxes on values thus computed is one thing; the question as to whether it has, by enactments now in force, done so is another and a widely different thing. With the first we have no concern, because the method of taxation, and what shall be taken as the measure of the tax, are

in the discretion of the legislature (Cooley on Taxation, 273); as to the second, we have reached the conclusion that no such legislation has yet been adopted. It follows, then, that the method pursued by the appeal tax court in this instance was without warrant of law, and that the assessment was irregular.

⁵⁵⁸ But there is, in addition, an equally serious objection to the validity of the assessment, though it rests on a different foundation. Whilst it is true this court cannot be required to sit as a board of review to revise the amount of the valuation placed by assessors, or other tax officials, upon property for purposes of taxation (*City of Baltimore v Bonaparte*, 93 Md. 156, 48 Atl. 735; *State Tax Cases*, 92 U. S. 610, 23 L. ed. 672), yet when the record shows that a valuation had been imposed upon property in a capricious or whimsical or unwarrantable way, instead of by the exercise of judgment, then such a valuation would not be an assessment at all. "An assessment, strictly speaking, is an official estimate of the sums which are to constitute the basis of an apportionment of a tax between the individual subjects of taxation within the district. As the word is more commonly employed, an assessment consists in the two processes of listing the persons, property, etc., to be taxed, and of estimating the sums which are to be the guide in an apportionment of the tax between them": *Cooley on Taxation*, 258; *New York v. Weaver*, 100 U. S. 539, 25 L. ed. 705; 3 Cyc. 1111. Taxes by valuation cannot be apportioned without an assessment "Without an assessment they have no support, and are nullities": *Thayer v. Stearns*, 1 Pick. 482. It is shown by the evidence that the six millions figure was fixed tentatively in the notice sent to the company, and that it was arrived at by the method hereinbefore indicated. But inasmuch as the result actually reached by the process followed by the appeal tax court produced a sum as the value of the easement in the streets and of the franchises nearly a million dollars in excess of the total par value of the capital stock, the appeal tax court proceeded at once to cut that sum down; first, by deducting an inflated and confessedly erroneous valuation of the personal property, and then by dividing the residuum by two. The inflation of the value of the personal property purely for the purpose of augmenting the amount of the subtrahend in the calculation detailed by the witness—an inflation having not a pretense of fact nor a shadow of justification to rest on—necessarily diminished the remainder; but as thus diminished it ⁵⁵⁹ was

still too high to permit even the semblance of judgment in its ascertainment to be predicated of it, and it was summarily split in two. The arbitrary inflation of the value of the personal property—arbitrary because done without the suggestion of a valid reason—tainted the whole calculation. It will be remembered that the value of the personal property was fixed at \$150,000; that this sum, without any suggestion that it was too low and without any intimation that it was erroneous, was raised to \$1,500,000; but when it appeared that the result obtained by deducting this last-named sum would not be represented in round numbers, \$250,000 were subtracted from the \$1,500,000, so as to make the remainder an even twelve millions. In all this there is not an element of judgment as respects the value of the easement. Any other combination of figures might just as well have been employed, and by subtracting here and adding there, \$6,000,000—the sum named in advance in the notice—could have been as readily and precisely reached. That is not the kind of judgment which the law contemplates shall be exercised by an assessor. The method of valuation was wrong, and the appellant asked the court to so rule; but by rejecting the company's fourth prayer the trial court refused to grant that instruction. In this there was error.

There was also error in granting the appellee's sixth and eighth instructions. The sixth declares that the burden of proof was on the company to show by a preponderance of testimony that the assessment was erroneous. Presumptions are in favor of the correctness of assessments (27 Am. & Eng. Ency. of Law, 2d ed., 728); but there must be an assessment before there can be a presumption in favor of its accuracy. In this case there was no assessment—hence no presumption can be invoked. The theory underlying the eighth prayer is that there had been a valid assessment of \$6,000,000 on the easements. As that theory is unsupported, the prayer must fall. This disposes of all the questions raised in the case; and it will be seen that whilst we hold the easements in question ⁵⁶⁰ to be taxable, we determine that the method followed in valuing them cannot obtain under the statutes now in force.

For the errors indicated, the order sustaining the action of the appeal tax court will be reversed and the alleged assessment as to the \$6,000,000 will be, and hereby is, vacated.

Order reversed with costs above and below.

The Taxation of Franchises is a question which was recently before the court of appeals of New York and the supreme court of the United States: See *People v. State Board of Tax Commrs.*, 174 N. Y. 417, 105 Am. St. Rep. 674, and note. The franchise of a street railway company, although not made taxable by express statute, may be taxed indirectly by associating it with tangible property, thereby increasing the valuation of the latter: *Detroit Citizens' St. Ry. Co. v. Common Council*, 125 Mich. 673, 84 Am. St. Rep. 589.

CASES
IN THE
SUPREME COURT
OF
MASSACHUSETTS.

**DUNN v. BOSTON AND NORTHERN STREET RAIL-
WAY COMPANY.**

[189 Mass. 62, 75 N. E. 75.]

**MASTER AND SERVANT, Railway Cars, Liability of the
Former for Defects Therein.**—A master on whose premises railway
cars come with coal consigned to him at his power-house and plant
to be unloaded is not under duty of inspecting them, and hence is
not liable to his employé injured through defects therein. (p. 602.)

MASTER AND SERVANT—Ways, Works, and Machinery.—
Steam railway cars loaded with coal and consigned to a street rail-
way company are not, while at its power-house to be unloaded, a part
of its ways, works, and machinery, where they are not the property
of such street railway corporation nor under its control. (pp. 602,
603.)

F. L. Hungerford, S. J. Elder and H. W. Barnum, for the
defendant.

E. R. Anderson and A. T. Smith, for the plaintiff.

62 LATHROP, J. This is an action of tort for personal
injuries sustained by the plaintiff while in the employ of the
defendant, on February 20, 1904. The declaration contains
four counts. The first is under the Revised Laws, chapter 106,
section 71, clause 2, alleging the negligence of a superintend-
ent. The second is under clause 1 of the same statute, for a
defect in the defendant's ways, works and machinery. The
third and fourth are at common law. At the close of the
evidence the judge directed a verdict for the defendant and
reported the case to this court. If the verdict was properly
ordered, judgment is to be entered for the defendant; other-
wise, by agreement of counsel, judgment is to be entered for
the plaintiff, and the damages assessed by a jury.

The plaintiff was about thirty years of age, and had been in the employ of the defendant at its power-house in Lowell for some sixteen to eighteen months before the accident, engaged in putting asbestos coverings on steam pipes, unloading coal-cars and doing other odd jobs when ordered by Nelson Young, the engineer of the defendant in general charge of the power-house and the men employed there.

Adjoining the boiler-house was a coalshed belonging to the ~~63~~ defendant, into which cars loaded with coal to be unloaded by the defendant were pushed over a single spur track from the road of the Boston and Maine Railroad, running up an incline to an elevated structure, which at the place of the accident was some twenty to twenty-five feet above the floor of the power-house, and was level for a space sufficient to accommodate four long coal-cars. The track rested on large sleepers supported by beams from the ground. A gangway about two feet wide for men occupied in unloading cars to stand on was laid on the sleepers outside the rails on both sides. There was a space some three feet wide between the sleepers and the wall of the shed on the side where the plaintiff fell. These conditions had existed during the time the plaintiff had worked at the power-house; and he testified that he did not need anyone to give him directions how to unload a coal-car.

On the day of the accident the plaintiff, with three others, was ordered by Young "to go and unload them coal-cars." There was evidence that while unloading the cars he was injured by a defect in one of the cars. The cars did not belong to the defendant, and it was not its custom to inspect them.

To sustain the counts at common law, the plaintiff relies upon the case of *Spaulding v. Flynt Granite Co.*, 159 Mass. 587, 34 N. E. 1134. But that case differs widely from the one before us. There a granite company was using a car to carry its granite from its premises to the place of destination. Here the defendant was merely a consignee of coal delivered on its premises by a car of a railroad company. We are not aware of any case where under such circumstances the consignee has been held liable to its servants for a defect in the car. Nor are we aware of any case which imposes upon the consignee the duty of inspecting the car.

The case of *Foster v. New York etc. R. R.*, 187 Mass. 21, 72 N. E. 331, has no application to the case at bar. In that case the defendant was using in its freight-house an empty car

belonging to another railroad, as a passageway from one of its own cars to the platform of the freight-house. There was a hole in the bottom of the car, through which a servant of the defendant fell.

It is further contended that this car was a part of the defendant's ways, works and machinery. But we are of opinion that ⁶⁴ under the circumstances of this case the car was not a part of the ways, works and machinery. The car in question was not under the control of the defendant. It was not its duty to inspect it, nor to repair it: *Hyde v. Booth*, 188 Mass. 290, 74 N. E. 337, and cases cited.

According to the terms of the report the order must be judgment for the defendant.

The Liability of a Master to His Servant for injuries resulting from defective machinery and appliances is the subject of a monographic note to Brazil Block Coal Co. v. Gibson, 98 Am. St. Rep. 289-325. As to the liability of an employer to his employé when the latter is injured while unloading a defective car furnished by a railroad company, see page 309 of this note.

JOYCE v. DYER.

[189 Mass. 64, 75 N. E. 81.]

APPEAL AND ERROR—Partition.—Though No Final Judgment has been Entered in a suit for partition, exceptions to the rulings of the trial judge may be heard upon appeal. (p. 604.)

COTENANCY.—The Using and Possessing of One Tenant in Common is to be taken as the using and possessing by his cotenant, and the occupation of one will be deemed to be in conformity to his right and title as tenant in common, and not adverse. (p. 606.)

COTENANCY.—The Ouster by One Cotenant of Another Should be Inferred from long, exclusive, and uninterrupted possession by one without any possession or claim for profits by the other. (pp. 606, 607.)

COTENANCY—Presumption from Entry Under a Conveyance Purporting to be of the Whole.—One receiving a conveyance from a cotenant purporting to be of the whole property and entering into possession thereunder will be presumed, nothing to the contrary being shown, to have entered under a claim of right to the fee of the whole. (p. 607.)

COTENANT—Adverse Possession Against, Presumption of Knowledge of.—If one enters into possession of property under a conveyance from a cotenant, purporting to be of the whole, though it is not recorded, the other cotenant must be presumed to know that the possession so taken was adverse, where he knows that a building thereon is changed from a stable to a dwelling and occupied by the grantee and his heirs as a homestead for more than half a century,

during all of which time his and their right to the exclusive possession is not questioned by anybody. (p. 608.)

CONVEYANCE by One Disseised.—Prior to the statute of 1891 a conveyance by a disseised person, unless delivered upon the premises, was inoperative to pass his interest. (p. 608.)

C. C. Mellen and G. W. Abele, for the respondents.

C. G. Swain, for the petitioner.

⁶⁴ **HAMMOND, J.** This is a petition for partition. After a trial in the superior court without a jury an interlocutory judgment was ordered for the petitioner, and the case is before us on exceptions taken by the respondent, Lewis Dyer. The appeal ⁶⁵ taken by him is not pressed. The petitioner contends that since no final judgment has been entered the exceptions should not now be heard, but it has been settled that in a proceeding like this the exceptions may be heard, although there has been no final judgment: *Lowd v. Brigham*, 154 Mass. 107, 26 N. E. 1004.

The record title to the fractional part claimed by the petitioner is in her, and she must therefore prevail unless some reason to the contrary be shown. The respondent makes two objections: 1. That the petitioner's mother was not the legitimate child of Nehemiah T. Dyer; and 2. That the record title is lost by long continued disseisin. The judge found that the petitioner's mother was the legitimate child of Nehemiah T. Dyer, and that there was no actual disseisin.

In the brief of the respondent no argument is made in support of the exceptions so far as they respect the question of the legitimacy of the petitioner's mother, and the point may be dismissed with the simple statement that, in view of the kind of evidence required to bastardize a child born in wedlock, it is manifest that the finding of the judge is amply warranted: *Rev. Laws, c. 152, sec. 22*; *Hemmenway v. Towner*, 1 Allen, 209, and cases cited; *Phillips v. Allen*, 2 Allen, 453.

The more difficult question is whether the finding that there was no actual disseisin is warranted by the evidence. Some doubt might at first arise as to the nature of the finding, whether it means that the relation of disseisor and disseisee never existed between the respondent Lewis Dyer and those under whom he claims on the one hand and the holders of the record title on the other, or whether it means that even if such a relation ever existed it never continued long enough to vest a complete title by adverse possession in the disseisor;

but inasmuch as various rulings requested by Dyer as to the effect of coverture, or other disability, upon the rights of a disseisee were refused upon the ground that "there had been no actual disseisin," and therefore the rulings were immaterial, the obvious conclusion is that the finding means that the relation of disseisor and disseisee never existed between the respondent Dyer and his predecessors in title and the holders of the record title. Did the evidence justify such a finding?

There is no material conflict in the evidence upon that point, ⁶⁶ and we do not understand either party to contend that the uncontradicted evidence is not to be taken as true. The facts shown were substantially as follows: In 1818, Nehemiah Thayer being seised of the real estate in question, died intestate, leaving a widow and three children—Sally, wife of Isaac Dyer, Clarissa Sanborn, and Mary, wife of Joseph Dyer. The petitioner claims under this Mary, her great-grandmother. This real estate was set off to the widow of Nehemiah Thayer as a part of her dower, and the daughter Mary was the owner of one undivided third subject to this right of dower. In 1826 Peter Dyer and Isaac Dyer, the husband of Sally, bought and interest of the widow and that of Clarissa, and received deeds of the same. The widow died in 1830. On June 17, 1829, Peter and Isaac Dyer conveyed the whole of the property by warranty deed containing the usual covenants of warranty, seisin, freedom from encumbrances and right to convey. Sally, the wife of Isaac, joined in the testimonium clause "in token of her consent to the bargain, sale and relinquishment of her right, claim," etc., and the deed was acknowledged by all three. It was not recorded until August 22, 1902. Samuel Dyer, the grantee, entered under it, occupied the building on the land as a store about 1835, and about that year changed the store into a dwelling-house, into which he moved; and "he continued to use and cultivate and live upon the property openly, peaceably continuously and exclusively" from 1835 down to the time of his death, which occurred in 1865.

Samuel Dyer died intestate, leaving several children. To the two sons, Andrew and Lewis, the respondent, the other children in 1867 released their interest in the property, and in the same year Andrew quitclaimed his interest to Lewis. The deeds describe the property as "the real estate formerly owned by our father, Samuel Dyer," and were duly recorded

in the same year. Lewis is now sixty-seven years old, has always lived on the premises, and has been from 1867 to 1904 continuously in open, peaceable and exclusive occupation of them. It further appears that for more than sixty years before her decease Mary Dyer aforesaid lived near the property in question and was a frequent visitor at the house; that Lewis frequently visited her house, and that this intimacy continued until her decease in February, ⁶⁷ 1889; that she and her husband Joseph lived together until his death, which occurred about six years before hers; that Joseph was an appraiser in the settlement of Samuel's property and appraised the property as a part of Samuel's estate in 1865; that Lewis never heard that anyone made any claim to any part of the property until after the death of Nehemiah T. Dyer in 1892, and no legal proceedings were taken to assert any title thereto until this petition was brought.

Here, then, upon the undisputed facts is an open, peaceable, continuous and exclusive occupation of real estate under a claim of right, and there can be no doubt that in the ordinary case the relation of disseisin as between the occupiers and the owners of the record title would be conclusively shown by such facts.

It is contended, however, by the petitioner that while the deed to Samuel Dyer purported to convey the entire property, yet, even if it be assumed that it operated to convey Sally's interest as well as that formerly owned by Clarissa, two of the daughters of Nehemiah Thayer, still in legal effect it did not convey the interest of Mary, the other daughter, and consequently Samuel became a tenant in common with Mary; and that, under the general rule of law that the possession of one tenant in common, though exclusive, being consistent with the right of the cotenant, does not amount to a disseisin of the cotenant in the absence of some act which the law deems equivalent to an ouster, there was no disseisin in this case, or, in other words, that it is not shown that the possession, though exclusive, was adverse to Mary.

The law upon this subject seems to be well settled. As stated by Shaw, C. J., in *Rickard v. Rickard*, 13 Pick. 251, 253: "It is, in general, true that the seisin and possession of one tenant in common is to be taken as the seisin and possession of his cotenant, and the occupation of one will be deemed to be in conformity to his right and title as tenant in common, and not adverse, and consequently that lapse of time will not bar

the cotenant. But this rule is subject to some qualification, and it has long been held that there may be an actual ouster of one tenant in common by another; that upon such actual ouster the possession becomes adverse, and if continued for a sufficient length of time the right of the cotenant out of possession may be barred. It is also now well settled that a long, exclusive and ⁶⁸ uninterrupted possession by one, without any possession or claim for profits by the other, is evidence from which a jury may and ought to infer an actual ouster." The same doctrine is stated by Bigelow, C. J., in *Lefavour v. Homan*, 3 Allen, 354, 355. The following part of his statement with reference to the effect of exclusive possession seems particularly pertinent here: "It may, however, be safely said that a sole and uninterrupted possession and pernanacy of the profits by one tenant in common, with the knowledge of the other, continued for a long series of years without any possession or claim of right and without any perception of profits or demand for them by the cotenant, if unexplained or controlled by any evidence tending to show a reason for such neglect or omission to assert a right, will furnish evidence from which a jury may and ought to infer an actual ouster and adverse possession"; citing *Doe v. Prosser*, Cow. 217; *Culley v. Taylerson*, 11 Ad. & E. 1008; *Rickard v. Rickard*, 13 Pick. 251; *Parker v. Proprietors of Locks & Canals*, 3 Met. 91, 37 Am. Dec. 121. In *Bellis v. Bellis*, 122 Mass. 414, 415, Morton, J., says: "If, with the knowledge of his cotenant, he [a tenant in common] enters upon the land under a claim of exclusive right, and maintains his possession to the exclusion of his cotenant, this will amount to a disseisin, which, if continued for twenty years, will give the disseisor a title by adverse possession."

In considering this question we must bear in mind the familiar principle that when one enters upon land he is presumed to enter under the title which his deed purports upon its face to convey, both as respects the extent of the land and the nature of his interest. The deed to Samuel Dyer purported to convey the fee in the whole. Under that deed he entered, and in the absence of anything shown to the contrary he is presumed to have entered under a claim of right to the fee in the whole. It is not a case where a tenant in common, being or entering into possession as such, afterward attempts to claim that his occupation was adverse to his cotenant. Dyer did not enter as a tenant in common. From the very

first he is presumed to have claimed under his deed, and there is nothing to show that he or his successors ever acknowledged or ever supposed that the interest thereby conveyed was anything other than as it appeared upon the face of the deed. The evidence conclusively shows that the possession ⁰⁹ was not only exclusive, but was adverse to every person, including Mary.

The next question is whether Mary must not be presumed to have known that the possession was adverse. If the deed had been recorded, she would be presumed to have known of it: *Parker v. Proprietors of Locks & Canals*, 3 Met. 91, 37 Am. Dec. 121. She knew that at the death of her father her cotenants were her two sisters and no one else. When Samuel Dyer came into possession she knew that he was either a disseisor as to her and her cotenants, or that he had some sort of deed from them. There was a store upon the land. He changed it from a store to a dwelling-house. As tenant in common she may well have challenged his right to make such a radical change in the property. For more than half a century under her own personal observation the house was occupied by him and his heirs as a homestead. She is not shown ever to have made a question as to his right to exclusive occupation or to have asserted any claim to the property in any way whatever, and there is no explanation of her silence. Applying the principles stated in the cases hereinbefore cited to the undisputed facts, it is clear that, as matter of law, the possession of Samuel Dyer and those claiming under him was adverse, and that the finding that there was no actual disseisin is not warranted by the evidence.

It does not appear from the registry of deeds or otherwise that Mary undertook to make any conveyance of her interest until June 2, 1886, on which day she, being then eighty-six years of age and a widow, conveyed by quitclaim deed to her son Nehemiah, the grandfather of the petitioner, "all right and title which I hold" in said property. The deed was made before Statutes of 1891, chapter 354, and is not shown to have been delivered upon the premises. As the grantor was then disseised, the deed was inoperative to pass her interest, whatever it might have been. So far, therefore, as the petitioner's claim rests upon this deed she cannot recover: *Sohier v. Coffin*, 101 Mass. 179. So far as her claim rests apart from this deed upon her relationship to Mary Dyer, it does not appear how many children Mary Dyer had, and hence it is not

shown what the share of the petitioner as her descendant would be.

Inasmuch as the finding that there was no actual disseisin was ⁷⁰ not warranted by the evidence, we think that in refusing upon that ground to pass upon the rulings requested by the respondent Dyer as to the effect of the statute of limitations, as well as in refusing to give the sixth ruling requested, there was error.

Exceptions sustained.

**THE ADVERSE POSSESSION OF ONE TENANT IN COMMON,
CREATION OF PRESCRIPTIVE TITLE THEREBY.**

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I. Presumption is Against Adverse Possession.

Every cotenant has the right to enter into and occupy the common property, and every part thereof, provided in so doing he does not exclude his fellow tenants or otherwise deny to them some right to which they are entitled as his cotenants, and, as he has the right to take and continue, in possession, they, on their part, may safely assume, until something occurs of which they must take notice, and which indicates to the contrary, that the possession taken and held by him is so held as a cotenant, and hence is in law the possession of all the cotenants, and not adverse to any of them. The presumption

is that the possession of a tenant in common is not adverse to his cotenants: *Williams v. Avery*, 38 Ala. 115; *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28, 17 S. W. 594; *Aguirre v. Alexander*, 58 Cal. 217; *McNeil v. First Congregational Soc.*, 66 Cal. 105, 4 Pac. 1096; *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177, 8 Pac. 146; *Blackaby v. Blackaby*, 185 Ill. 94, 56 N. E. 1053; *Simon v. Richard*, 42 La. Ann. 842, 8 South. 629; *Mansfield v. McGinniss*, 86 Me. 118, 41 Am. St. Rep. 532, 29 Atl. 956; *Barnard v. Pope*, 14 Mass. 434, 7 Am. Dec. 225; *Joyce v. Dyer*, 189 Mass. 64, ante, p. 603, 75 N. E. 81; *Strong v. Colter*, 13 Minn. 82 (Gil. 77); *Stevens v. Martin*, 168 Mo. 407, 68 S. W. 347; *Hogg v. Beerman*, 41 Ohio St. 81, 52 Am. St. Rep. 71; *Moss v. Rose*, 27 Or. 595, 50 Am. St. Rep. 743, 41 Pac. 666; *Clymer v. Dawkins*, 3 How. 674, 11 L. ed. 778. Hence, whenever the question is material, the burden of showing that the possession of a cotenant was adverse must be assumed by him and the persons who claim under him, or who otherwise find it to their interest to establish that his possession was not amicable, but hostile, and therefore amounted to an ouster of his cotenants: *Van Bibber's Lessee v. Frazier*, 17 Md. 443; *Berthold v. Fox*, 13 Minn. 507 (Gil. 462), 97 Am. Dec. 243; *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269; *Freeman on Cotenancy and Partition*, sec. 222.

II. The Possibility of Ouster and Adverse Possession.

Resting on the general presumption referred to above, there have been decisions almost justifying the inference that the possession of one cotenant was necessarily the possession of the others and implying that one cotenant could not oust the others, or, at least, could not do so, except by some act of physical violence not essential to an ouster when the person taking and holding possession had no title to the property, and the person removed or excluded therefrom was the owner or claimant in severalty, but there is not now, and never has been, any serious doubt that one tenant in common may disseise another, and by his acts of disseisin, sufficiently long continued, acquire a prescriptive title as against his cotenants: *Lavelle v. Strobel*, 89 Ill. 370; *Boyd v. Boyd*, 176 Ill. 40, 68 Am. St. Rep. 169, 51 N. E. 782; *Gillaspie v. Osborn*, 3 A. K. Marsh. 77, 13 Am. Dec. 136; *Simon v. Richard*, 42 La. Ann. 842, 8 South. 629; *Thornton v. York Bank*, 45 Me. 158; *Richardson v. Richardson*, 72 Me. 403; *Joyce v. Dyer*, 189 Mass. 64, ante, p. 603, 75 N. E. 81; *Hoffstetter v. Blattner*, 8 Mo. 276; *Florence v. Hopkins*, 46 N. Y. 182; *Northrop v. Marquam*, 16 Or. 173, 18 Pac. 149; *Caperton v. Gregory*, 11 Gratt. 505; *Cooey v. Porter*, 22 W. Va. 120; *McClung v. Ross*, 5 Wheat. 116, 5 L. ed. 46; *Rickard v. Williams*, 7 Wheat. 59, 5 L. ed. 395; *Dexter v. Arnold*, 32 Sum. 152, Fed. Cas. No. 3859; *Prescott v. Nevers*, 4 Mason, 326. This ouster need not extend to all the property of the cotenants or to the whole of any tract claimed by them. It may be restricted to a part of a tract and result in the acquisition of adverse title thereto: *Stevenson v. Anderson*, 87 Ala. 228; *Carpenter v. Webster*, 27 Cal. 549.

III. Where the Entry into Possession was not Intended to be as a Cotenant.

a. Entry Under Deed or Other Writing Purporting to be for the Whole Property.

1. Under a Conveyance by Warranty.—A decided preponderance of the authorities maintains that when a grantee enters into possession of property, his entry will be presumed to correspond to his conveyance, and when that purports to be in severalty, his entry will be presumed to be as a claimant in severalty, and hence adverse to all other persons, though they or some of them were in fact cotenants of his grantor: Freeman on Cotenancy, sec. 224. Where a conveyance contains covenants of warranty, or otherwise makes the grantor answerable for any defect in his title or right of possession, it is clear that he at least intended to assert that he was the owner in fee and in severalty, and that his conveyance was intended to be in hostility to the rights of his cotenants, if he is shown to have any. It is not quite clear to us that his views or intentions are necessarily attributable to his grantee, or that the entry of the latter acquired any additional meaning or force, as against persons not parties to the deed, by the fact that the grantor may be answerable for defects in the title. Doubtless, however, the willingness of the grantor to enter into covenants for title, or to guarantee his grantee's right to the possession, is well calculated to encourage the latter in his belief that no other person has any share or right in the property purchased. On the other hand, by the registry acts in force in every part of the United States, all persons dealing with real property are chargeable with notice of the title thereto as it appears by the registry, and this whether the conveyance is by warranty or by quitclaim, and it seems impossible to maintain that a grantee from a person whose title, as disclosed by the public records, is that of a cotenant only is any less chargeable with notice of limitations upon or defects in the title acquired by him, when his conveyance is by warranty, than when it is in a form imposing no liability upon the grantor for such defects. Nevertheless, it is perhaps more fully established by the decisions that an entry under a conveyance with covenants of warranty is to be deemed adverse to the other cotenants than when made under a conveyance of a different character, and that they are bound, at their peril, to take notice of such adverse character. The giving and receiving of a conveyance and the taking possession thereunder, are said to operate as an ouster of the cotenants who did not join therein, by virtue of which the statute of limitations is at once set in motion against them: *Burgett v. Taliaferro*, 118 Ill. 503, 9 N. E. 334; *Leach v. Hall*, 95 Iowa, 611, 64 N. W. 790; *Thomas v. Pickering*, 13 Me. 337; *Soper v. Lawrence Bros. Co.*, 98 Me. 268, 99 Am. St. Rep. 397, 56 Atl. 908; *Rutter v. Small*, 68 Md. 133, 6 Am. St. Rep. 434, 11 Atl. 698; *Merryman v. Cumberland Paper Co.*, 98 Md. 223, 56 Atl. 364; *Kittredge v. Proprietors*, 17 Pick. 246, 28 Am. Dec. 296; *Marcy v. Marcy*,

6 Met. 360; *Miller v. Bledsoe*, 61 Mo. 96; *Neher v. Armijo*, 9 N. Mex. 325, 54 Pac. 236; *Town v. Needham*, 3 Paige, 546, 24 Am. Dec. 246; *Sweetland v. Buell*, 89 Hun, 543, 35 N. Y. Supp. 346; *Roberts v. Morgan*, 30 Vt. 319.

2. **Under Conveyances Without Covenants of Title.**—We have in the preceding subdivision indicated our inclination to the view that, for the purposes here under consideration, there can be no substantial difference between a conveyance with and one without covenants for title. Either, if in severalty, indicates the intention of the grantor to convey, and of the grantee to acquire, a complete title to the property, and neither warrants any foundation for the belief that the entry of the grantee can be otherwise than as a claimant in severalty. There is little, if any, dissent from the proposition that where a cotenant conveys to a stranger to the title by a conveyance appropriate in form to transfer an estate in severalty, and the grantee enters into exclusive possession of the property thereunder as a claimant in severalty, this is an ouster of the other cotenants of which they must take notice, and which, if sufficiently long continued, bars them of all right to the property: *Fielder v. Childs*, 73 Ala. 567; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658; *Gregory v. Gregory*, 102 Cal. 50, 36 Pac. 364; *Horne v. Howell*, 46 Ga. 9; *King v. Carmichael*, 136 Ind. 20, 43 Am. St. Rep. 303, 35 U. S. 509; *Kinney v. Slattery*, 51 Iowa, 353, 1 N. W. 626; *Murray v. Quigley*, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869; *Scantlin v. Allison*, 32 Kan. 376, 4 Pac. 618; *Gill v. Fauntleroy's Heirs*, 8 B. Mon. 177; *Adkins v. Whalin*, 87 Ky. 153, 12 Am. St. Rep. 470, 7 S. W. 912; *Rutter v. Small*, 68 Md. 133, 6 Am. St. Rep. 434, 11 Atl. 698; *Merryman v. Cumberland Paper Co.*, 98 Md. 223, 56 Atl. 364; *Bigelow v. Jones*, 10 Pick. 161; *Joyce v. Dyer*, 189 Mass. 64, ante, p. 603, 75 N. E. 81; *Gardiner v. Hinton*, 86 Miss. 604, post, p. 726, 38 South. 779; *Beall v. McNeeney*, 63 Neb. 70, 93 Am. St. Rep. 427, 88 N. W. 134; *Abernathie v. Consolidated V. M. Co.*, 16 Nev. 260; *Foulke v. Bond*, 41 N. J. L. 527; *Jackson v. Smith*, 13 Johns. 406; *Sudduth v. Sumeral*, 61 S. C. 276, 88 Am. St. Rep. 883, 39 S. E. 534; *Puckett v. McDaniel*, 8 Tex. Civ. App. 630, 28 S. W. 360; *Mayes v. Manning*, 73 Tex. 43, 11 S. W. 136; *Church v. Waggoner*, 78 Tex. 200, 14 S. W. 581; *Johnston v. Virginia C. & L. Co.*, 96 Va. 158, 31 S. E. 85; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580; *Bennett v. Pierce*, 50 W. Va. 604, 40 S. E. 395; *McCann v. Welch*, 106 Wis. 142, 81 N. W. 996; *Elder v. McClaskey*, 17 C. C. A. 251, 70 Fed. 529; *Bradstreet v. Huntington*, 5 Pet. 402, 8 L. ed. 170; *Doe v. Taylor*, 2 Nott & McC. 508, 5 Barn. & Adol. 575, 3 L. J. K. B. 67. It is not material that the deed under which the entry is made contains no covenant for title, nor that it is of a character from which no covenant of title can be presumed. Thus, it may be a conveyance by an administrator or other person acting merely as an officer of the law or the court, and against whom it cannot be presumed that he intended to make any affirmance whatever respecting the nature and extent of the title he, in his repre-

sentative capacity, assumed to sell and convey: *Fielder v. Childs*, 73 Ala. 567; *Winterburn v. Chambers*, 91 Cal. 170, 27 Pac. 658.

3. **Under a Judgment.**—If a judgment purports to award a party title in severalty or otherwise to vest him with a right to the possession of the whole thereof, his entry under it must be presumed to be as claimed in severalty, and hence to be an ouster of any person who may in fact be a cotenant with him. This rule is specially applicable to decrees in partition to which some of the cotenants were not parties, and which are, therefore, not binding on them. A cotenant to whom the award of the property is made by the decree and who enters upon or subsequently holds exclusive possession thereunder thereby ousts the cotenants not parties to the decree, and the continuance of the exclusive possession will result in the loss of their title by prescription: *Cryer v. Andrews*, 11 Tex. 181; *Scoby v. Sweatt*, 28 Tex. 713; *Clymer v. Dawkins*, 3 How. 674, 11 L. ed. 778.

4. **Under a Bond for Title.**—It is not indispensable that the writing under which the entry is made purports to at once vest the person entering with the legal title. It is sufficient that it purports to give him an exclusive right of possession. Hence, if he is a purchaser of a cotenant and, as such, receives a bond or other writing showing his purchase and that he will be given a conveyance on complying with the terms thereof, and he enters under such writing claiming the whole, subsequently paying for the property according to the terms of his contract, and maintaining an open and notorious possession, he thereby ousts the cotenants of his vendor, and the statute of limitations begins to run in favor of such vendee from the time he first took exclusive possession, though the acquisition of the title by him was at a date long subsequent: *Rose v. Ware*, 115 Ky. 420, 74 S. W. 188.

5. **Under a Quitclaim Deed.**—A deed of quitclaim or one purporting to convey the grantor's right, title, and interest is sufficient in form for the transfer of the title in fee and in severalty. It is, nevertheless, generally looked upon merely as a surrender of the grantor's title, and, at all events, cannot be regarded as an affirmance that he had any. If made by a cotenant, it, according to the view of the decided preponderance of authority speaking upon the question, so far as the statute of limitations is concerned, operates as would a conveyance in terms restricted to the grantor's moiety or interest. He who enters into possession under it is not deemed to enter under a conveyance of the whole, and his ouster of his cotenants must be proved and brought home to their knowledge in the same manner as if the conveyance had purported to be of a moiety only: *Hume v. Long*, 53 Iowa, 299, 5 N. W. 193; *Moore v. Antill*, 53 Iowa, 612, 6 N. W. 14; *Lefavour v. Homan*, 3 Allen, 354; *Edwards v. Bishop*, 4 N. Y. 61; *Purcell v. Wilson*, 4 Gratt. 16. From this view there is a very reasonable dissent, which was thus expressed in the case of *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463: "Complainants insist that a quitclaim deed cannot operate as

an ouster, citing *Woods v. Banks*, 14 N. H. 101; *Hume v. Long*, 53 Iowa, 299, 5 N. W. 193; *Packard v. Johnson*, 57 Cal. 180. In each of these cases, however, the conveyance was simply of all the grantor's right, title, and interest, and it was held that a deed could not be even color of title beyond what it purports to convey, that these deeds were merely releases of the interest of the grantors, and that no ouster of the true owner would arise. An ouster need not necessarily be predicated upon a deed from a cotenant. One cotenant may oust another in the absence of any conveyance except that which creates the cotenancy. The ouster must, in such case, arise from other acts. Defendants must show acts equivalent to a denial of the rights of the cotenants. The deed is evidence of a claim to the entire premises, of the character of the entry, and of the possession under it. It cannot be said to be any less notice because not a warranty. Conceding that the receipt of a quitclaim deed puts the grantee upon inquiry, it does not follow that defendants' grantors did make inquiry, or that they did not rely upon the deed as a conveyance of the entire estate, or that they did not intend to claim title to the whole. If the question of good faith should be considered, it is to be determined from all the facts. There is nothing in this record upon which an inference of bad faith may be predicated."

6. Under an Unrecorded Conveyance.—If an entry is made upon property by a grantee whose conveyance purports to be in severalty, there is no doubt that he is presumed to enter as a claimant in severalty. If the conveyance is recorded, the cotenants of his grantor are bound to take notice thereof, and that the entry and subsequent exclusive possession are adverse to them, though, as a matter of law, the register of a conveyance usually operates as notice only to persons subsequently acquiring some claim to the property from and under the grantor. What is the effect of the failure of a grantee of the cotenant to record his conveyance where he enters under it and holds exclusive possession of the property? The question can hardly be said to be as yet judicially answered. The principal case tends to support the conclusion that it is the duty of the other cotenants to inform themselves of such possession and to inquire under what claim it is taken and held, and hence that the want of the recording of the conveyance is not material when considering the acquisition of title by prescription: *Joyce v. Dyer*, 189 Mass. 64, ante, p. 603, 75 N. E. 81. We thought the conclusion in *Hignite v. Hignite*, 65 Miss. 447, 7 Am. St. Rep. 673, 4 South. 345, was to the contrary, but such is not the opinion of the court announcing it: *Gardiner v. Hinton*, 68 Miss. 604, post, p. 726, 38 South. 779.

7. Dissent in North Carolina from the General Rule.—As we understand the decisions in North Carolina, they are at entire variance from those of the other states in maintaining that the grantee of a cotenant, though the conveyance purports to be in severalty, necessarily takes the place of his grantor, and that the entry under such a conveyance is not any more than if it were on its face restricted to

the actual interest of the grantor presumed to be adverse to the other cotenants; and finally, if such grantee can acquire title against them by prescription, it must be under the same circumstances as would create such title in his favor had his conveyance purported to transfer to him an undivided interest only, with a limitation restricted to those cases in which the possession has been held for twenty years or more, and then the inference of ouster may be indulged: *Ward v. Farmer*, 92 N. C. 93; *Page v. Branch*, 97 N. C. 97, 2 Am. St. Rep. 281, 1 S. E. 625; *Jester v. Davis*, 109 N. C. 458, 13 S. E. 908; *Ferguson v. Wright*, 113 N. C. 537, 18 S. E. 691; *Roscoe v. John L. Roper L. Co.*, 124 N. C. 42, 32 S. E. 389; *Tharpe v. Holcomb*, 126 N. C. 365, 35 S. E. 608; *Shannon v. Lamb*, 126 N. C. 38, 35 S. E. 232; *Hardee v. Weatherington*, 130 N. C. 91, 40 S. E. 855.

8. **Where the Grantee is Already a Cotenant.**—One who is in fact a cotenant, and whom the other cotenants, therefore, have the right to assume to be holding possession under and in subordination to the common title may receive a conveyance of the property which purports to be in severalty, or if not in severalty, to be for a moiety which, added to that previously held by him, would exclude the ownership of all other persons; and one of the questions subsequently arising will be whether such grantee will be presumed to thereafter hold adversely to the other cotenants not parties to the conveyance to him. Where two persons claim land as tenants in common, and one conveys to the other, who enters under a conveyance claiming the whole, the better view is that his possession is adverse to a third cotenant whose title the grantor and grantee in the deed have never recognized: *Winters v. Haines*, 84 Ill. 585; *O'Mara v. Lilly (Ky.)*, 53 S. W. 516. If a tenant in common holds possession which is adverse to the others, and one of them contains a conveyance from such adverse holder and takes possession thereunder, also claiming in severalty, his possession is adverse to the title of the remaining cotenants, and may be tacked to that of his grantor for the purpose of creating title by prescription against them: *Wheeler v. Taylor*, 32 Or. 421, 67 Am. St. Rep. 540, 52 Pac. 183. The execution of a deed by a cotenant with covenants of warranty and the subsequent repurchase by him under like covenants, with the record of his deed, a subsequent possession and acts indicating an open claim of exclusive ownership, are sufficient to bar his cotenant: *Dawson v. Edwards*, 189 Ill. 60, 59 N. E. 590.

A cotenant may receive a conveyance from one not a tenant in common with him which purports to convey the whole title, but which is in fact inoperative, because the grantor had no title to convey, or because the conveyance purports to be in consummation of a tax, execution, or judicial sale, and the proceedings on which it rests are not sufficient to transfer title. There is no doubt that a conveyance of either class may constitute the foundation of a claim of title by prescription, and that possession continued for the requisite time under it may bar the title of the other cotenants if they had notice

that such possession was held in hostility to them: *Thornton v. York Bank*, 45 Me. 158. Furthermore, we think such a conveyance always constitutes some evidence that the possession held by the grantee is adverse to his cotenants: *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177, 18 Pac. 146; but the reception of such a conveyance and the subsequent exclusive possession under it do not constitute an ouster of the cotenants of the grantee, nor set the statute of limitations in motion against them until they have some notice of the claim in hostility to their title: *Inglis v. Webb*, 117 Ala. 387, 23 South. 125; *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28, 17 S. W. 594; *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. 674, 16 L. R. A. 326; *Sorenson v. Davis*, 83 Iowa, 405, 49 N. W. 1004; *Buchanan v. King's Heirs*, 22 Gratt. 414.

9. **Ouster, at What Time Deemed to Take Place Under.**—Where a conveyance is in severalty, and the grantor had a moiety only, if the grantee enters into exclusive possession thereunder, such conveyance and entry, if accompanied by a claim of title in severalty, operate as an ouster of the other cotenants, and the statute of limitations is at once set in operation against them, and the time when title by prescription will become perfect against them is to be computed from the date of such entry: *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579, 2 S. W. 774; *Rutter v. Small*, 68 Md. 133, 6 Am. St. Rep. 434, 11 Atl. 698; *Sudduth v. Sumeral*, 61 S. C. 276, 85 Am. St. Rep. 883, 39 S. E. 534.

10. **The Possession Necessary to be Taken.**—It is well established that the making and receiving of a conveyance in severalty do not alone amount to an ouster. They must be supplemented by the taking possession under the conveyance: *New York & T. L. Co. v. Hyland*, 8 Tex. Civ. App. 601, 28 S. W. 206; *Holley v. Hawley*, 39 Vt. 525, 94 Am. Dec. 350; *Hannon v. Hannah*, 9 Gratt. 146; *Parker v. Brast*, 45 W. Va. 399, 32 S. E. 269. Actual possession need not, however, be taken of every part and parcel of the property, for if possession is taken of part under a claim of title of the whole, such possession is by operation of law, for the purposes of the statute of limitations, deemed to extend over the whole tract, this rule being not less applicable to possession held under a conveyance made by a grantor who is in fact a cotenant than to controversies arising where no cotenancy has ever existed: *Campan v. Campan*, 44 Mich. 34; *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463.

11. **Necessity for Ignorance of the Title of the Other Cotenants.**—In many of the cases maintaining the rule that the entry under a conveyance purporting to be in severalty is presumed to be adverse to the cotenants of the grantor and to operate as an ouster of them, though the point was not necessarily involved, the operation of the rule was said to be restricted to those cases in which such entry was made in good faith, and good faith, as the term was employed,

meant in ignorance of the title of the cotenants of the grantor and in the belief of the person entering that he was the sole owner of the property: *Highstone v. Burdett*, 61 Mich. 54, 27 N. W. 852; *Foulke v. Bond*, 41 N. J. L. 527. In the one case coming within our observation in which the question was involved, this belief and ignorance were held to be essential, and a grantee entering under a conveyance in severalty, with notice of the title of the cotenants of his grantor, was said to occupy the relation to them occupied by his grantor and to be unable to establish an ouster or a title by prescription, except by the same acts and evidence which would have been necessary for his grantor had the latter not conveyed: *Packard v. Johnson*, 51 Cal. 545. It strikes us, however, that ignorance is not a necessary element of disseisin, whether the person disseised was a tenant in common or in severalty, and that the same acts which constitute an ouster if done by an ignorant, well-meaning man must have a like effect when done by a well-informed, though vicious, one. The latter may determine, though acquiring title as a cotenant, that he will not recognize the rights of his fellow-tenants; that he will exclude them from possession, and will never allow them to possess or otherwise enjoy part of the property unless compelled to do so by the judgment of some court of competent jurisdiction. If so, their only remedy is by resort to such court within the time prescribed by the statute of limitations. If they do not do so, it will generally be in vain for them to prove that their adversary had complete knowledge of their title, or, at all events, withheld possession, not ignorantly or innocently, but malevolently and with a desire to deprive them of their right, to which he well knew them to be entitled. It will introduce a false and unnecessary element into title by prescription to require an examination respecting the intelligence or good or bad faith of the adverse possessor where the evidence shows that his possession was adverse, exclusive and continued without interruption for the time specified by the statute.

b. **Possession Adverse at Its Inception, Though not Taken Under a Conveyance in Severalty.**—It does not usually happen that a cotenant who has not a conveyance purporting to be in severalty enters upon the property then having an intention to possess and claim the same adversely to his cotenants. Should he do so, however, he may acquire a title by prescription: *Whittaker v. Whittaker*, 157 Mo. 342, 58 S. W. 5; *Hendricks v. Musgrove*, 183 Mo. 300, 81 S. W. 1265; *Craven v. Craven*, 68 Neb. 459, 94 N. W. 604; *Thompson v. Gerrish*, 57 N. H. 85; *Trustees v. Johnson*, 66 Barb. 119; *Hilton v. Duncan*, 1 Coldw. 313; but the acts necessary to constitute an ouster or to support a title by prescription do not differ from those essential for the same purpose when the ouster, instead of being coincident with the original entry into possession, takes place subsequently.

IV. Ouster After Possession has been Held for or With the Other Cotenants.

a. **General Rule.**—There is no doubt that one cotenant may disseise another, and thereby lay the foundation to title by prescription. Whether, however, any particular act or series of acts constitutes a disseisin is sometimes a difficult question. Acts which, as against one holding in severalty, confessedly amount to conclusive evidence of his disseisin, do not necessarily, and perhaps not usually, have the like result in the case of cotenants. "It is said to depend upon the intent with which they are done and their notoriety as affording evidence of notice of the adverse character of the possession": *Johnson v. Toulmin*, 18 Ala. 50, 52 Am. Dec. 212. "Evidence of disseisin must always be clear, unequivocal and convincing. There must be ouster and acts of exclusive possession of an unequivocal character, overt, and notorious, and of such a nature as by their own import to impart information and give notice to the cotenants that an adverse possession and an actual disseisin are intended to be asserted against them": *Busch v. Huston*, 75 Ill. 343; *Ball v. Palmer*, 81 Ill. 370. "We held in this case when here before (44 Mich. 31) that as between tenants in common a claim of adverse possession by one should not be of doubtful character, but clear and unambiguous. The reason of this is that the possession itself is rightful and does not constitute such adverse possession as would be that of a stranger, so that the presumption of possession in recognition of the rights of the cotenants must be overcome by acts and declarations clearly inconsistent therewith brought home to the cotenants": *Campan v. Campan*, 45 Mich. 367, 8 N. W. 85. "That one tenant in common may disseise another there can be no doubt; but in consequence of the legal presumption, acts of exclusive possession which, in the case of a stranger would be deemed adverse and per se a disseisin, are in cases of tenancy in common susceptible of explanation consistently with the real title; they are not necessarily inconsistent with the unity of possession existing in such case. It is for this reason that it depends upon the intent with which the acts of ownership are done, and upon their notoriety and essential character, whether they will be such as to break and dissolve the unity of possession, constitute an adverse possession against the cotenants, and amount to a disseisin": *Warfield v. Lindell*, 38 Mo. 561, 90 Am. Dec. 443; *Golden v. Tyer*, 180 Mo. 196, 79 S. W. 143; *Forward v. Deetz*, 32 Pa. St. 69. "That the possession of one coheir or cotenant is the possession of the other coheirs and is taken in trust for their benefit is an elementary and indisputable principle of law. But this possession may become adverse to the other heirs by acts and declarations repelling the presumption that the possession is in the character of a coheir, and which shows clearly a claim of exclusive right. One tenant in common may disseise or hold adversely to the other tenant in common; but the hostile intent of the possession should be manifested by acts of a

more unequivocal character than would be necessary in ordinary cases where there is no privity of estate between the claimants to the property": *Alexander v. Kennedy*, 19 Tex. 488, 70 Am. Dec. 358. "The real point in controversy turns upon the second instruction given by the court, in answer to the prayer of the defendants. That direction, in substance, states that if any of the defendants entered into possession of the lands respectively claimed by them, and held the same for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not for an undivided part thereof, in cotenancy with Clymer or his devisees, but adversely to them, then such defendant was entitled to a verdict in his favor, whether he held by a purchase from Lynch, or Blanton, or any other person who afterward, up to the commencement of the suit, continued to hold the possession. We see no objection to this instruction, which ought to prevail in favor of the plaintiff; on the contrary, we deem it entirely correct, and consonant to the principles of law upon the subject. It is true that the entry and possession of one tenant in common of and into the land held in common is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all until some notorious act of ouster or adverse possession by the party so entering into possession is brought home to the knowledge or notice of the others. When this occurs, possession is from that period treated as adverse to the other tenants, and should afterward be as operative against them as if the party had entered under an adverse title. Now, such a notorious adverse possession may be by an overt act in pais, of which the other tenants have due notice, or by the assertion, in any proceeding at law, of a several or distinct claim of title to an entirety or the whole land, or, as in the present case, of a several and distinct title to the entry of the whole of the tenant's purparty under a partition, which, in contemplation of law, is known to the other tenants. Under so familiar a doctrine it scarcely seems necessary to cite any authorities. So early as *Townsend & Pastor's Case*, 4 Leon. 52, it was holden in the common pleas by all the justices that where there are two copartners of a manor, if one enters and makes a feoffment in fee of the whole manor, this feoffment not only passes the moiety of such coparcener, which she might lawfully part with, but also the other moiety of the other coparcener, by disseisin. This decision was fully affirmed and acted on in the recent case of *Doe d. of Reed v. Taylor*, 5 Barn. & Adol. 575, where the true distinction was stated, that although the general rule is, that where several persons have a right, and one of them enters generally, it shall be entry for all; for the entry generally shall always be taken according to right; yet that any overt act or conveyance, by which the party entering or conveying asserted a title to the entry, would amount to a disseisin of the other parties, whether joint tenants or tenants in common, or parceners": *Clymer v. Dawkins*, 3 How. 674, 11 L. ed. 778.

The position of one cotenant toward another is, with respect to the question of adverse possession, somewhat analogous to that of a tenant toward his landlord. In both cases, where the entry was in subordination to the common title, there is a presumption that it continues to be so, and this presumption is conclusive in favor of one not in the actual possession until there has been a denial of the title, and an intention to hold, and an actual holding adversely to the tenant brought home to the one not in possession either directly or by acts of which he cannot remain ignorant, and it may be safely asserted that those acts which amount to an adverse holding on the part of a tenant against his landlord will also amount to an adverse holding by one cotenant against another: *Ball v. Palmer*, 81 Ill. 370; *Squires v. Clark*, 17 Kan. 84; *Chandler v. Ricker*, 49 Vt. 128.

b. **By Mere Exclusive Possession.**—There can be no doubt that exclusive possession is not necessarily adverse: *Owen v. Morton*, 24 Cal. 373. When, however, possession, in addition to being exclusive, is long continued and attended by the exercise of all the rights of a tenant in severalty and without any recognition of the title or rights of a cotenant, the question becomes more doubtful. Nevertheless, it is safe to assert, as a general proposition, as very many of the cases do, that exclusive, silent possession by a tenant in common, irrespective of its duration, does not constitute an ouster, or even prima facie evidence thereof: *Brewer v. Keeler*, 42 Ark. 289; *Miller v. Myers*, 46 Cal. 535; *Morgan v. Mitchell*, 104 Ga. 596, 30 S. E. 792; *McMahill v. Torrence*, 163 Ill. 277, 45 N. E. 269; *English v. Powell*, 119 Ind. 93, 21 N. E. 458; *Flock v. Wyatt*, 49 Iowa, 466; *Bader v. Dyer*, 106 Iowa, 715, 68 Am. St. Rep. 332, 77 N. W. 469; *Small v. Clifford*, 38 Me. 213; *Hudson v. Coe*, 79 Me. 83, 1 Am. St. Rep. 288, 8 Atl. 249; *Mansfield v. McGinness*, 86 Me. 118, 41 Am. St. Rep. 532, 29 Atl. 956; *Weshgyl v. Schick*, 113 Mich. 22, 71 N. W. 273; *Allen v. Carter*, 8 Pick. 175; *Northrop v. Wright*, 24 Wend. 221; *Cloud v. Webb*, 4 Dev. 290, 25 Am. Dec. 711; *Heirs of Marr v. Gilliam*, 1 Cold. 488; *Scofield v. Douglass* (Tex. Civ. App.), 30 S. W. 817; *Newcomb v. Cox*, 27 Tex. Civ. App. 583, 66 S. W. 338; *Justice v. Lawson*, 46 W. Va. 163, 33 S. E. 102; *McClung v. Ross*, 5 Wheat. 116, 5 L. ed. 46. This is true, because such possession may have been maintained without any claim of title and with a full intention of recognizing the rights of the other cotenants whenever requested. But, at least in all those cases where the possession of property is useful or valuable, it is contrary to the usual order of events and the usual instincts of mankind for possession to be exclusively held and acts of dominion, including the cultivating, improvement and reception of rents and profits, be exclusively exercised by one who does not claim full ownership, and for such acts to be submitted to by one entitled to share in the possession and other benefits, unless he knows that his attempt to so share will be resisted. From these unusual conditions some inference may justly

be drawn of a character entirely different from that which follows when the possession and other benefits are shared in common by the cotenants. The better opinion, therefore, is that from exclusive possession and exclusive reception of rents and profits a jury is warranted in presuming an ouster, where there is evidence tending to show that the possessor claimed the whole title or to be entitled to receive and retain the whole rents and profits: *Brady v. Huff*, 75 Ala. 80; *Brewer v. Keeler*, 42 Ark. 289; *Casey v. Casey*, 107 Iowa, 192, 70 Am. St. Rep. 190, 77 N. W. 844; *Izard v. Bodine*, 11 N. J. Eq. 403, 69 Am. Dec. 595; *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481, 64 N. W. 463; *Beall v. McMenemy*, 63 Neb. 70, 93 Am. St. Rep. 427, 88 N. W. 134; *Vandyke v. Van Buren*, 1 Caines, 84; *Jackson v. Whitbeck*, 6 Cow. 632; *Butler v. Phelps*, 17 Wend. 642; *Frederick v. Gray*, 10 Serg. & R. 182; *Cochran v. Cochran*, 55 W. Va. 178, 46 S. E. 924; *Rodgers v. Miller*, 55 W. Va. 576, 47 S. E. 354.

c. **By Refusing to Let a Cotenant into Possession or by Denying His Title.**—It has been held that the finding of a demand to be let into possession and the refusal thereof do not amount to a finding of an ouster: *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 131; but this decision, if maintainable at all, must be regarded as a mere criticism on the manner in which the legal result of such demand and refusal should be expressed, for there is no question that an ouster need not be by physical eviction and may result from the keeping of exclusive possession, as well as from the forcible or otherwise dispossessing of the fellow-tenant. The exclusion of a cotenant from any part of the cotenancy, however small, may be ouster as to that parcel, though its area is less than the amount to which the refusing tenant must be entitled on partition: *Carpentier v. Webster*, 27 Cal. 524. Whenever a cotenant having possession of the common property or any part thereof refuses to let another cotenant share his possession, this warrants, and indeed requires, a finding of an ouster of the party so refused: *Norris v. Sullivan*, 47 Conn. 474; *Bracket v. Norcross*, 1 Greenl. 89; *Marcy v. Marcy*, 6 Met. 360; *Falconer v. Roberts*, 86 Mo. 574; *Jordan v. Surghnor*, 107 Mo. 520, 17 S. W. 1009; *Meredith v. Andres*, 7 Ired. 5, 45 Am. Dec. 504; *Roberts v. Moore*, 3 Wall. Jr. 292, Fed. Cas. No. 11,905; and a like result follows any express denial by the tenant in possession of the title or right to possession of a fellow-tenant brought home to the knowledge of the latter: *Gill v. Fauntleroy's Heirs*, 8 B. Mon. 177; *Minton v. Steele*, 125 Mo. 181, 28 S. W. 746; *Siglar v. Van Riper*, 10 Wend. 414; *Humbert v. Trinity Church*, 24 Wend. 587; *Meredith v. Andres*, 7 Ired. 5, 45 Am. Dec. 504; *Hellings v. Bird*, 11 East, 150.

d. **Taking the Entire Rents and Profits.**—The receipt and retention by a cotenant of the entire rents and profits of the common property may, like his holding exclusive possession thereof, be in subordination to and in recognition of the common title. Hence, it has

been said that such receipt and retention do not establish an ouster and are not necessarily evidence of it: *Johnson v. Toulmin*, 18 Ala. 50, 52 Am. Dec. 212; *Thornton v. York Bank*, 45 Me. 158; *Linker v. Benson*, 67 N. C. 150; *Morris v. Vanderen*, 1 Dall. 64, 1 L. ed. 38. It is difficult to conceive a more unequivocal act of ownership, and the long submission to it certainly justifies the assumption that the party submitting regards himself as out of possession, or for some other reason not entitled to share in the earnings of the property. The tendency of the authorities, especially the more modern of them, is to affirm that from the exclusive receipt and retention of the rents and profits an ouster is inferable, and, if sufficiently long continued, that title by prescription results. "It may, however, be safely said that a sole and uninterrupted possession and pernanacy of the profits by one tenant in common, with the knowledge of the other, continued for a long series of years without any possession or claim of right and without perception of profits or demand for them by the cotenants, if unexplained and uncontested, without any evidence tending to show the reason of such neglect or omission to assert the right, will furnish evidence from which the jury may and ought to infer an actual ouster and adverse possession. Such an inference is reasonable and justified under the circumstances, because a man does not ordinarily sleep on his rights for a long period, and a strong presumption arises that actual proof of ouster has become lost by lapse of time": *Lefavour v. Homan*, 3 Allen, 354; *Joyce v. Dyer*, 189 Mass. 64, ante, p. 603, 75 N. E. 81; *Robidoux v. Cassilegi*, 10 Mo. App. 516; *Law v. Patterson*, 1 Watts & S. 184; *Mehaffy v. Dobbs*, 9 Watts, 363; *Doe v. Prosser*, Cowp. 217.

e. **Other Acts Indicative of Ownership.**—Various other acts usually performed only by owners of property may be relied upon either as in themselves constituting an ouster or as evidence of some essential element thereof. Thus, declarations of the tenant in possession may be offered in evidence as bearing upon this subject. They are generally admissible, even when made to strangers, where they tend to show that the cotenant making them was holding possession for himself alone, or that he disputed the title of his cotenant. Of course, he cannot disseise his cotenant by secret declarations: *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614. There must be other evidence of an ouster, and when such evidence exists, as where there is evidence of sole possession or the receipt and retention of rents and profits, and the intent with which such possession was held or such profits received and retained is material, the declarations of the tenant in possession may be admissible: *Brady v. Huff*, 75 Ala. 80; *Brewer v. Keeler*, 42 Ark. 289; *Casey v. Casey*, 107 Iowa, 192, 70 Am. St. Rep. 190, 77 N. W. 844. A cotenant may execute a mortgage in severalty of the property. This is not of itself an ouster of his cotenant: *Leach v. Hall*, 95 Iowa, 611, 64 N. W. 790; *Leach v. Beattie*, 33 Vt. 195; but it may be evidence of an adverse claim on the part of the mortgagor and admissible as such in connection

with the other facts: *Moore v. Collishaw*, 10 Pa. St. 224; *Leach v. Beattie*, 33 Vt. 195; and if the mortgagee enters under it, claiming the whole, his acts will have the same effect as if he entered under an absolute conveyance of the whole: *Wood v. Griffin*, 46 N. H. 230. Neither the payment of taxes, the cutting of timber (*Ewer v. Lovell*, 9 Gray, 276; *Peck v. Ward*, 18 Pa. St. 506), nor the erection of improvements (*Garcia v. Illg*, 14 Tex. Civ. App. 482, 37 S. W. 471; *Illg v. Garcia*, 92 Tex. 251, 47 S. W. 717), ipso facto, constitute an ouster. They may, however, with other circumstances, tend to establish one, if, with such circumstances they show an exclusive claim to the property (*Bogges v. Meredith* 16 W. Va. 1), and an exclusive appropriation of it to the use of the tenant in possession: *Bennett v. Clemence*, 6 Allen, 10; *Joyce v. Dyer*, 189 Mass. 64, ante, p. 603, 75 N. E. 81. Of course, there cannot be such exclusive appropriation if the other cotenants use the building or other improvements whenever they find it convenient to do so: *Ingalls v. Newhall*, 139 Mass. 268, 30 N. E. 96.

f. Notice of Adverse Possession.

1. **Necessity for Notice.**—Certainly a cotenant cannot be ousted from the possession of the common property, nor prescriptive title created against him in favor of another cotenant, by acts of secret or doubtful character. Hence the general statement, often repeated, that a cotenant must have notice of the adverse possession of his fellow-tenant, and that, in the absence of such notice, such possession is ineffective, and that the statute of limitations cannot be set in operation until such notice is in some way given: *Ashford v. Ashford*, 136 Ala. 631, 96 Am. St. Rep. 82, 34 South. 10; *Packard v. Johnson*, 57 Cal. 180; *Faubel v. McFarland*, 144 Cal. 717, 78 Pac. 261; *Boyd v. Boyd*, 176 Ill. 40, 68 Am. St. Rep. 169, 51 N. E. 782; *Knowles v. Brown*, 69 Iowa, 11, 28 N. W. 409; *Fenton v. Miller*, 94 Mich. 204, 53 N. W. 957; *Weshgyl v. Schick*, 113 Mich. 22, 71 N. W. 323; *Alsobrook v. Eggleston*, 69 Miss. 833, 13 South. 850; *Bentley v. Callaghan's Exr.*, 79 Miss. 302, 30 South. 709; *Northrop v. Marquam*, 16 Or. 173, 18 Pac. 449; *Gray v. Givens*, Riley Eq. 41; *Gross v. Washington* (Tenn. Ch.), 38 S. W. 442; *Moody v. Butler*, 63 Tex. 210; *Madison v. Matthews* (Tex. Civ. App.), 66 S. W. 803; *House v. Williams*, 16 Tex. Civ. App. 122, 40 S. W. 414; *Gist v. East*, 16 Tex. Civ. App. 274, 41 S. W. 396; *Roberts v. Morgan*, 30 Vt. 319; *Stewart v. Stewart*, 83 Wis. 364, 35 Am. St. Rep. 67, 53 N. W. 686.

2. **The Character of the Notice.**—Perhaps the language of the opinions in some of the cases last cited warrants the inference that the notice to a disseised cotenant must be actual, and that he must, in contemplation of law, be deemed in possession unless he in fact knows that his cotenant holds adversely to him. Nothing of the kind was, however, meant. He may be disseised without knowing it: *Lodge v. Patterson*, 3 Watts, 74, 27 Am. Dec. 335; *Elder v. McClaskey*, 17 O. C. A. 251, 70 Fed. 529. He need not be present at

the commission of acts of disseisin, nor need he be verbally informed of them, whether they consist of acts of expulsion or of mere exclusion: *Dunlap v. Griffith*, 146 Mo. 283, 47 S. W. 917. If the entry is under a conveyance purporting to be in severalty, he is chargeable with notice of that fact: *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Joyce v. Dyer*, 189 Mass. 64, ante, p. 603, 75 N. E. 81. The rule must be applied against an inattentive as well as against an attentive owner, and not be applied so as to punish the diligent or award the negligent. Each owner should be, and is, chargeable with knowledge of facts susceptible of observation and necessarily affecting his property. If a tenant in common in possession exercises acts of ownership of an unequivocal character manifesting an adverse holding, it is the duty of the other cotenants to be informed thereof and to draw such reasonable inferences therefrom as prudent persons possessed of and interested in like information would naturally do, and such cotenants out of possession cannot prevent the operation of the statute of limitations by proving that they did not know of the facts affecting their interest, or, knowing of them, did not draw correct conclusions therefrom: *Ashford v. Ashford*, 136 Ala. 631, 96 Am. St. Rep. 82, 34 South. 10; *Packard v. Johnson*, 57 Cal. 180; *Feliz v. Feliz*, 105 Cal. 1, 38 Pac. 521; *Knowles v. Brown*, 69 Iowa, 11, 28 N. W. 409; *Peck v. Lockridge*, 97 Mo. 549, 11 S. W. 246; *Peeler v. Guilkey*, 27 Tex. 365; *Van Gunden v. Virginia C. & I. Co.*, 3 C. C. A. 294, 52 Fed. 838.

In some of the recent cases in which the notice of adverse possession was held to be sufficient and an ouster was presumed, the facts disclosed were indicative of the abandonment or nonclaim of the premises by the cotenant out of possession, and were, in our judgment, sufficient to have supported the presumption of an actual grant of his interest in the property, the evidence of which had been lost: *Casey v. Casey*, 107 Iowa, 192, 70 Am. St. Rep. 190, 77 N. W. 844; *Wheeler v. Taylor*, 32 Or. 421, 67 Am. St. Rep. 540, 52 Pac. 183; *Talbott v. Woodford*, 48 W. Va. 449, 37 S. E. 580. Where, however, the evidence does not warrant this presumption, but goes no further than to show an actual exclusive possession by one of the tenants in common without any express communications between him and the others, and nothing from which to infer their abandonment or grant of their title or the fact of, or knowledge of, their ouster, except that the acts of the tenant in possession were in no sense secret, but, on the contrary, were open to the observation of all persons coming in contact with the property, and if not known to the other tenants, their want of knowledge was due to their inattention to their interests, a distinction may properly be made between an alleged ouster resting upon open, visible and notorious acts, and an ouster predicated upon a mere denial of the cotenant's rights, or upon some act of so notorious a nature as to be evident to every person evincing any considerable interest in the subject of the tenancy. This distinction was very well stated and sup-

ported by Napton, J., in delivering the opinion of the supreme court of Missouri: "To constitute an adverse possession of one tenant in common against his cotenants, there must be some notorious act asserting an entire ownership. It is further said, in some cases, that this act must be brought home to the knowledge of the cotenant. This, we suppose, depends upon the nature of the act. If it consists altogether of a mere verbal assertion of entire ownership, such an assertion could not, with any propriety, be regarded as an act of adverse possession of which the cotenant was bound to take notice unless made to him, or communicated to him. A declaration to a mere stranger amounts to nothing, unless that declaration is brought to the knowledge of the cotenant. But when the act is of such a nature as the law will presume to be noticed by persons of ordinary diligence in attending to their own interests, and of such an unequivocal character as not to be easily misunderstood, it is not believed to be necessary that any positive notice should be given to the cotenant, or that it devolves upon the possessor to prove a probable actual knowledge on the part of the cotenant. It is sufficient that the act itself is overt, notorious; and if the cotenant is ignorant of his rights or neglects them, he must bear the consequences": *Warfield v. Lindell*, 30 Mo. 272, 77 Am. Dec. 614; 38 Mo. 561, 90 Am. Dec. 443; *Lapeyre v. Paul*, 47 Mo. 586; *Hutson v. Hutson*, 139 Mo. 229, 40 S. W. 886. The conclusion here announced seems to be fully supported by a decision in Pennsylvania, in the course of which it was said: "The character of adverse possession is given, not by proving notice to persons interested, but by the nature of the acts done by the party. There must be a hostile intent, and that intent must be manifested by outward acts of an unequivocal kind. To constitute a disseisin, it was never held to be requisite that notice should be given to the disseisee, or that he had knowledge of the entry and ouster committed on his land. The open act of entry on the land, with the declared intent to disseise, constitutes the disseisin": *Lodge v. Patterson*, 3 Watts, 74, 27 Am. Dec. 335; *Alexander v. Kennedy*, 19 Tex. 488, 70 Am. Dec. 558. In a subsequent case in the same state the proposition was affirmed that: "In order to prove that one tenant in common has claimed the whole exclusively, it is not requisite that he should be proved to have made an express declaration to that effect; for it may be shown as clearly from his acts as from his words. For this purpose it will be sufficient to show that he entered upon the whole of the land and took possession thereof as if it had been his own exclusively; and that he has continued to occupy the whole, either by himself or his tenants, and to receive the rents, issues and profits of the same, for twenty-one years, without having accounted to his cotenant for any portion thereof, or any demand being shown to have been made to do so, or evidence given of his having acknowledged the claim of his cotenant": *Law v. Patterson*, 1 Watts & S. 184. "There must have been some overt and no-

torious act of an unequivocal character clearly indicating an assertion of ownership of the entire premises, to the denial and exclusion of the right of the cotenant": *Ball v. Palmer*, 81 Ill. 370; *Kotz v. Belz*, 178 Ill. 434, 53 N. E. 367; *Hawk v. Senseman*, 6 Serg. & R. 21; *Youngs v. Heffner*, 36 Ohio St. 232. The question manifestly is not to be determined solely by taking evidence to show that the cotenant against whom an adverse possession is claimed had actual notice thereof. As a property owner he ought to manifest some interest in and regard for his property. He cannot close his eyes and ears, nor by willful inattention occupy an advantage over defendant on his want of diligence. It is sufficient that the acts of adverse possession were such in their character and attendant circumstances that a man reasonably attentive to his own interests would have known that an adverse right was being asserted: *Packard v. Johnson*, 57 Cal. 180; *Aguirre v. Alexander*, 58 Cal. 21; *Unger v. Mooney*, 63 Cal. 586, 49 Am. Rep. 100; *Larraway v. Larue*, 63 Iowa, 407, 19 N. W. 242. "If no explicit notice is given to the cotenant of the denial of his right, the occupant must make his possession so visibly hostile and notorious, and so apparently exclusive and adverse, as to justify an inference of knowledge on the part of the tenant sought to be ousted, and of laches if he fails to discover and assert his rights": *Culver v. Rhodes*, 87 N. Y. 349.

The Civil Code of Georgia provides that there can be no adverse possession against a cotenant until an actual ouster, or exclusive possession, after demand, or express notice of adverse possession. A claimant in severalty of a cemetery lot was sued by a person holding an interest therein as tenant in common, and the question arose whether certain acts done by the claimant amounted to an ouster and had resulted in title in his favor by prescription. In stating the facts relied upon by the respective parties and the legal inferences flowing therefrom, the supreme court of the state said: "In the present case, there was no record deed, and the defendant can take nothing from the fact that the entry of transfer of title to him was made in the cemetery records, as the plaintiffs were not shown to have had any notice of this entry. The plaintiffs can take nothing from the fact that they have been absent for several years in another state, and had no opportunity of observing the acts of the defendant, for the reason that the law presumes, conclusively, when actual ouster has been shown, that the plaintiffs had notice of the defendant's claim. Thus narrowed, the facts relied on by the defendant to show actual ouster of the plaintiffs are the burial of his child, fencing of the part to which he claims title, and the placing of a stone at the gate to the section, with his family name engraved thereon. The burial of his child in the portion of the lot claimed by him would not amount to an actual ouster, for the reason that such an act is not at all inconsistent with cotenancy in a cemetery lot. The placing of the stone at the gate of the section, with the name of the defendant thereon, would not amount to an actual ouster; for it ap-

pears that this stone was placed at the gate of the section, and was not placed in any such peculiar position as to indicate a claim of ownership of any designated portion of the section. The case is, therefore, in narrow limits. The question is whether, when one, a tenant in common with two others in a cemetery lot, makes claim to a certain designated part of the lot, and asserts this claim by erecting a substantial iron fence on the dividing line, between the portion claimed and the remainder of the lot, he does such an act as would amount to an actual ouster of his cotenants. Ordinarily, the erecting of a dividing fence separating two parts of a lot will not amount to an actual ouster. Especially is this true as to farm and residence lots. But, on account of the peculiar character of a cemetery lot, we are of opinion that the erection of a substantial division fence, cannot be other than an actual ouster of those claiming an interest in the part so fenced off. The erection and maintenance of such a fence on a cemetery lot cannot make any other impression upon the passer-by than that the lot is owned by two persons, or sets of persons, and the fence marks the dividing line. This is what we understand the law to mean when it says that the acts relied on to constitute an actual ouster must be such as to indicate unequivocally an intention to hold adversely against all other claimants': *Roumillot v. Gardner*, 113 Ga. 60, 38 S. E. 362, 53 L. R. A. 729.

BURNHAM v. CHINA MUTUAL INSURANCE CO.

[189 Mass. 100, 75 N. E. 74.]

INSURANCE, MARINE—Construction of Policy.—Policies against "the risk of collision sustained" or against "loss sustained by collision with another vessel" mean the same thing, namely, collision with another vessel. (p. 628.)

INSURANCE, MARINE—Collision—Vessel Aground.—If a vessel is temporarily aground, or at anchor, or at her dock, and is run into by another vessel, this is a collision with another vessel within the meaning of marine insurance. (p. 628.)

INSURANCE, MARINE—Striking Sunken Wreck.—The injury of a vessel from striking some portion of the masts, spars, sails, or rigging of a vessel wrecked several hours before, and which is never raised, and the cost of raising which would have exceeded her value, is not from collision with another vessel within the meaning of marine insurance. (p. 629.)

Seven actions on policies of marine insurance for injuries claimed to have been suffered by the plaintiff's vessel coming in collision with the schooner "Abraham Richardson." This schooner, shortly before 9 o'clock of April 1, 1900, sank from coming into collision with a barge. After sinking to a depth

of about fifty-four feet at low water, the masts of the schooner projected some fifteen feet above the water, but none of her sails remained visible. About twelve hours after such sinking, the plaintiff's vessel, striking some part of the masts, spars, sails, or rigging of the submerged schooner, sustained damage thereby, to recover for which the actions were commenced. No attempt was ever made to raise the sunken schooner. She could have been raised and repaired, but the cost would have exceeded her value. The trial court ordered judgment for the defendant, and the plaintiff appealed.

A. H. Russell, for the plaintiff.

J. D. Bryant, L. E. Griswold and A. L. Howard, for the defendants.

¹⁰² LATHROP, J. Some of the policies in these cases cover "the risk of collision sustained" and others are against "loss sustained by collision with another vessel." We are of opinion that the two forms mean the same thing—namely, collision with another vessel. We agree with the plaintiff that if a vessel is temporarily aground, or at anchor, or at her dock, and is run into by another vessel, this is a collision with another vessel within the meaning of the policies: *London Assurance v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, 17 Sup. Ct. Rep. 785, 42 L. ed. 113, and cases cited. So, it may be true, as was decided in *Chandler v. Blogg*, [1898] 1 Q. B. 32, that where a vessel strikes another vessel which is at the time under water, and resting on the bottom, this is a collision within the meaning of the policy, if the vessel is raised ¹⁰³ within a few hours. Mr. Justice Bigham in this case adopted the view that "collision," when used alone, without other words, meant two navigable things coming into contact; and that the sunken vessel, though she could not be navigated at the time, was still navigable, as she was raised within a few hours.

In the cases at bar the plaintiff's vessel struck a wreck, sunk several hours before, and which was never raised. While it was practicable to raise her, the cost would have exceeded her value when raised. Under such circumstances we are of opinion that the plaintiff's vessel did not come into collision with another vessel within the meaning of this word in the policies.

The case of *Richardson v. Burrows*, though not reported, is cited in *Lowndes on Marine Insurance*, section 196, in *Spencer*

on Collisions, 14, and in *Cline v. Western Assur. Co.*, 101 Va. 496, 44 S. E. 700. The counsel for the plaintiff state in their brief that they have had an opportunity to examine a stenographic report of the case, and that it was an action to recover for a partial loss of wheat shipped on a small schooner, which sailed from Lynn, in England, for Caen, in France. During the night the vessel struck something which caused damage to the cargo. What the object was did not appear, but it was probably some old sunken wreck, or possibly floating wreck. After the evidence was in, Lord Coleridge inquired whether there were any cases of collision. None were referred to. Lord Coleridge ruled that he should hold that the word "collision" meant collision with another ship, and did not mean either a rock or a sandbank or floating wreck. The jury were then discharged by consent, and judgment given for the defendant. The case was decided December 16, 1880. While this is a *nisi prius* decision, it is of some weight: See, also, *Hough v. Head*, 54 L. J. Q. B. 294; *Reischer v. Borwick*, [1894] 2 Q. B. 548; *Cline v. Western Assur. Co.*, 101 Va. 496, 44 S. E. 700; *The Bristol*, 10 Blatchf. C. C. 537.

We do not regard the case of *Chapman v. Fisher*, 20 L. T. Rep. 319, as applicable to this case. It involved no discussion as to what is collision nor any adjudication thereon. The case of *Barr v. Gibson*, 3 Mees. & W. 390, relates to a bill of sale of a vessel on the shore. It has no bearing on this case.

Judgment in each case for the defendant.

The Word "Collision" in a policy of marine insurance, according to a recent Virginia decision, means the act of ships striking together, and does not include the striking by a ship of some floating or sunken object: *Cline v. Western Assur. Co.*, 101 Va. 496, 44 S. E. 700. The New York court of appeals, however, takes a more reasonable view of this question in *Newtown Creek Towing Co. v. Aetna Ins. Co.*, 163 N. Y. 114, 57 N. E. 302, where Chief Justice Parker said: "Collision, in its strict nautical and legal acceptation, originally meant the impinging upon one another of vessels while being navigated, but, in course of time, and by common usage, the application of the term has been so far extended, in this country, at least, as to include the impact of a vessel with other floating objects." It is nevertheless held in this case, that forcing a boat through ice, heedless of the risk, is not a "collision." A similar holding will be found in *Standard Marine Ins. Co. v. Nome Beach etc. Co.*, 133 Fed. 636. To constitute a collision between vessels, both vessels need not be in motion: *London Assurance v. Companhia De Moagens Do Barreiro*, 167 U. S. 149, 17 Sup. Ct. Rep. 785, 42 L. ed. 113.

COMMONWEALTH v. SISSON.

[189 Mass. 247, 75 N. E. 619.]

JUDICIAL ACTION, What is not.—The Order of the Fish and Game Commission determining that the discharge of sawdust from a mill into a stream would materially injure the fish therein, directing the erection of a blower, and forbidding the making of a pile of sawdust in connection with the mill, while not a general regulation, is not judicial action. (p. 633.)

CONSTITUTIONAL LAW—Forbidding the Discharge of Sawdust into a Stream.—It is within the power of the legislature to protect and preserve the edible fish in the rivers and brooks of the state, and for that purpose to forbid any sawdust being discharged into any brook containing such fish. (p. 634.)

CONSTITUTIONAL LAW.—The Right to Run a Sawmill on the Bank of a Brook or River is, like all other rights of property, subject to be regulated by the state when the unrestrained exercise of it conflicts with other rights, private or public. (p. 634.)

A PRESCRIPTIVE RIGHT to Discharge Sawdust into a Stream is not acquired by the exercise of such right for thirty years before the people of the state interposed by the enactment of legislation regulating such right for the purpose of preserving fish in the brooks and rivers of the state. (p. 635.)

CONSTITUTIONAL LAW.—The Legislature may Delegate to the Fish and Game Commission the power to determine which of the brooks and rivers of the state have in them fish of sufficient value to warrant the prohibition or regulation of the discharge of sawdust therein. (pp. 634, 635.)

FISH AND GAME COMMISSION, Powers Exercised by are not Judicial.—The power delegated to the fish and game commission to fit the details of regulation to the circumstances of each case is of a character long exercised by such commission and their predecessors, and is legislative and not judicial. The fish commission need not act on sworn evidence, nor grant hearings to parties interested, and its action is as final as is the action of the legislature in enacting a statute. Hence, the questions of fact passed on by the commissioners in adopting the provisions enacted by them cannot be tried over in any court. (p. 635.)

H. C. Joyner, for the defendants.

J. F. Noxon, district attorney, for the commonwealth.

247 LORING, J. These are two complaints, one against each defendant, charging them severally with permitting sawdust to be discharged into the Konkapot river, on March 29, 1905, in violation of an order made by the fish and game commissioners under Revised Laws, chapter 91, section 8, dated August 1, 1904.

The order, after reciting the authority given by the act, and stating that the mill here in question owned by the defendants had been examined by the board and that it had been

determined by the board that the fish in the brook are of sufficient value to warrant the prohibition of the discharge of sawdust into it, and that the discharge of sawdust from the defendants' mill into said brook materially injures the fish therein, directs the defendants (1) to erect a blower or take other means approved by the commissioners to prevent the discharge of sawdust from said mill into said brook, directly or indirectly, and ²⁴⁸ (2) not to accumulate a pile of sawdust on the bank of the brook so that it may be liable to fall into the stream or be swept away by a rise of water

At the trial [in the superior court before Crosby, J.] it was proved that this order was served on the defendants on or before July 1, 1904, and that the defendants continued to discharge sawdust into Konkapot river up to the time these complaints were instituted. It also appeared that there were edible fish in the river at the time the board passed the order in question.

The defendants offered to show in substance that the commissioners in making the order did not act on sworn evidence or personal knowledge as to the fish or the sawdust; that in the spring of 1905 the defendants asked for a hearing, which the commissioners denied; that the mill has been used as it is now used for more than thirty years, under a claim of right, and that the right was admitted by the next mill owner below; and finally, that a compliance with the order as to a blower would impair the efficiency of the mill about twenty-five per cent; that the sawdust could not be sold, and to cart it away would entirely destroy the value of the land for mill purposes. This evidence was excluded, and an exception was taken.

The defendant then made the following six requests for rulings, to wit:

"1. That the act of the commissioners on fisheries and game, by which they determine that the fish in any brook or stream are of sufficient value to warrant the prohibition, or regulation, of the discharge of sawdust from any particular sawmill materially injures such fish, is a judicial act, which can be lawfully performed only after the hearing of evidence bearing upon the questions involved viz., the value of the fish in such brook or stream, and the effect of such sawdust as injuring such fish.

"2. That the order in this case, having been passed by the commissioners, without hearing any evidence, and without any

knowledge by them of the value of the fish in the stream or the amount of water in the stream, or the amount of sawdust that is discharged by defendants' sawmill into the stream, is not a lawful order under the statute and is not binding upon the defendants.

249 "3. That the defendants, and the predecessors in title, having been discharging sawdust from their sawmills for more than twenty years consecutively, under a claim of right, into the Konkapot river, have acquired by prescription a title to such right, and such right is their property, of which they cannot be deprived without compensation.

"4. That section 8 of chapter 91 of the Revised Laws makes no provision for compensation to the owner of a sawmill, who is forbidden by an order of the commissioners to discharge sawdust into a brook or stream, and said statute is therefore unconstitutional and void so far as these defendants are concerned.

"5. That this order of the commissioners so interferes with the use of the property of the defendants as to amount to a taking of such property for public use, and the order is void, as no compensation to the defendants for such taking is provided by the order or by the statute under which the order is made.

"6. That this order of the commissioners so interferes with the use of the property of the defendants as to seriously damptaking of such property for public use, and the order is void, as no provision is made either in the order or the statute under which the order is created for compensating the defendants for such damage, impairment or injury to their property."

The judge refused to make any of these rulings, and directed a verdict of guilty in each case, imposing a fine of fifteen dollars on each defendant. The defendants excepted, and the judge on their motion suspended sentence until the questions of law involved could be determined by this court.

The defendants' grievance is that by an order of the board of fish and game commissioners they have been deprived, without compensation being made therefor, of the right to conduct the business of sawing wood, as they and their predecessors in title have conducted it for thirty years last past; that from this decision there is no appeal; and that not only was the order made without a hearing, but when a hearing was asked for by the defendants it was denied.

250 Their contention is: 1. That under the act they had a right to be heard at the trial in the superior court on the questions of fact determined by the board; 2. That they could not be deprived by the board of their prescriptive right to discharge sawdust into Konkapot river without being heard and by a finding not made on sworn evidence; and 3. That under any circumstances this right cannot be taken without compensation being made for it.

In support of their contention they argue that the board, in determining (1) that the fish in Konkapot river are of sufficient value to warrant the prohibition or regulation of the discharge of sawdust therein, and (2) that the discharge of sawdust from the defendants' mill materially injured such fish, was a judicial action; and, in connection with this argument, they rely on the distinction pointed out in *City of Salem v. Eastern R. R.*, 98 Mass. 431, 96 Am. Dec. 650. between the action of a local board of health in making general regulations respecting articles capable of conveying infection or creating sickness and the authority of such a board to examine into the existence of any specific case of nuisance, filth or cause of sickness dangerous to the public health and to make an order for the removal of it. The former being a rule for all is legislative in character; the latter being a determination as to a particular thing resulting in an order to the owner of it to do a specified act is judicial in character. For a later case where it is pointed out that similar legislative and judicial powers are given to the state board of health in connection with the pollution of a body of water used as a supply of a city or town, see *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693.

We agree with the defendants' counsel as to what the order here in question is not. We agree that it is not a general regulation. What is determined by it is that the discharge of sawdust from the defendants' mill materially injures the fish in Konkapot river, and it orders the defendants to erect a blower, and forbids the defendants making a pile of sawdust in connection with the mill; and it resulted in an order served on these defendants to do these acts. This is not a general regulation. But we do not agree that because it is not a general regulation it is a judicial action. The question to be decided here does not depend upon a choice between the two classes dealt with in ²⁵¹ *Salem v. Eastern R. R.*, 98 Mass. 431, 96

Am. Dec. 650, and in *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693, and for these reasons: We are of opinion, in the first place, that it is within the power of the legislature to protect and preserve edible fish in the rivers and brooks of the commonwealth, and for that purpose, if they think proper, to forbid any sawdust being discharged into any brook containing such fish.

The right to run a sawmill on the bank of a brook or a river is, like all rights of property, subject to be regulated by the legislature when the unrestrained exercise of it conflicts with other rights public or private: See *Commonwealth v. Alger*, 7 Cush. 53; *Rideout v. Knox*, 148 Mass. 368, 12 Am. St. Rep. 560, 19 N. E. 390, 2 L. R. A. 81. The defendants' contention that they have a prescriptive right to discharge sawdust into the river (even if it kills or injures the fish therein), which prescriptive right cannot be taken away or impaired without compensation being made therefor, means this and nothing more: Where the legislature, up to the passage of the act here in question (Stats. 1890, c. 129), had not regulated the business of sawing wood on the banks of streams having in them edible fish, and where, in the absence of such regulation, the defendants had discharged sawdust into the stream for thirty years, the people have lost the power to regulate the conflicting rights of sawmills on the bank of the stream and to preserve fish in the stream itself. The statement of the proposition is enough to show that there is nothing in it. The decision in *Attorney General v. Revere Copper Co.*, 152 Mass. 444, 25 N. E. 605, 9 L. R. A. 510, relied on by the defendants, is confined to the gaining of prescriptive rights with respect to property owned by the public under a statute of limitations which puts the property rights of the public on the same basis as those of individuals.

We are of opinion, in the second place, that in case the legislature thought that in regulating the conflicting rights of individuals to run sawmills on the banks of a river on the one hand, and of the public on the other hand to have fish live and increase in the same stream, it was not worth while to forbid sawdust being discharged into every stream in which there were edible fish, they could leave to a board having peculiar knowledge on the subject the selection of the brooks and rivers in which the fish were of sufficient value to warrant the prohibition or regulation²⁵² of the discharge of sawdust. The right of the legislature to delegate some legislative functions

to state boards was considered by this court in *Brodline v. Revere*, 182 Mass. 598, 66 N. E. 607.

And further, in case the legislature thought that an act which forbade any sawdust to be discharged into any of the streams selected by the board was an unnecessarily stringent one, they could in our opinion leave it to the board to settle in each particular case the practical details required to harmonize best these two conflicting rights.

The powers thus delegated to the board of fitting the details of regulation to the particular circumstances of each case is of the same character as that long exercised by the fish and game commissioners and their predecessors the board of inland fisheries in prescribing the details of the construction of the fishways to be constructed in dams where by law fishways have to be maintained: See Stats. 1866, c. 238, secs. 2, 6; Stats. 1867, c. 344; Pub. Stats., c. 91, sec. 4. See, also, Prov. Stats. 1745-46, c. 20; 3 Prov. Laws, state ed., 267. These acts provide that the board, after examination of dams upon rivers where the law requires fishways, is to determine whether the fishways in existence are sufficient, and to prescribe by an order in writing what changes or repairs, if any, shall be made, and at what times the fishways are to be kept open, and to give notice thereof to the owners of such dams. The action of the fish commissioners under these acts is unquestionably legislative in character, and we cannot doubt that their action under them, exercised and acquiesced in by the public for this length of time, is valid.

The result is that in our opinion the action of the board in the case at bar was the working out of details under a legislative act. The board is no more required to act on sworn evidence than is the legislature itself, and no more than in case of the legislature itself is it bound to act only after a hearing or to give a hearing to the plaintiff when he asks for one; and its action is final, as is the action of the legislature in enacting a statute. And being legislative, it is plain that the questions of fact passed upon by the commissioners in adopting the provisions enacted by them cannot be tried over by the court. This court has been recently asked to try over the expediency of compulsory vaccination in an action under a statute requiring it: *Commonwealth* ²⁵³ v. *Jacobson*, 183 Mass. 242, 66 N. E. 719, 67 L. R. A. 935. On its declining to do so an appeal was taken to the supreme court of the United States, and its refusal to do so was held to be correct: *Jacobson v. Massa-*

chusetts, 197 U. S. 11 (see particularly p. 30), 25 Sup. Ct. Rep. 358, 49 L. ed. 643. See, also, Devens, J., in *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 129.

The practical result is that the defendants are forbidden to conduct their sawmill as they had conducted it for thirty years, by a board who have not heard evidence and have refused the defendants a hearing; that the action of the board is final, and that no compensation is due to them.

This result may seem strange. But it is no less strange than the practical results in cases which are decided law. Take the case before the court in *Nelson v. State Board of Health*, 186 Mass. 330, 71 N. E. 693, namely, a farm on the banks of a pond used as the water supply of a town. The state board of health can pass a general regulation under section 113 of the Revised Laws, chapter 75, forbidding privies within a specified distance from its shore, and if the defendant had had a privy there for thirty years his right to maintain it would cease although the order was made without hearing; and the action of the board is final. On the other hand, if the board had proceeded under section 118 to investigate this particular privy, the defendant would have been entitled to a hearing, and, on appeal, to a jury, as provided by section 119. Again, take for example the regulation of a local board of health in question in *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113, 11 N. E. 129, requiring all rags arriving at the port of Boston from any foreign port to be disinfected at the expense of the owner before being discharged. The power of the local board of health to declare these rags a nuisance per se, so as to impose upon the owner without trial the expense of disinfecting them, was established by this court in that case. Had the local board undertaken to investigate the particular rags in question in *Train v. Boston Disinfecting Co.*, under their jurisdiction to inquire into sources of filth, and they had been authorized under that act to abate the nuisance if they found the rags to be a nuisance, by ordering them to be disinfected at the expense of the defendant, they would have had to give the defendant a hearing on notice, and from their decision the defendant would have had a right to a trial by jury. That is what was decided in *Salem v. Eastern R. R.*, 98 Mass. 431, 96 Am. Dec. 650.

²⁵⁴ That is to say, on the one hand where the law is general and the question is whether under it the defendants are com-

mitting a nuisance, the facts are determined by judicial action. On the other hand, the determination of the same facts is legislative in case the legislature decides to make the thing a nuisance per se. And where it is legislative it is final and no hearing is necessary; and where, as is the case here, it is made in the exercise of the police power, no compensation is due. The delegation of such legislative powers to a board is going a great way. But the remedy is by application to the legislature if a remedy should be given. In our opinion it is within its constitutional power, and the court can give no remedy.

For similar cases where the use which can be made of property has been left to the final determination of boards, see *Newton v. Joyce*, 166 Mass. 83, 55 Am. St. Rep. 385, 44 N. E. 116; *Commonwealth v. Roberts*, 155 Mass. 281. See, also, in this connection, *Wares, Petitioner*, 161 Mass. 70, 36 N. E. 586. The difference between the majority and the minority of the court in *Miller v. Horton*, 152 Mass. 540, was on the construction of the act then in question.

Exceptions overruled.

A Statute Prohibiting the Deposit of Sawdust in the waters of a lake or any of its tributaries, thus rendering the waters thereof unwholesome, is a proper exercise of the police power: State v. Griffin, 69 N. H. 1, 76 Am. St. Rep. 139.

PIERCE v. PERRY.

[189 Mass. 332, 75 N. E. 734.]

LIMITATION OF ACTIONS—Trustee, Who is.—A brother who acts as the financial agent of his unmarried sister, collecting, managing and dealing with her property as if it were his own, and having possession of all her securities and investments, may be found to have been a trustee for her, so that the statute of limitations will not bar a suit brought by her executors against him for an accounting. (p. 640.)

LIMITATION OF ACTIONS—Pleading the Statute by Setting Out the Facts.—Where the bill for an accounting sets out facts sufficient to avoid the statute of limitations, or to show that it was never applicable, and the defendant pleads the statute, the plaintiff need not interpose any additional replication. (p. 640.)

LIMITATION OF ACTIONS Against Trustee.—In the absence of a demand, the statute of limitations does not apply to an action against a trustee for an accounting. (p. 640.)

W. L. Putnam and S. Bell, for the plaintiffs.

H. R. Bailey and P. G. Bolster, for the defendants.

333 HAMMOND, J. 1. The defendants contend that the statute of limitations is a bar to the recovery of any sum received by Oliver H. Perry more than six years before the bringing of this suit. The total amount which it is contended is thus barred is nine thousand two hundred and thirty-eight dollars and seventy-seven cents, including interest. The defendants contend that the relation of Perry to his sister, the plaintiff's testatrix, was not that of a trustee, but simply that of a single agent for the collection of money and a mere custodian. As to this the master has found that "he was not a mere custodian, as claimed by the defense, and that he was more than a financial agent, as alleged in the bill; that he was really a trustee, [and] that the statute of limitations did not run in his favor." This finding should stand unless upon the facts found and evidence reported it appears to be erroneous.

As to this question of trust, although the master has not reported the evidence verbatim, he states that he has reported it in substance. The report is somewhat voluminous, but the following may be regarded as a brief summary of the facts bearing upon this question.

Oliver, the defendant, Martha, the plaintiff's testatrix, and Mrs. Moseley were the three surviving children of Augustus B. Perry, who died in November, 1887, leaving his property, real and personal, one-half to Oliver and one-quarter to each of his daughters. Oliver and Mr. Moseley, the husband of one of the daughters, were the executors, and they kept the accounts in the name of A. B. Perry & Company. They managed the real estate, and from time to time made division of the rents and of the principal and income of the personal property. Up to the **334** time of her father's death Martha had no property of her own. She was then fifty-seven years old. "She had always lived at home with her parents, and, with the exception of a trip to Europe some years before her father's death, her life had been simple and uneventful." She was an intelligent woman, but up to the time of her father's death she had no particular knowledge of or experience in business matters. Her share of her father's estate amounted to more than thirty thousand dollars. She liked to travel, and although "economical, even close," she spent considerable money in gratifying this taste. Besides making short journeys

she went once to Alaska, once to the Yellowstone Park, and twice to Europe; and at the time of her death which occurred very suddenly, she was planning a trip to Japan. She does not seem to have collected any money herself. Her part was paid to her brother, and when she needed money she went to him.

On May 12, 1888, Mr. Moseley brought her a check for her first dividend of income and gave it to her. She took it, but said that he might as well "pay the dividends to Oliver." Accordingly the subsequent checks for her share were by her instructions drawn to the order of "Oliver H. Perry, trustee," and were by him so indorsed and deposited with his own funds in a national bank. On June 12, 1888, Oliver, Martha and Mrs. Moseley received their respective shares of certain railroad bonds, a part of their father's estate. Mrs. Moseley received hers, but Oliver said to Martha that he would keep hers in his box without charge; she told him to do so, and he put them there together with other bonds which he afterward bought for her. The coupons from these bonds were deposited like the dividends in his name at the bank. In 1889, a house belonging to the estate of Augustus B. Perry was sold, the purchaser giving a mortgage back for two thousand dollars, which, at the defendant's suggestion, was taken in Martha's name as an investment. It is not profitable to recite further details of the collection by Oliver of money belonging to his sister Martha's estate. The report goes into the matter very fully, and it is sufficient to say that she personally had but little, if anything, to do with the collection or investment of her money or with the care of it.

Owing to the death of both principals there is but little information as to what express contract, if any, was made ³³⁵ between them, and what there is comes entirely from Oliver. In May, 1900, speaking to one of the tenants in a store belonging to the estate, respecting his relations with his sister, he said that Martha had told him to do with her property as he would with his own. He also told one Grant, a close personal friend of his, that he had charge of his sister's property; and to another friend he said that he kept the bonds in his box because his sister did not want to pay the expense of a separate one, and that he had told her that he would take care of her property as he did of his own. In a letter of July 2, 1888, he incoupons, and he asks what she wants him "to do with the forms her that he has collected the money on certain bond

money." In another letter he says: "I deposited at Provident Savings Bank for you six hundred dollars; believe they don't pay interest over one thousand dollars; so when you have some more money, if you do not want to use it right off, should buy a bond, say the N. Y. & N. E. first, but when it comes round you can tell." He afterward bought such a bond and told Mr. Moseley he had bought it for Martha.

We are of opinion that upon the whole evidence the question whether he was the mere custodian of the property of his sister or whether there was an element of trust in the relation between them was a question of fact for the master, and we cannot say that the finding that the relation was one of trust was clearly erroneous, so far as respected the defense of the statute of limitations: See *Jones v. McDermott*, 114 Mass. 400; *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070.

2. The defendants further contend that as they have pleaded the statute of limitations as a bar, the plaintiffs were bound either to allege in their bill the facts which avoid it by any exception, or specially reply to it. The defendants contend that the plaintiffs have done neither. The true rule is tersely stated in *Piatt v. Vattier*. 9 Pet. 405, 416, 9 L. ed. 173: "And the doctrine is now clearly established, that if the statute of limitations is relied on as a bar, the plaintiff, if he would avoid it by any exception in the statute, must explicitly allege it in his bill, or specially reply [to] it; or, what is the modern practice, amend his bill, if it contains no suitable allegation to meet the bar."

While it is true as contended by the defendants that there is no special replication here, we are of opinion that the bill sets³³⁶ out enough to avoid the statute, or rather to show that the statute is not applicable. It sets out that the defendant Oliver acted as the financial agent and trusted adviser of the plaintiff's testate, and as such did the various acts described in the bill. It thus sets out a trust. To such a trust the statute is not applicable, at least in the absence of a demand: *Campbell v. Whoriskey*, 170 Mass. 63, 48 N. E. 1070. It is not a claim against which the statute would run and which would be barred by it but for some exception upon which the plaintiff relies, but is a case against which the statute does not run.

Exceptions to the master's report overruled; decree for the plaintiffs accordingly.

Limitation of Actions as Between Trustees and trustor is the subject of a monographic note to Miles v. Thorne, 99 Am. Dec. 389-399. The

general rule is, that trustees cannot, during the continuance of the trust, plead the statute of limitations against a claim of the cestui que trust: *Teasley v. Bradley*, 110 Ga. 497, 78 Am. St. Rep. 113; *Jones v. Home Sav. Bank*, 118 Mich. 155, 74 Am. St. Rep. 377; *Fawcett v. Fawcett*, 85 Wis. 332, 39 Am. St. Rep. 844.

The Statute of Limitations Must be Pleaded in order to be available as a defense: *Fred Miller Brew. Co. v. Capital Ins. Co.*, 111 Iowa, 590, 82 Am. St. Rep. 529; *Gilbert v. Hewetson*, 79 Minn. 326, 79 Am. St. Rep. 486; *Valz v. First Nat. Bank*, 96 Ky. 543, 49 Am. St. Rep. 306; *Gibson v. Green*, 89 Va. 524, 37 Am. St. Rep. 888. See, however, *Jackson v. Plyler*, 38 S. C. 496, 37 Am. St. Rep. 782.

DESAUTELS v. CLOUTIER.

[189 Mass. 349, 75 N. E. 703.]

MASTER AND SERVANT—Negligence of a Fellow-servant in Throwing a Pick Without Warning.—If the proprietor of an icehouse tells one of his employes to throw a pick over a partition into another room, the order can be interpreted only as an order to throw the pick in a proper way and place, and not as telling him to throw it regardless of the safety of those in the other room, and if the employé throws it into the other room without giving due warning, whereby one of his coemployes is injured, the negligence is that of the fellow-servant for which the proprietor is not answerable. (p. 642.)

T. B. O'Donnell, for the plaintiff.

W. Hamilton, for the defendants.

350 LATHROP, J. This is an action of tort at common law for personal injuries received by the plaintiff while in the employ of the defendants. At the trial in the superior court, at the close of the plaintiff's evidence, the judge ruled that the action could not be maintained, and directed a verdict for the defendants. The case is before us on the plaintiff's exceptions.

The defendants were the proprietors of an ice business, and had an ice-house divided by partitions into compartments or rooms, each about fifty by seventy-five feet in extent. The partitions, according to the plaintiff's testimony, were about twenty-seven feet in height, and extended to within five feet of the roof. At the time of the accident the plaintiff was working with others in room 2, and was injured by being struck in the foot by an ice pick, which was thrown over the partition from room 1, by a fellow-servant named McFadden. The surface of the ice in both rooms was at the time within about twelve feet of the top of the partition, and there was a ladder to each

opening in the building, which was used by the workmen as the surface of the ice was raised.

McFadden testified that as he was going up the ladder leading to room 1, and when he was five feet from the ground, one of the defendants "told him to take the pick and throw it over in the other room"; that he "took the pick and got on top of the ice, and threw the pick, and called out to the men below to look out"; that "he hollered 'look out' before he threw the pick over and then threw the pick." He was then asked: "How long after you hollered 'look out below' that you threw the pick?" He answered: "When I threw the pick I hollered."

This evidence indicates very strongly that the warning and the act of throwing were separated by only a slight interval of time, if they were not simultaneous. This, too, is shown by the testimony of the plaintiff, who testified through an interpreter. He was asked, "How long was it after you heard somebody call out to look out was it before you got hurt?" The answer was: "He only had time to get his head up." The plaintiff had previously testified that at the time he was hurt he had just put a cake of ice in its place; that he was stooping down and, as he straightened up, the pick fell on his foot.

There can be no doubt that the evidence shows an act of negligence ³⁵¹ on the part of McFadden in not ascertaining where the men were who were working in the room, and in throwing the pick over immediately after once shouting "look out"; but as McFadden was a fellow-servant of the plaintiff, the defendants cannot be held liable for McFadden's act. It is sought, therefore, to hold the defendants on the ground that the order given was an act of negligence, and that McFadden should have been warned of the danger of throwing the pick over without giving adequate notice. But this McFadden knew as well as anyone. The order can be interpreted only as an order to throw over the pick in a proper way and in a proper place, and not as telling him to throw it over regardless of the safety of those in the other room. This view of the meaning of an order was taken in a somewhat similar case: *Gouin v. Wampanoag Mills*, 172 Mass. 222, 51 N. E. 1078. See, also, *Gorman v. Woodbury*, 173 Mass. 180, 53 N. E. 373.

Exceptions overruled.

The Decision in the Principal Case finds support in Gouin v. Wampanoag Mills, 172 Mass. 222, 51 N. E. 1078; *Griffin v. Glen Mfg. Co.*, 67 N. H. 287, 30 Atl. 344.

TURNER v. TURNER.

[189 Mass. 373, 75 N. E. 612.]

MARRIAGE BY PERSON Having a Husband or Wife Living, When Valid as to the Innocent Party, and Sufficient to Prevent an Action to Nullify It.—If a woman marries a man in good faith, without the knowledge of his prior marriage, and that he has a wife then living, and, after the impediment is removed by the death of the first wife, continues to live with him in good faith, the marriage becomes legal under the statutes of Massachusetts, and the wife cannot have it annulled and declared void on the ground that she was induced to enter into it by the false and fraudulent representations of the husband, and that after she had knowledge of the first marriage she had never lived with him. (pp. 644, 645.)

W. A. Gile and C. S. Dodge, for the libelant.

No counsel appeared for the libelee.

³⁷⁴ HAMMOND, J. This is a petition for nullity of marriage. At the hearing it appeared that at the time of the marriage, which occurred September 16, 1897, the libelee had a wife then living. After this marriage the first wife obtained a divorce from the libelee, and in January, 1899, she died. In his application for a license for the second marriage the libelee asserted that this was to be his first marriage, and the libelant entered into the marriage in good faith, without knowledge of the former marriage, relying upon the representation of the libelee that he was then to marry for the first time. The parties continued to live together as husband and wife in good faith on the part of the libelant until March, 1904, when the libelee deserted her and had continued such desertion up to the time of the hearing. The libelant did not know of the former marriage, nor of the divorce or death of the former wife, until after the desertion, nor did she live with the libelee as his wife or cohabit with him after she learned of his former marriage. There have been no children by his second marriage.

The main question is whether the marriage, although illegal at the time it was solemnized, became legal by virtue of Revised Laws, chapter 151, section 6. This statute, which is a continuation of Statutes of 1895, chapter 427, is as follows: "If a person, during the lifetime of a husband or wife with
³⁷⁵ whom the marriage is in force, enters into a subsequent marriage contract with due legal ceremony and the parties thereto live together thereafter as husband and wife, and such

subsequent marriage contract was entered into by one of the parties in good faith, in the full belief that the former husband or wife was dead, that the former marriage had been annulled by a divorce, or without knowledge of such former marriage, they shall, after the impediment to their marriage has been removed by the death or divorce of the other party to the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them, be held to have been legally married from and after the removal of such impediment, and the issue of such subsequent marriage shall be considered as the legitimate issue of both parents."

The case is within the literal terms of the statute, namely, a marriage illegal by reason of the existence at the time of a former wife of the husband, but nevertheless entered into in good faith on the part of the wife who has no knowledge of the former marriage, the removal of the impediment by the death of the former wife, and a living together as husband and wife in good faith on her part for five years thereafter.

It is argued by the libellant that the statute is not applicable when one of the parties to the marriage has been induced to enter into it in good faith by fraudulent representation on the part of the other as to the existence of the impediment arising out of the former marriage; and moreover, that the petitioner cannot be said to have lived with the husband in good faith after the impediment was removed, as she was not aware of the existence of the impediment until after the husband had left her, and she did not thereafter live with him.

While one of the objects of the statute is to protect persons who enter into the marriage relation in good faith, the broad general purpose of the statute is to provide against illegitimacy of children and to protect the public interests. Its purpose is to provide that the marriage ceremony, illegal at first by reason of the existence of an impediment, shall be regarded as taking place at the time the impediment is removed and as covering all marital relations thereafter assumed in good faith. It is immaterial whether the removal of the impediment is known or ³⁷⁶ unknown. Whether known or not, the marriage ceremony becomes operative upon the removal, if the parties continue to live together as husband and wife in good faith on the part of one of them. Such a construction of the statute is not only in accordance with its plain reading, but it carries out the real bona fide intention of the innocent party to contract a valid marriage. Upon the removal of the impedi-

ment and the subsequent cohabitation in good faith, the relation becomes such as the innocent party supposed it to be. And such a relation thus once sanctioned in the law legitimizes the children and leads to the protection of the moral welfare of the community.

The fraudulent representation as to the existence of the impediment is not ground for nullity. It is unnecessary to enter into a discussion of the question as to what kind of fraud is ground for nullity: See *Reynolds v. Reynolds*, 3 Allen, 605; *Smith v. Smith*, 171 Mass. 404, 68 Am. St. Rep. 440, 50 N. E. 933, 41 L. R. A. 800. The statute contemplates that there may be a fraudulent representation as to the existing impediment, and that in many cases only one of the parties enters into the marital relation in good faith, and yet it expressly declares that if, after the impediment has been removed, the parties continue to live together as husband and wife in good faith on the part of one of them the marriage is valid. It is manifest that at the time the marriage becomes valid under the statute the fraudulent representation as to the former existence of the impediment which has ceased to exist is not a representation affecting the capacity of the fraudulent party then to enter into the marriage. To hold that, after the marriage has become valid under the statute, the defrauded party upon a subsequent discovery of the original fraud shall have the right, because of such fraud, to avoid the marriage at his or her election, is to defeat the very object of the statute.

Libel dismissed.

The Validity of a Marriage contracted when one of the parties thereto has a husband or wife then living and undivorced is discussed in the monographic note to *State v. Lowell*, 79 Am. St. Rep. 378-380. A marriage void because one of the parties is under a legal disability may be good as a common-law marriage if they continue to live together as husband and wife after the removal of the disability: *Poole v. People*, 24 Colo. 510, 65 Am. St. Rep. 245; *Barker v. Valentine*, 125 Mich. 336, 84 Am. St. Rep. 578. Thus, where persons marry in good faith, in ignorance that the wife's decree of divorce, recently granted, has not been recorded, the marriage is valid if they continue to cohabit as husband and wife after the decree has been entered and recorded: *Land v. Land*, 206 Ill. 288, 99 Am. St. Rep. 171. See, too, *Schuehart v. Schuehart*, 61 Kan. 597, 78 Am. St. Rep. 342.

FAIRBANKS v. BOSTON STORAGE WAREHOUSE COMPANY.

[189 Mass. 419, 75 N. E. 737.]

MASTER AND SERVANT, Liability of the Former for an Assault by the Latter.—If an employé in a storage warehouse sent with a customer to take him in an elevator to the room where his goods are stored, assaults him on the return trip without provocation, the master is not liable therefor, because in making the assault the employé is not engaged in the master's work, nor doing an act as a means or for the purpose of performing such work. (pp. 646, 647.)

STORAGE WAREHOUSE CORPORATIONS, Contracts of do not Assure Customers of Protection from Personal Violence.—A contract between a storage warehouse company and its customers does not bind it to protect them while on its premises from personal violence or improper force on the part of its employés. (p. 647.)

C. W. Bartlett, E. R. Anderson and A. T. Smith, for the plaintiff.

P. H. Cooney and F. L. Hayes, for the defendant.

419 MORTON, J. There was evidence which would have warranted a finding by the jury of an unjustifiable and wanton assault upon the plaintiff by Havender, who was the defendant's servant. But the question is whether the defendant is liable for it. The fact that Havender was in the employ of the defendant at the time when the assault was committed, and that the assault took place upon the defendant's premises does not necessarily show that the defendant is liable therefor. "An act done by a servant while engaged in his master's work, but not done as a means or for the purpose of performing that work, is not to be **420** deemed the act of the master": *Bowler v. O'Connell*, 162 Mass. 319, 320, 44 Am. St. Rep. 359, 38 N. E. 498, 27 L. R. A. 173; *Driscoll v. Scanlon*, 165 Mass. 348, 52 Am. St. Rep. 523, 43 N. E. 100; *Perlstein v. American Exp. Co.*, 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959. In the present case the uncontradicted evidence showed that the defendant's superintendent directed Havender to take the plaintiff up in the elevator, and that he did so and unlocked the room where the plaintiff's goods were stored, and then went back to the elevator; that the plaintiff went in and selected some goods which he wished to take away, and in a short time went to the elevator-well and called to Havender to come up and get him; that he called two or three times with considerable

waits between, and finally called to Havender and asked him to go out into the yard and get a man who had come with the plaintiff and take him in where it was warm; and that in about ten minutes Havender came up with the man, and as the elevator stopped at the landing, Havender stepped forward, leaving the man on the elevator, and grabbed and struck the plaintiff without any provocation, committing the assault complained of. Havender was not a witness and it did not appear where he was. He was discharged by the defendant three days after the assault. There was nothing to show that down to the time of the assault his conduct, while in the defendant's employ, had been otherwise than good. We do not see how it can be said that the assault was committed as a means or for the purpose of performing the work which Havender was employed to do.

The plaintiff, relying on the doctrine laid down in *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311, and similar cases, contends that, under the contract between himself and the defendant, the latter was bound to protect him while on its premises pursuant to such contract from improper force and violence on the part of any of its employes, and that it is liable to him for any damages sustained by him in consequence of its failure to perform this duty. The contract, so far as material, was a contract for the storage of goods belonging to the plaintiff, with an agreement on the part of the defendant to use due care in keeping the property, and to deliver it upon reasonable demand, and that the plaintiff might visit the room where it was stored during business hours in the presence of one of its employes. The contract was not like that in *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311, for transportation by a common carrier, ⁴²¹ but, as already observed, was a contract for the storage of goods, and the case comes within the class of cases relating to warehousemen or those where one enters upon the premises of another by his express or implied invitation for the transaction of business with him. What is required in such cases is ordinary care and diligence: *Carleton v. Franconia Iron etc. Co.*, 99 Mass. 213; *Plummer v. Dill*, 156 Mass. 426; *Aldrich v. Boston etc. R. R.*, 100 Mass. 31, 1 Am. Rep. 76, 97 Am. Dec. 74. There is nothing to show that it was not exercised by the defendant in the selection and employment of Havender, or otherwise. The result is that the exceptions must be overruled.

So ordered.

The Liability of a Master to Third Persons injured by the wrongful or negligent acts of his servant is discussed in the monographic note to *Goodloe v. Memphis etc. R. R. Co.*, 54 Am. St. Rep. 71-93. The rule as to the extent of the liability of a master for the acts of his servant is, that if the act is done without the authority of the master and not for the purpose of executing his orders or doing his work, then he is not responsible; but if it is done in the execution of the authority given by the master and for the purpose of performing what he has directed, then he is responsible, whether the act is negligent or willful: *McCarthy v. Timmins*, 178 Mass. 378, 86 Am. St. Rep. 490. If the act of a servant does not fairly tend to effectuate the discharge of the duty for which he was employed, his master is not liable: *Guille v. Campbell*, 200 Pa. St. 119, 86 Am. St. Rep. 705; *Brown v. Boston Ice Co.*, 178 Mass. 108, 86 Am. St. Rep. 469. But the liability of a master for the willful, wrongful and malicious acts of his servant extends to every case where the act is done with a view to the furtherance and discharge of the master's business and within the scope of his employment: *Holler v. Ross*, 68 N. J. L. 324, 96 Am. St. Rep. 546; *Bergman v. Hendrickson*, 106 Wis. 434, 80 Am. St. Rep. 47.

PUTNAM v. MISOCHI.

[189 Mass. 421, 75 N. E. 956.]

CONTRIBUTION, General Right of.—When several are equally liable for the same act, and one is compelled to pay the whole, he may have contribution against the others to obtain from them the payment of their respective shares. (p. 649.)

CORPORATION—Stockholders, Right of One Against Another to Contribution.—A stockholder who has been compelled to pay more than his share of the debts of the corporation may maintain an action against his costockholders for contribution. This rule is applicable, though the corporation is organized under the laws of another state under whose statutes the liability which was enforced against the plaintiff was created, and he, after satisfying the judgment against him in that state, made no demand of the corporation and took no action against it. (p. 650.)

H. V. Cunningham, for the plaintiff.

A. H. Russell and G. Libby, for certain defendants.

422 KNOWLTON, C. J. This is a bill in equity brought against certain stockholders of a corporation organized under the laws of Maine, to obtain contribution toward the payment of a judgment against the corporation, made by the plaintiff, under a liability created by the statutes of that state. The plaintiff failed to make full payment for his subscription to the capital stock of the corporation, and was therefore liable for the corporate debts, under the Revised Statutes of Maine, chapter 46, sections 37, 38, 44, 45, 46 and 47, to an amount

equal to the sum left by him unpaid. For the same reason each of the defendants was equally liable for these debts. Each had subscribed for the same number of shares of the capital stock, and had made the same payment for them.

It is a familiar principle that, when several parties are equally liable for the same debt and one is compelled to pay the whole of it, he may have contribution against the others to obtain from them the payment of their respective shares. This right to contribution is not founded upon contract, but upon a principle of natural equity and justice. To use the language of the court in *Aspinwall v. Sacchi*, 57 N. Y. 331, 335, "The doctrine of contribution rests on the principle that when the parties stand in equali jure, the law requires equality which is equity, and one of them shall not be obliged to bear the burden in ease of the rest. It is founded, not on contract, but on the principle that equality of burden as to common right is equity. And the obligation to contribute arises from the nature of the relation between the parties": See, also, *Stone v. Fenno*, 6 Allen, 579; *Cary v. Holmes*, 16 Gray, 127; *Ray v. Powers*, 134 Mass. 22; *Merrill v. Prescott*, 67 Kan. 767, 74 Pac. 259; 1 Story's Equity Jurisprudence, 493, 495; 7 Am. & Eng. Ency. of Law, 2d ed., 363. The principle has long been applied to the liability of stockholders in corporations for the corporate debts. In Cook on Corporations, fifth edition, section 211, we find the law stated as follows: "A court of chancery will compel subscribers to pay in full the amount of their unpaid subscriptions if the corporate indebtedness make it necessary, leaving them to seek contribution from the other stockholders. The rule, however, is well settled that a stockholder who has been compelled to pay more than his proportion of the debts of the company may maintain an action against his ⁴²³ co-stockholders for contribution." The neglect of a subscriber for stock to pay for it in full is not a tort, which deprives him of his right to contribution; but it leaves him in the position of a surety, who is liable for a debt equally with other sureties: *Nickerson v. Wheeler*, 118 Mass. 295. This is recognized in the numerous suits for contribution by stockholders which are sustained by the courts.

This case is, therefore, one of a common class, in which a plaintiff's right to relief is plain, unless there is something peculiar in the facts that the corporation was established in another state and that the original liability arose under the laws of that state. In this respect there is nothing in this

case materially different from the liability, under the laws of other states, which has been enforced repeatedly by this court in other cases. While this liability for corporate debts is statutory in terms, it is contractual in its nature. In this respect it is like the liability referred to in *Broadway Nat. Bank v. Baker*, 176 Mass. 294, 57 N. E. 603; *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888 49 L. R. A. 301; *Hancock Nat. Bank v. Ellis*, 172 Mass. 39, 70 Am. St. Rep. 232, 51 N. E. 207; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 20 Sup. Ct. Rep. 477, 44 L. ed. 587; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 20 Sup. Ct. Rep. 506, 44 L. ed. 619; *Flash v. Conn*, 109 U. S. 371, 27 L. ed. 966. Such a liability, unless an exclusive mode of enforcing it under local laws is prescribed by the statute, is enforceable anywhere. If we assume, without deciding, that the remedy by a bill in equity, prescribed by the Revised Statutes of Maine, chapter 46, section 47, is only by a suit brought in that state, this same section permits an action at law against a single stockholder. In view of the decisions above referred to, we see no good reason why such an action may not be brought in any state where a stockholder is found. But whether it may or may not, the action in this case was brought against the plaintiff in Maine, and he was compelled to pay the amount of the judgment previously recovered against the corporation. The liability which he thus met was properly enforceable against him, and it gave him a right of contribution against other stockholders who are under the same liability, which right rests on broad principles of equity. It is a right which he carries with him into any state where he invokes the aid of the courts against other stockholders. There is nothing in the origin or nature of the liability on which the suit against ⁴²⁴ him was founded, that deprives him of the remedy in equity which belongs to one who has paid more than his proper proportion of a debt for which others are equally holden. For other cases bearing upon the general subject, see *Allen v. Fairbanks*, 45 Fed. 445; *Moxham v. Grant*, [1900] 1 Q. B. 88; *Richter v. Henningsan*, 110 Cal. 530, 42 Pac. 1077; *Bell v. Farwell*, 176 Ill. 489, 68 Am. St. Rep. 194, 52 N. E. 346, 42 L. R. A. 804; *Buchanan v. Meisser*, 105 Ill. 638.

The fact that the plaintiff, after satisfying the judgment, made no demand upon the corporation and took no action against it, under the Revised Statutes of Maine, chapter 46, section 49, does not affect his right to contribution.

The contribution should be decreed against the solvent defendants who are within this jurisdiction: *Wood v. Leland*, 1 Met. 387; *Cary v. Holmes*, 16 Gray, 127; *Merrill v. Prescott*, 67 Kan. 767, 74 Pac. 259; 7 Am. & Eng. Ency. of Law, 2d ed., 341 et seq.

Decree for the plaintiff.

A Stockholder who has been compelled to pay more than his share of a debt of the corporation to a creditor has a claim for contribution in equity against the other stockholders who were liable for the debt: See the monographic note to *Thompson v. Reno Sav. Bank*, 3 Am. St. Rep. 870. In a recent case it has been held that an action to enforce a stockholder's liability to contribute proportionately with other stockholders to a fund to pay the debts of the corporation, must ordinarily be brought in the state where the corporation is located, since there only can its obligation be ascertained, its officers controlled, and its assets marshaled: *Miller v. Smith*, 26 B. I. 146, 106 Am. St. Rep. 699.

BEST v. BERRY.

[189 Mass. 510, 75 N. E. 743.]

WILLS.—Extrinsic Evidence, Though Consisting of a Memorandum in the Testator's Handwriting and by Him Signed, is not admissible to control or alter the legal effect of the will, where there is no ambiguity on its face, taken in connection with all the surrounding facts, so that no doubt arises on the subject matter of a bequest or the identity of a legatee. (p. 653.)

WILLS, Bequest, When not to a Class.—The bequest of the residue of the testator's estate to her younger children, E. G. C. and E. I. B., to be divided equally between them, is a separate bequest to each, and not one bequest to them as a class. Hence, on the death of E. G. C., during the life of the testator, E. I. B., does not take the residue, but the deceased, as to it, must be regarded as dying intestate. (p. 654.)

J. J. O'Connor and W. J. Corcoran, for the plaintiff.

W. E. Fuller, Jr., and A. S. Phillips, for the defendant.

⁵¹⁰ **SHELDON, J.** Nancy C. Chace died February 16, 1903, leaving a will, the material parts of which are as follows:

"First. After the payment of my just debts and funeral charges, I give and bequeath the sum of two hundred dollars to my oldest son, Lewis W. Berry.

"Second. I give and bequeath the rest and residue of my estate to my younger children Elbridge G. Chace and Ellen I. Best to be divided equally between them.

"Third. I hereby nominate my son, Elbridge G. and my daughter Ellen I. sole executors of this will, and request that no sureties be required on their bond as such executors."

Lewis W. Berry is the son of the testatrix by her first husband, who died in 1859, and Elbridge G. Chace and Ellen I. Best are her children by her second husband, who also died before the date of her will. At the date of the will the three children named therein were living, but Elbridge C. Chace died before the testatrix, intestate and leaving no issue. The testatrix received at least a substantial part of her property ⁵¹¹ under the will of a sister of her second husband. The petitioner was appointed executrix of Mrs. Chace's will, and having paid all debts and charges and the legacy to Lewis W. Berry, and having a considerable residue in her hands, she brought this petition in the probate court to determine her rights and those of Berry under the residuary clause of said will. She claims the entire residue, contending that it was bequeathed to a class of which she is the survivor, while the respondent Berry claims that the residue was given in equal parts to the petitioner and the deceased severally and not as members of a class, and that upon the decease of said Elbridge the share bequeathed to him descended in equal parts to the heirs of the testatrix—that is, one-half to the petitioner and one-half to the respondent, so that the respondent is now entitled to one-fourth part of such residue. The probate court entered a decree in favor of the respondent's contention, and the petitioner appealed.

1. After the death of the testatrix, there was found among her private papers, together with her will, a memorandum, reading as follows:

"Fairhaven, I have finished this the 7 day of December 1902, began it a month ago.

"Nancy C. Chace.

"Lewis W. Berry Rock Elm, Wis.

"I have remembered him, it was my duty, he was a neglected child after nine years old.

"Ida M. Putny Gilmingtion, Wis.

"Ellen, give her 25 dollars, is my wish

"She is my granddaughter & married

"Mary E. Berry Marinett Wis.

"Give her 50 dollars, she is single, also my granddaughter, not strong.

"Alvira Cowley, Plymouth, Mass.

"Give my niece 50 dollars as a debt of grattitude, she & I understand

"A mat to Frank Shooks

" " " " Effie Peck

"Silk quilt to Deborah, and anything else you wish.

"Alter & Ellen what they wish.

"Give Will's folks two quilts, the same to Walter.

512 "You will do this for me Ellen—but give no money legacies unless you have plenty for other expences.

"Your mother

"To Ellen I. Best, Stoneham, Mass.

"This is not a legal document but you with your princaple will legalize it if necessary with without interference if so make what change you need.

"Feb. 3d, 1903. N. C. Chace"

The authenticity of this memorandum is admitted, and it is agreed that it may be admitted in evidence, if competent; but the respondent denies its competency. The petitioner contends that the contents of this memorandum indicate an intention that Berry should have only the two hundred dollars bequeathed to him, and that the whole of the residue should go to the younger children; that it is equivalent to a declaration by the testatrix that her intention was what the petitioner now contends that it was. But the very statement of her contention is enough to overthrow it. The language of the will is to be construed with reference to the subject matter and all the surrounding facts which were known to the testatrix; her purpose and intention must be gathered from the language of the will, taken in connection with such attendant circumstances: *Gould v. Chamberlain*, 184 Mass. 115; *Morse v. Stearns*, 131 Mass. 389; *Buckley v. Gerard*, 123 Mass. 8. And where, as here, there is no ambiguity on the face of the will taken in connection with all the surrounding facts, so that no doubt is raised as to the subject matter of the bequest or the identity of the legatee, extrinsic evidence of the intention of the testatrix is not admissible to control or alter her legal intent as manifested by the will itself: *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; *American Bible Soc v. Pratt*, 9 Allen, 109; *Tucker v. Seaman's Aid Soc.*, 7 Met. 188.

Accordingly the memorandum was not admissible to show the intention of the testatrix.

2. The residuary clause in the will must be regarded as making separate bequests to Elbridge G. Chace, and the petitioner, and not one bequest to them considered as a class. There is nothing to indicate that these words are, as argued by the petitioner, merely the chance expression of the scrivener. The general ⁵¹³ rule is "that when an aggregate fund is bequeathed to several legatees, to be divided among them, nominatim, in equal shares, if any of them die before the testator, what was intended for them will lapse": Metcalf, J., in Jackson v. Roberts, 14 Gray, 546, 550. And the same rule has been often affirmed and followed by this court: Lyman v. Coolidge, 176 Mass. 7, 56 N. E. 831; Powers v. Codwise, 172 Mass. 425, 52 N. E. 525; Frost v. Curtis, 167 Mass. 251, 45 N. E. 687; Workman v. Workman, 2 Allen, 472; Sohier v. Inches, 12 Gray, 385; Gardiner v. Savage, 182 Mass. 521, 65 N. E. 851.

It is true that this rule will not be enforced when it plainly appears from the will that the testator intended that the survivors of such legatees should take the whole fund bequeathed, as in Swallow v. Swallow, 166 Mass. 241, 44 N. E. 182, and Jackson v. Roberts, 14 Gray, 546, though the language of the court in the cases just cited and in Sohier v. Inches, 12 Gray, 385, shows that this limitation must be applied with some strictness. We find no sufficient circumstances in the case at bar to prevent the application of the general rule.

The result is that the contention of the respondent must be sustained and the decree of the probate court affirmed.

So ordered.

Gifts to a Class, such as to "children," are discussed in the monographic note to Thomas v. Thomas, 73 Am. St. Rep. 413-440. Where a devise is to a class, the death of one of the members thereof before the testator will not cause a lapse of any part of the gift, but those of the described class who survive the testator will take the whole: Lancaster v. Lancaster, 187 Ill. 540, 79 Am. St. Rep. 234. See, in this connection, Downing v. Nicholson, 115 Iowa. 493, 91 Am. St. Rep. 75.

HAYNE v. UNION STREET RAILWAY COMPANY.

[189 Mass. 551, 76 N. E. 219.]

CARRIER—Duty of to Protect Passengers from the Former's Servant.—A common carrier of passengers impliedly agrees to exercise the utmost care and diligence, consistent with the proper management of its business, to protect its passengers from injury through the misconduct of other persons while it is performing its contract for their transportation. In the application of this rule to injuries caused by a servant of the carrier while engaged in the performance of the contract of carriage, it is liable absolutely for their misconduct. (pp. 655, 656.)

STREET RAILWAYS, Liability of to Passengers for Injuries Caused by an Employé.—If the conductor of a street railway car, in sport, throws the body of a dead hen at the motorman of another, and, missing him, breaks a window and causes injury to a passenger in his car, the corporation is liable therefor, though the conductor was not acting within the scope of his employment and was not employed on the car in which the injured passenger was riding. (p. 657.)

A. P. Gay and J. T. Keen, for the plaintiff.

O. Prescott, Jr., for the defendant.

⁵⁵¹ KNOWLTON, C. J. The plaintiff was a passenger on the defendant's street-car, and was riding near the front window, on a seat in the corner of the car. The car entered upon a turnout to pass two other cars, going in the opposite direction, which were waiting there for the plaintiff's car to go by. The conductor of one of these cars, who had picked up a dead hen on the beach near the road, threw the hen in sport at the motorman on the car on which the plaintiff was riding. When he threw the hen he was standing on the ground near his car. He missed the motorman, and his missile struck the window, broke the glass, and thereby injured the plaintiff. This action was brought to recover compensation for the injury. The judge of the superior ⁵⁵² court ordered a verdict for the defendant, and the case is here on the plaintiff's exceptions.

We will assume in favor of the defendant that there was no evidence to warrant a finding that the conductor who threw the hen was acting within the scope of his employment, and therefore, under the rules of law applicable to the ordinary relations of master and servant, the defendant would not be liable for the servant's act. But the plaintiff invokes a special rule applicable to common carriers. A common carrier of passengers impliedly agrees to exercise the utmost care and diligence, consistent with the proper management of his busi-

ness, to protect his passengers from injury through the misconduct of other persons, while he is performing his contract for their transportation. They necessarily submit themselves in a large degree to his care and control, and he undertakes to provide for their safety in all those particulars which ought to be under his direction and management. Among these, to a certain extent, are the kind of persons permitted to approach the passenger on the carrier's premises, and the rules and regulations which govern the conduct of the carrier's servants and others, while the contract for carriage is being performed. While the carrier does not guarantee perfection in these particulars, he is under an obligation of implied contract and consequent legal duty, to use a very high degree of care to prevent injuries that might be caused by the negligence or willful misconduct of others. This rule prevails generally in the American courts: *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99; *Bryant v. Rich.*, 106 Mass. 180, 8 Am. Rep. 311; *New Jersey Steamboat Co. v. Brockett*, 121 U. S. 637, 7 Sup. Ct. Rep. 1039, 30 L. ed. 1049; *Goddard v. Grand Trunk Ry.*, 57 Me. 202, 2 Am. Rep. 39; *Stewart v. Brooklyn etc. R. R.*, 90 N. Y. 588, 43 Am. Rep. 185; *Dwinelle v. New York Cent. R. R.*, 120 N. Y. 117, 17 Am. St. Rep. 611, 24 N. E. 319, 8 L. R. A. 224; *Haver v. Central R. R.*, 62 N. J. L. 282, 72 Am. St. Rep. 647, 41 Atl. 916, 43 L. R. A. 84; *Chicago etc. R. R. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33; *Fick v. Chicago etc. Ry.*, 68 Wis. 469; *Indianapolis Union Ry. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219; *Terre Haute etc. R. R. v. Jackson*, 81 Ind. 19. In the application of the rule to injuries caused by servants of the carrier while engaged in the performance of his contract of carriage, it is held that he is liable absolutely for their misconduct. This part of ⁵⁵³ the rule was discussed particularly in *Bryant v. Rich.*, 106 Mass. 180, 8 Am. Rep. 311, as the more general doctrine was discussed in *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99.

Under the authorities, it is plain that if the wrongful act which caused the injury in the present case had been done by the conductor or motorman of the car on which the plaintiff was riding, the defendant would be liable. The only question upon which there is ground for any doubt is, whether the rule applies to an injury done by a servant who was engaged in the same general service, but was employed upon another car, and was not charged directly and primarily

with any duty to provide for the safety of the plaintiff. We are of opinion that the liability of the defendant is the same as if the conductor who threw the hen had been in charge of the plaintiff's car. The rule of liability in such cases is made absolute. The reason for the rule applies as well when the servant is employed upon another car as when he is working on the car upon which the injury occurs.

If one of the reasons for the liability is that the servant, through his relation to his master, owes a duty to protect the passenger from injuries by others, and a fortiori from injuries by himself, this duty, so far as it relates to the last branch of the obligation, is not confined to servants the nature of whose service requires them to give personal attention to the passenger in reference to possible injuries from others, but it includes those employed in the general business of transportation, and involves a duty to refrain from doing injury to any of the master's passengers, whether in the special charge of the servant or not. It would be too strict and narrow a rule to hold that this liability of the master extends only to injuries by servants especially charged with the duty of protecting passengers from injury. In *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311, it was said that, "In respect to such treatment of passengers, not merely the officers but the crew are the agents of the carriers." The great diligence and learning of the defendant's counsel have discovered for our enlightenment no case in which it has been held that the carrier was not liable, because the servant, at the time of his wrongful act, was not directly employed in carrying the passenger injured, if he was engaged in the general business of which the transportation of the passenger was a part. Of course, if he was at the ⁵⁵⁴ time in a position wholly disconnected with his duties to the carrier, as, if his misconduct was away from his place of employment at an hour of the day when he was at liberty to go where he pleased, the master would not be liable. But the mere fact that he was on one car and his wrongful act was directed to a passenger on another car, should make no difference with the master's liability. In *Dwinelle v. New York Cent. etc. R. R.*, 120 N. Y. 117, 17 Am. St. Rep. 611, 24 N. E. 319, 8 L. R. A. 224, a case somewhat different from the present one, the court used this language: "While this general duty rested upon the defendant to protect the person of the passenger during the

entire performance of the contract, it signifies but little or nothing whether the servant had or had not completed the temporary or particular service he was performing or had completed the performance of it, when the blow was struck. That blow was given by a servant of the defendant while the defendant was performing its contract to carry safely and to protect the person of the plaintiff, and was a violation of such contract." In *Atlanta Consolidated Street Ry. v. Bates*, 103 Ga. 333, 30 S. E. 41, the court said: "When this injury occurred, therefore, the defendant company was under a legal obligation to use extraordinary diligence to protect the life and person of the plaintiff. We know of no rule of law that would necessarily restrict this doctrine to the agents of the company having in charge the particular car upon which the plaintiff had taken passage." In *Planz v. Boston etc. R. R.*, 157 Mass. 377, 32 N. E. 356, 17 L. R. A. 835, the following sentence appears: "The cases which hold that a carrier of passengers is always liable for willful and wanton injuries inflicted by its servants upon those who are being carried by it are not applicable": See, also, *Birmingham Railway etc. Co. v. Baird*, 130 Ala. 334, 89 Am. St. Rep. 43, 30 South. 456, 54 L. R. A. 752; *White v. Norfolk etc. R. R.*, 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191; *Gillespie v. Brooklyn Heights R. R.*, 178 N. Y. 347, 102 Am. St. Rep. 503, 70 N. E. 857, 66 L. R. A. 618.

We are of opinion that the defendant is liable for the misconduct of the conductor, although he was not employed upon the car in which the plaintiff was riding.

Exceptions sustained.

A Carrier is Liable absolutely as an insurer for the protection of its passengers against assault or insult at the hands of its own servant: *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263, 105 Am. St. Rep. 592, and see the cases cited in the cross-reference note thereto.

REAGAN v. UNION MUTUAL LIFE INSURANCE COMPANY.

[189 Mass. 555, 76 N. E. 217.]

INSURANCE—Incontestable Clause, Applicability of to Fraud.—Though a policy of life insurance purports to be incontestable after date of issue for any cause except nonpayment of premium, an action thereon is subject to the defense that the assured made material false and fraudulent representations before the issuing of the policy, sufficient to avoid it for fraud. (pp. 662, 663.)

J. M. Morton, Jr., and R. A. Dean, for the plaintiff.

A. S. Phillips and W. E. Fuller, Jr., for the defendant.

⁵⁵⁵ **KNOWLTON, C. J.** This is an action of contract on a policy of life insurance issued to the plaintiff's intestate. The defendant answered that the policy was obtained by fraud of the insured. The policy contains a clause as follows: "Incontestability: This policy is incontestable from date of issue for any cause, except nonpayment of premium." After having introduced proofs of her intestate's death, and other evidence that made a prima facie case, the plaintiff rested, her counsel stating as her contention "that no question of health or fraud such as is set up in the answer is open to the defendant under this incontestable policy." The defendant then offered to prove that the insured made material false and fraudulent representations before the issuing of the policy, which would be sufficient to avoid it for fraud, which were made orally to the medical examiner for the purpose of having him incorporate them in his report to the company, and which he did so incorporate; that the insured was an insurance agent, and made these misrepresentations for the purpose of securing this form of insurance at the time and place stated in the policy; and that the policy was issued in reliance thereon, and would not otherwise have been issued. The judge ruled that the evidence was not admissible under the policy, and directed a verdict for the plaintiff. He then reported the case, stating that the only question ⁵⁵⁶ raised is whether the evidence of such fraud is admissible in defense under such a policy.

This is not like the numerous cases in which the policy provides that it shall be incontestable for fraud after the expiration of a specified time, which is not unreasonably short. It has often been held that a provision of that kind is valid be-

cause it is in the nature of a limitation of the time within which the defendant may avoid the policy for this cause. Such a provision is reasonable and proper, as it gives the insured a guaranty against possible expensive litigation to defeat his claim after the lapse of many years, and at the same time gives the company time and an opportunity for investigation, to ascertain whether the contract should remain in force. It is not against public policy, as tending to put fraud on a par with honesty: *Wright v. Mutual Ben. Assn.*, 118 N. Y. 237, 16 Am. St. Rep. 749, 23 N. E. 186, 6 L. R. A. 731; *Vetter v. Massachusetts Nat. Assn.*, 29 App. Div. (N. Y.) 72, 51 N. Y. Supp. 393; *Clement v. New York Ins. Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650, 46 S. W. 561, 42 L. R. A. 247; *Goodwin v. Provident Assur. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411, 66 N. W. 157, 32 L. R. A. 473; *Kline v. National Ben. Assn.*, 111 Ind. 462, 60 Am. Rep. 703, 11 N. E. 620; *Murray v. State Ins. Co.*, 22 R. I. 524, 48 Atl. 800, 52 L. R. A. 742; *Royal Circle v. Achterrath*, 204 Ill. 549, 98 Am. St. Rep. 224, 68 N. E. 492, 63 L. R. A. 452. But this clause purports to make the policy incontestable for any cause, from the date of issue. We must assume that the defendant issued the policy on the faith of the fraudulent representations without discovering the fraud, --, so far as appears, having any opportunity to discover it before the contract was made. It is true that it might have declined to issue a policy until it should take time to investigate the matters represented. If it had postponed making the contract for a considerable time, and had investigated the subjects to which the representations related, and had then issued a policy, inserting in it a provision that, having made an examination of the material matters stated by the insured, it was so far convinced of the truth of his statements that it would waive its right afterward to set up fraud as a defense to the claim, a different question would have been presented. It then might appear that the contract was not induced by reliance upon fraudulent representations, but by an investigation which the defendant conducted, on which it relied. There is nothing to show that the policy was not issued immediately upon the receipt by the company of the report containing the false statement. The company was not ⁵⁵⁷ bound to postpone the making of the contract. It had a right to enter into it, relying upon the report which was founded on the false representations.

We think the question intended to be presented by the report of the judge is the same as if the plaintiff's intestate had gone into the home office of the defendant, and had made material representations as inducements to the issuing of a policy, and the defendant's manager had said, "I will give you a policy, relying on your representations. I do not know whether they are true or false, but however false and fraudulent they may be, the company will never avail itself of the fraud as a defense to a suit upon the policy," and had then given him a policy containing this clause. Will the court enforce an agreement never to set up fraud in defense to a contract, when the contract is made in reliance upon material representations that may be true or false? This question has been considered in its application to contract of insurance. In *Wheelton v. Hardisty*, 8 El. & Bl. 232, 283, Lord Campbell interpreted a provision that a contract should be indefensible as meaning indisputable, "subject to the implied exception of personal fraud which will vitiate every contract." In *Masachusetts Ben. Life Assn. v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261, the court said: "A policy providing generally that it should be incontestable from its date, but silent on the subject of defending upon grounds originating in fraud, would still be a valid contract; the waiver of the right to defend on the ground of fraud not being the subject of express stipulation, the law would imply that the insurer intended to reserve to himself the right to defend upon that ground. If, however, the policy stipulated that it should be incontestable from its date, and the insurer should not be allowed any defenses, whether originating in fraud or otherwise, or if it were clear from the terms of the contract that it was the intention of the parties that fraud should not be a defense, then such a contract would be void as being opposed to the policy of the law." In *Welch v. Union Cent. Life Ins. Co.*, 105 Iowa, 224, 78 N. W. 853, 50 L. R. A. 774, substantially the same doctrine is clearly stated. To the same effect is *Bliss on Insurance*, 1st ed., sec. 247, 2d ed., secs. 254, 255. All the cases in the first group of the above citations discuss the incontestability of policies after the lapse of a specified time upon grounds that imply the existence of the same rule of law.

⁵⁵⁸ The reasons for the enforcement of such a rule are particularly strong when one of the contracting parties is a mu-

tual insurance company, all the members of which share in the profits and losses.

There are various cases which forbid companies to make contracts of life insurance that are against the policy of the law. In *Ritter v. Mutual Ins. Co.* 169 U. S. 139, 18 Sup. Ct. Rep. 300, 42 L. ed. 693, it was held that a contract to insure one against suicide would be against public policy. Mr. Justice Harlan, in the opinion, said: "A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice or be made the foundation of its judgment." An agreement to be bound by a contract which the parties are making, in spite of subsequently discovered fraud by which it was obtained, would be subversive of sound morality. In *Hatch v. Mutual Ins. Co.*, 120 Mass. 550 21 Am. Rep. 541, this court held that there could be no recovery under a policy of life insurance when the insured knowingly and voluntarily exposed her life by submitting to a criminal operation which proved fatal. For similar decisions, see *Amicable Society v. Bolland*, 4 Bligh, N. S., 194, and *Burt v. Union Cent. Life Ins. Co.*, 187 U. S. 362, 23 Sup. Ct. Rep. 139, 47 L. ed. 216.

We have been referred to no decision which holds valid a provision that a policy of life insurance shall be incontestable for fraud from the day of its date. The only case that we have discovered in which there is any language looking in that direction is *Patterson v. Natural Premium Mut. Life Ins. Co.*, 100 Wis. 118, 69 Am. St. Rep. 899, 75 N. W. 980, 42 L. R. A. 253, and in that the ground of the decision, as we understand it, is that there was no evidence on which to raise the question.

The plaintiff's contention that, because by the terms of the policy the entire contract is contained in the policy and the application, the defendant is precluded from showing fraud practiced as an inducement to the making of the contract, is not well founded. This defense does not rest upon any provision of the contract, but upon the misconduct of the plaintiff, whereby he obtained the contract.

If we say that, in addition to the expressed exception, the clause before us impliedly excepts fraud, then the clause is not applicable to this defense, and the evidence should have
559 been admitted. If we treat it as intended to include fraud among the matters which cannot be set up in defense,

and this perhaps is its most probable meaning, we are of opinion that this part of the provision is against the policy of our law, and therefore void. According to the terms of the report, the entry must be verdict set aside.

Stipulations in a Life Insurance Policy that it shall become incontestable for fraud in procuring it after the lapse of a specified period from the date of its issue are valid as creating a short statute of limitations in favor of the insured: *Royal Circle v. Achterrath*, 204 Ill. 549, 98 Am. St. Rep. 224; *Clement v. Insurance Co.*, 101 Tenn. 22, 70 Am. St. Rep. 650; *Wright v. Mutual etc. Assn.*, 118 N. Y. 237, 16 Am. St. Rep. 749.

BOLAND v. MCKOWEN.

[189 Mass. 563, 76 N. E. 206.]

TENANCY BY ENTIRETY, Mortgage, When Held by.—A mortgage in favor of a husband and wife, to secure a note payable to them, vests in them as tenants by the entirety, and, on his death, she is entitled to collect the whole debt, and his executor has no interest therein. This rule remains applicable notwithstanding the statutes of Massachusetts relating to conveyances and to the separate property and rights of married women. (pp. 664, 665.)

R. P. Coughlin, for the claimant.

F. A. Milliken, for the plaintiff.

564 KNOWLTON, C. J. In 1894 certain real estate was conveyed to Edward J. Boland and Agnes Boland, these persons being husband and wife. In 1902 they conveyed the property to Catherine McKowen and took back from her, on the same day and as a part of the same transaction, a mortgage to secure a part of the purchase money. The mortgage runs to "said Edward J. Boland and Agnes Boland and their heirs," etc., and the note secured by it is payable in like manner to them jointly. Edward J. Boland having deceased, and the note remaining unpaid, the question before us is whether his widow, Agnes Boland, has a right to collect it, or whether the executor of the husband's will, Edward J. Boland, Jr., the present claimant is entitled to one-half of it. The estate of the husband is ample to pay his debts, so that the rights of creditors are not involved.

At common law a conveyance to two or more persons, without special provisions, created an estate in joint tenancy, unless these persons were husband and wife, in which case

it created an estate by entirety, which differs from a joint tenancy in the fact that the tenancy cannot be severed and the right of the survivor terminated by either party: *Shaw v. Hearsey*, 5 Mass. 521; *Appleton v. Boyd*, 7 Mass. 131; *Wales v. Coffin*, 13 Allen, 213; *Fray v. Stebbins*, 141 Mass. 219, 55 Am. Rep. 462, 4 N. E. 824. See, also, *Pease v. Whitman*, 182 Mass. 363, 65 N. E. 795; *McLaughlin v. Rice*, 185 Mass. 212, 102 Am. St. Rep. 339, 70 N. E. 52. By the Statutes of 1785, chapter 62, section 4, the common law was changed, so that conveyances to two or more persons were to be interpreted as creating estates in common, unless it clearly appeared from the language that estates in joint tenancy were intended. It was held in the cases above cited that this statute did not apply to mortgages or conveyances to husband and wife. The Revised Statutes, chapter 59, sections 10, 11, continue this statute in force, with an expressed provision, in accordance with the previous decisions, that it should not "apply to mortgages, nor to devises or conveyances made in trust, or made to husband and wife," and the provision remained without material change until the enactment of the Statutes of 1885, chapter 237: Gen. Stats., c. 89, secs. 13, 14; Pub. Stats., c. 126, secs. 5, 6. By Statutes of 1885, chapter 237, conveyances to husband and wife are included in the provisions in regard to conveyances ⁵⁰⁵ to other persons, so that conveyances and devises to husband and wife, made since the enactment, do not create estates by entirety unless an intention to create such an estate is expressed in the writing. But in this as in the former statutes mortgages are exempted from the provision, and these are left to be governed by the rules of the common law.

In *Pray v. Stebbins*, 141 Mass. 219, 4 N. E. 824, and in *Phelps v. Simons*, 159 Mass. 415, 38 Am. St. Rep. 430, 34 N. E. 657, it was held that the statutes in regard to the separate property and separate rights of married women do not affect the common law in regard to estates by entirety. In *Draper v. Jackson*, 16 Mass. 480, the court decided, in an elaborate opinion, that a note and mortgage made to husband and wife go to the wife, if she survives her husband, and not to the executor of the husband. As a general proposition, this is the law to-day; for except the Statutes of 1885, chapter 237, just cited, there is nothing in the statutes in regard to married women which extends or limits their rights, as against their husbands, in reference to property held under deeds or

contracts running to them jointly. As at the common law, husband and wife are left incapable of making ordinary contracts with one another.

Although this case presents no such question as that upon which the court divided in *Pheips v. Simons*, 159 Mass. 415, 38 Am. St. Rep. 430, 34 N. E. 657 (see, also, *Draper v. Jackson*, 16 Mass. 480), the discussion in that case recognized tenancies or ownership by entirety in personal property as well as in real estate. This view of the court is sustained by the cases cited in the opinion.

Upon the facts before us in the present case, we are of opinion that the plaintiff has the same rights as she would have had if the common law had remained unchanged.

Judgment for the plaintiff affirmed.

Tenancies by the Entirety are discussed in the monographic note to *Hardenbergh v. Hardenbergh*, 18 Am. Dec. 377-389. By the common law, such a tenancy is created when the grantees are husband and wife, unless a contrary intent is manifest. This rule, however, has been abrogated in many of the American states: See *Wilson v. Frost*, 186 Mo. 311, 105 Am. St. Rep. 619; *McLaughlin v. Rice*, 185 Mass. 212, 102 Am. St. Rep. 339, and cases cited in the cross-reference note thereto.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

McMILLAN v. REAUME.

[137 Mich. 1, 100 N. W. 166.]

LIMITATION OF ACTIONS—Mistake in Form of Remedy.—Under a statute providing that “if in any action the writ be abated or the action otherwise avoided or defeated, or for any matter of form, or if after a verdict for the plaintiff, the judgment shall be arrested, or shall be reversed on writ of error, the plaintiff may commence a new action for the same cause within one year,” a plaintiff may bring a new action within a year after a former action was dismissed because by mistake brought in assumpsit instead of in tort. (pp. 667, 668.)

FRAUD.—The Question of Fraud should be Submitted to the Jury when there is a substantial conflict of evidence in respect thereto. (p. 668.)

FRAUD—Measure of Damages.—In an action for fraudulently inducing a person to convey her interest in her father’s estate for less than its value, an instruction declaring the measure of damages to be the difference between what she actually received and what her interest was worth, is correct, in the absence of peculiar circumstances called to the attention of the court. (p. 669.)

John D. Conely and William C. Stuart, for the appellants.

Fred A. Baker, for the appellee.

¹ GRANT, J. The circumstances and facts upon which the present suit is based are sufficiently stated in the three former decisions ² of this court based upon the same transaction: *Bedier v. Reaume*, 95 Mich. 518, 55 N. W. 366; *Bedier v. Fuller*, 106 Mich. 342, 64 N. W. 331, 116 Mich. 126, 74 N. W. 506. The first suit was brought on the chancery side of the court to set aside the deed given by plaintiff, the complainant in that suit, on the ground of fraud. The bill was

dismissed in the court below, and the decree affirmed in this court. Plaintiff then, in the belief that she could waive the tort and sue in assumpsit, brought the second suit. The declaration contained a special count and the common counts. The demurrer to the special count was sustained both in the circuit and in this court (106 Mich. 342, 64 N. W. 331), for the reason that plaintiff could not disaffirm the contract, waive the tort, and maintain assumpsit as upon an implied promise for the difference between the amount received and the actual value. Plaintiff then went to trial upon the common counts, and her claim will be found stated in the third case in this court: 116 Mich. 123, 74 N. W. 506. Upon the opening statement in that case by her counsel, the court directed a verdict for defendants upon the ground that she had affirmed the contract, and could not, therefore, recover "as for an implied promise in assumpsit." After the determination of the former suit, plaintiff then brought this action of tort, based upon the fraud alleged to have been committed by the defendants upon her in the sale of her interest in her father's estate. She recovered verdict and judgment. Three questions are presented: 1. Is the action barred by the statute of limitations? 2. Was there evidence of fraud to justify the verdict? 3. Was the correct rule of damages submitted to the jury?

2. The principal ³ and most important question arises upon the statute of limitations. That portion of the statute applicable to the case is as follows: "If, in any action duly commenced within the time limited in this chapter and allowed therefor, . . . the writ be abated, or the action otherwise avoided or defeated, . . . for any matter of form, or if, after a verdict for the plaintiff, the judgment shall be arrested, or . . . shall be reversed on a writ of error, the plaintiff may commence a new action for the same cause at any time within one year after the abatement or other determination of the original suit, or after the reversal of the judgment therein": 3 Comp. Laws, sec. 9738.

The only suit determined within one year prior to the commencement of this suit was that upon the common counts, which was determined in May, 1897, and this suit was commenced in April, 1898—within one year after the final determination of the former suit. This suit was not a determination upon the merits. The merits were not entered upon. The plaintiff and her counsel believed that they could try

the merits of the controversy in an action of assumpsit, instead of tort. No testimony was taken. After the opening statement, the court held that the plaintiff's suit was planted upon a mistaken view of the law; in other words, plaintiff had mistaken her form of remedy.

We think the statute clearly covers such a case. Our statute of limitations was borrowed from that of Massachusetts. It was said by the supreme court of that state, speaking through Chief Justice Shaw: "This is a remedial statute, both in its enacting and qualifying clauses, and should have such construction as will best carry into effect the intent of the legislature; . . . and the presumption [of payment] does not arise if the creditor resorts to legal diligence to recover his debt within the time limited."

That court therefore held that, where the first letters of administration were held to be a nullity, and a second suit was commenced within one year after that decision, and "more than six years after the debt accrued, the new suit could be maintained: *Coffin v. Cottle*, 16 Pick. 383.

It is not an infrequent occurrence for attorneys to make a mistake in the form of the remedy. Where they have acted in good faith, the statute should be held to apply. So, where an action upon contract was defeated on demurrer to a declaration in a suit at law, a bill in equity was held maintainable under this statute: *Taft v. Stow*, 167 Mass. 363, 45 N. E. 752; *Phelps v. Wood*, 9 Vt. 399; *Spear v. Newell*, 13 Vt. 288.

2. Without entering into details, we think there was sufficient evidence to justify the submission of the question of fraud to the jury. If there was any substantial conflict of evidence, it belonged to the jury; and we think there was.

3. The court instructed the jury that, if they should find for the plaintiff, the measure of damages would be the difference between what the property sold for and what her interest really was; i. e., the difference between what she actually received and what her interest was worth. It is contended that plaintiff knew that her share was worth much more than she received for it, and that, therefore, the true measure of damages would be the difference between what her interest was worth and what she was led to believe it to be worth. While there is evidence that plaintiff knew that, aside from debts, the value of the widow's dower, and expense of litigation, the value of the estate was more than four thousand five hundred dollars, yet her claim is based upon the theory

that these defendants induced her to believe that four thousand five hundred dollars was all her interest was in fact worth. Furthermore, counsel for the defendants preferred no request for instruction upon this point. The rule laid down by the court is the usual measure of damages. If the defendants contended that there was anything in the peculiar circumstances of this case to bring it without the general rule, it was their duty to call the attention of the court to the matter. We think the instruction correct.

The judgment is affirmed.

The other justices concurred.

For Decisions Construing Statutes of Limitation of somewhat similar import to the one involved in the principal case, see *Little Rock etc. R. R. Co. v. Manees*, 49 Ark. 248, 4 Am. St. Rep. 45; *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334; *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468. In this last case it is decided that the bringing of an action, though erroneous in form, will save a claim from the bar of the statute of limitations, under the Indiana statutes.

VAN DERLYN v. MACK.

[137 Mich. 146, 100 N. W. 218.]

ADOPTION—Inheritance by Child from Collateral Kindred.—

A statute providing that an adopted child shall become the heir of the person adopting it, the same as if a child in fact, does not entitle a child to inherit, by right of representation, from the brother of its adoptive parent. (pp. 670, 674.)

COSTS.—When an Executor Brings a Suit to determine the rights of a person who claims a share in the estate, but who in fact has no interest therein, costs should not be imposed on the estate. (p. 674.)

Pringle & Hewitt, for the appellant.

Parkinson & Campbell and Charles E. Townsend, for the appellees.

¹⁴⁷ **HOOVER, J.** Lillie May Mack was adopted, under the provisions of the statute (3 Comp. Laws, sec. 8776 et seq.), in the year 1895, by John F. Mack and his wife, Mahala J. Mack. She was not of kin to either of these persons. Mahala J. Mack had four brothers, viz., James, Alfred, John, and Nelson Van Derlyn.

John Van Derlyn made a will September 25, 1901, in which he left his property to his three brothers, and mentioned his sister as having previously died without issue. On February 14, 1903, he made a codicil to the will, revoking all provision in his will in favor of his brother James.

A question arises as to the effect of this codicil; i. e., Should the other two brothers take the share bequeathed to James in the first will, or did the codicil leave it subject to distribution under the statute? Lillie May Mack bases her claim upon the latter view and a claim that she is entitled to inherit a portion of the same through representation of her mother by adoption, Mahala J. Mack, testator's sister.

The bill was filed by Nelson Van Derlyn, individually and as executor of John Van Derlyn, and Alfred Van Derlyn. In its prayer they asked (1) that it be decreed that Lillie May Mack is not an heir at law of John Van Derlyn, or a distributee in any of the personal estate of the deceased; (2) that the will and codicil be construed; (3) that it be decreed that the complainants are the sole devisees ¹⁴⁸ and owners of all of said estate; (4) that the title be declared free and clear from any claim on her part.

The bill was demurred to, and, the demurrer being overruled, the defendant has appealed.

The statute (3 Comp. Laws, sec. 8780) provides: "Such judge of probate with whom such instrument is filed shall thereupon make an investigation, and if he shall be satisfied as to the good moral character, and the ability to support and educate such child, and of the suitableness of the home of the person or persons adopting said child, he shall make an order to be entered on the journal of the probate court that such person or persons do stand in the place of a parent or parents to such child, and in case a change of name is desired, that the name of such child be changed to such name as shall be designated in said instrument for that purpose. Whereupon such child shall, in case of a change of name thereafter be known and called by said new name, and the person or persons so adopting such child shall thereupon stand in the place of a parent or parents to such child in law, and be liable to all the duties and entitled to all the rights of parents thereto, and such child shall thereupon become and be an heir at law of such person or persons, the same as if he or she were in fact the child of such person or persons."

The power to inherit from Mahala J. Mack is given by this statute, and that is as far as the statute goes. It does not say that she shall be the heir of Mahala J. Mack's kindred, nor that she may inherit from them by the right of representation of Mahala J. Mack. We cannot extend the statute by construction. We see nothing in it to lead to the belief that it was the legislative intention to permit one to adopt heirs for third persons.

It is claimed that there are many decisions which sustain the claim of Lillie May Mack, although counsel concede that there are others which deny it. It will be found, however, that there is not much inharmony in the cases, when the varying statutes of different states are considered; and we are satisfied that most, if not all, of the cases can be reconciled with the view above indicated, if ¹⁴⁹ proper allowances are made for the differences in statutes. Thus in Massachusetts the statute provides that: "A child so adopted shall be deemed, for the purposes of inheritance by such child and all other legal consequences and incidents of the natural relation of parents and children, the child of the parents by adoption, the same as if he had been born to them in lawful wedlock; except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation": Gen. Stats. 1860, c. 110, sec. 7.

In the case of *Sewall v. Roberts*, 115 Mass. 262, the Massachusetts court properly held that the exceptions in the statute aided in the interpretation, and perhaps broadened it—a doctrine that is also enunciated in *Glascott v. Bragg*, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258, and *Warren v. Prescott*, 84 Me. 483, 30 Am. St. Rep. 370, 24 Atl. 948, 17 L. R. A. 435. See, also, *Hilpire v. Claude*, 109 Iowa, 159, 77 Am. St. Rep. 524, 80 N. W. 332, 46 L. R. A. 171. Also the cases of *Flannigan v. Howard*, 200 Ill. 396, 93 Am. St. Rep. 201, 65 N. E. 782, 59 L. R. A. 664, and *Hartwell v. Tefft*, 19 R. I. 644, 35 Atl. 882, 34 L. R. A. 500, both of which states have statutes similar to that of Massachusetts. See, also, *Vidal v. Comma-gere*, 13 La. Ann. 516, for a broad construction of a statute of this kind, following the rule of the civil law.

The foregoing cases are for the most part justified by the respective statutes, and therefore do not militate against an-

other construction of a statute, which, while it makes an adopted child the heir of the persons adopting him, contains nothing to indicate that he may inherit the property of others, which never has descended to those adopting him. In the construction of such statutes the following authorities are in point.

In *Barnhizel v. Ferrell*, 47 Ind. 335, it was held that, by adopting a child, he was not made the heir of his foster brother, under the statute of Indiana: See *In re Estate of Sunderland*, 60 Iowa, 736, 13 N. W. 655.

¹⁵⁰ In *Power v. Hafley*, 85 Ky. 676, 4 S. W. 685, the court said: "In reaching the conclusion that one, by adopting another, may make that other his own heir, with full capacity to inherit his estate, and that the children of the adopted may also inherit from him, we do not wish to be understood as deciding that the adopting parent can make the adopted child the heir of other people, so as to entitle such child to inherit property that does not come directly from the adopting parent. The case at bar does not involve that question, and we prefer to reserve any expression of opinion thereon until the question actually arises."

In *Meador v. Archer*, 65 N. H. 215, 23 Atl. 521, the Massachusetts act was interpreted, and the court said: "Holt's mother outlived him, and owned the land at the time of her death, and the plaintiffs are the next of kin. The defendant is Holt's adopted son. As Holt had no title, the land did not go to the defendant as Holt's heir. By the law of the defendant's adoption, he could inherit property which Holt 'could have devised by will.' This land Holt could not have devised. By the same law, 'as to the succession to property,' the defendant stands, 'in regard to the legal descendants, but to no other of the kindred of' Holt, in the same position as if he were Holt's son. This does not make him an heir of Holt's mother. No objection being made in argument to the form of action, the question of procedure has not been considered."

In *Helms v. Elliott*, 89 Tenn. 448, 14 S. W. 930, 10 L. R. A. 535, the Tennessee court said: "As between the adopting parent and the adopted child, the statute declares in the plainest terms that the adopted child shall, by the act of adoption, acquire all the rights of a child born to such parent. The adopted child becomes entitled to the same protection and support as if born the child of the adopting parent, and

is given the capacity of inheriting or succeeding to the estate of the adopting parent as heir or next of kin. The adopting parent assumes the same parental obligations to the adopted child as if such child were born to such parent, and the adopted child is clothed with the same rights in the estate of the adopting ¹⁵¹ parent as an heir or next of kin. This is the full measure of the benefits conferred upon the adopted child. No claims are given upon anyone except the adopting parent. No property rights are conferred except in the estate of such parent.

“It is contended that the legal status of the adopted child is the same as that of the child born in lawful wedlock, and that, as a consequence, the same rights of heir and next of kin exist in the one case as in the other, not only as to the parent, but as to all other persons. This position is sound in part only. So far as the parental obligations and the estate of the adopting parent are concerned, it is well taken, but beyond that it is not tenable. As to the estates of other persons than the adopting parent, the law of adoption fixes no right in the adopted child. It is only as to the adopting parent that the adopted child is made ‘heir or next of kin’ by the statute. By the adoption, Anderson Lewis, the adopted son, became vested with all the rights of heir and next of kin of Louie Lewis, the adopting father, but he was not thereby made the heir and next of kin of the children born to Louie Lewis. As to them he occupied the same relation in law after the adoption as before—that of a stranger in blood. . . .

“The strict legal meaning of the phrase ‘next of kin’ is ‘next or nearest in blood.’ In ascertaining who the next of kin is, the law follows the line of consanguinity. Such is the general rule of the common law. It is the same in this state under our general statute of distribution. It is so in every case unless there be an express statutory exception. In the law of adoption, such an exception is made, but, as we have already seen, it applies alone to the estate of the adopting parent. The law of adoption arbitrarily establishes for the adopted child the relation of heir and next of kin to the adopting parent, but it does not establish such a relation to the descendants of the adopting parent. As to them and their estates, the adopted child stands in no other relation than that existing before the act of adoption.”

In *Moore v. Moore's Estate*, 35 Vt. 98, where the statute constituted an adopted child an heir at law "in as full and perfect a manner as if born to the adopting parents in lawful wedlock," it was held that the statute did not make the child, by representation, an heir of the brother of its mother by adoption, although she would be an heir if living: ¹⁵² See, also, *Delano v. Bruerton*, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698; *Keegan v. Geraghty*, 101 Ill. 26.

We think these cases are conclusive of the question, as already indicated, and that Lillie May Mack has no interest in this estate.

Whether or not it would have been proper to file a bill merely to adjudicate upon Lillie May Mack's claim of heirship, it would be necessary to construe the will and codicil if her right to inherit from John Van Derlyn should be sustained, and in such case the complainants might file a bill for that purpose. This they did, and, having jurisdiction for that purpose, we may decide the other question.

This disposition of that question makes it unnecessary to pass upon other questions, except that of costs, which counsel for the appellant ask us to impose upon the estate. We see no occasion to do this. The friends of Lillie May Mack saw fit to claim for her a share of an estate in which she has no interest. To impose costs upon the estate is an indirect way of making the true owners of the property pay them, which ought not to be required. On the contrary, they are entitled to costs.

The decree overruling the demurrer is affirmed, with costs.

The other justices concurred.

EFFECT OF ADOPTION ON THE KINDRED OF THE PERSONS ADOPTING.*

- I. Introductory, 674.
- II. Inheritance by Adopted Child, 675.
- III. Inheritance from Adopted Child, 676.
- IV. Property Rights of Surviving Spouse, 676.
- V. Rights Under Wills and Testaments, 678.

I. Introductory.

The legal adoption by one person of the offspring of another was an institution unknown to the common law of England. It was, however, recognized by the Roman law, and has been very generally

* REFERENCE TO MONOGRAPHIC NOTE.

Adoption by one person of the children of another: 39 Am. St. Rep. 210.

introduced into our present day jurisprudence by statutory enactments. In the interpretation of statutes providing for the adoption of children, it is reasonable, therefore, to look to the civil law for assistance: *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207; *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683; *Ross v. Ross*, 129 Mass. 243, 37 Am. Rep. 321. It would seem, moreover, that such statutes, having for their manifest object the promotion of the welfare of children without parents, or with parents unable properly to care for them, as well as the brightening of the homes of foster parents and the safeguarding of the interests of society in general, should be given a liberal interpretation, and every reasonable intentment indulged in with a view to further their humane and beneficent purpose: See *Parsons v. Parsons*, 101 Wis. 76, 70 Am. St. Rep. 894, 77 N. W. 147; *Nugent v. Powell*, 4 Wyo. 173, 62 Am. St. Rep. 17, 33 Pac. 23, 20 L. R. A. 99. It is not doubted, however, that some courts, in the interpretation of adoption statutes, steadfastly adhere to that senseless and vicious rule that statutes in derogation of the common law are to be strictly construed, and thereby give the legislative will and declaration as limited an application as possible: *Furgeson v. Jones*, 17 Or. 204, 11 Am. St. Rep. 808, 20 Pac. 842, 3 L. R. A. 620.

II. Inheritance by Adopted Child.

While an adopted child may be entitled to inherit directly from his adopting parents, he is not, as adoption statutes have generally been construed, entitled to inherit through them from their ancestors: In *re Sunderland*, 60 Iowa, 732, 13 N. W. 655; *Meador v. Archer*, 65 N. H. 214, 23 Atl. 521; *Quigley v. Mitchell*, 41 Ohio St. 375; *Phillips v. McConica*, 59 Ohio St. 1, 69 Am. St. Rep. 753, 51 N. E. 445. Compare *Warren v. Prescott*, 84 Me. 483, 30 Am. St. Rep. 370, 24 Atl. 948, 17 L. R. A. 435. Nor is he entitled, by right of representation, to inherit from the collateral kindred of his adopting parents: See the principal case, ante, p. 669; *Moore v. Estate of Moore*, 35 Vt. 98. To quote from *Wyeth v. Stone*, 144 Mass. 441, 11 N. E. 729: "He can inherit directly from his parent, but he cannot inherit in lieu of his parent, by right of representation, from any of his parent's kindred." It has been decided, moreover, that an adopted child cannot inherit from the natural children of his adopting parent: *Keegan v. Geraghty*, 101 Ill. 26; *Helms v. Elliott*, 89 Tenn. 446, 14 S. W. 930, 10 L. R. A. 535. "The law of adoption," it is said in this last decision, "arbitrarily establishes for the adopted child the relation of heir and next of kin to the adopting parent, but it does not establish such a relation to the descendants of the adopting parent. As to them and their estates, the adopted child stands in no other relation than that existing before the act of the adoption." Some of the statutes, however, have been given a more liberal construction. Thus, it has been held that an adopted child may inherit from a child of one of the adopting parents, where the statutes provide that an adopted child shall take the same place in the

estate of the adopting parent as if born in lawful wedlock, and shall stand in regard to legal descendants, but to no other kindred of such parent, in the same position as if born to him: *Stearns v. Allen*, 183 Mass. 404, 97 Am. St. Rep. 441, 67 N. E. 349.

The heirs of an adopted daughter may be entitled to inherit, through her, a share in the estate of the deceased adopting parent, just as though she were a daughter by blood: *Gray v. Holmes*, 57 Kan. 217, 45 Pac. 596, 33 L. R. A. 207. See, too, *Pace v. Klink*, 51 Ga. 220; *Power v. Hafley*, 85 Ky. 671, 4 S. W. 683. In this last case it is decided that where an adopted child, made capable by special act of the legislature of taking by descent the estate of the person adopting him, dies before such person, leaving children, they inherit the estate of the adopter of their deceased parent as if they were his grandchildren. Where a boy is adopted by his grandfather, it has been held that he can inherit from the grandfather only as his adopted son, and not by representation of his deceased father also: *Delano v. Bruerton*, 148 Mass. 619, 20 N. E. 308, 2 L. R. A. 698.

III. Inheritance from Adopted Child.

In a number of states it has been decided that on the death of an adopted child his estate goes to his relatives by blood, and not to his adopting parents or relatives by adoption: *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802; *Upton v. Noble*, 35 Ohio St. 655; *Hole v. Robbins*, 53 Wis. 514, 10 N. W. 617. In the case of *Barnhizel v. Ferrell*, 47 Ind. 335, it was decided that property descending to an adopted child from his adopting parent would, on the death of such child, go to his next of kin by blood, to the exclusion of the children of the adopting parent. This decision, however, was very materially modified in *Davis v. Krug*, 95 Ind. 1. And according to *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788, and *Paul v. Davis*, 100 Ind. 422, where a child, adopted by a husband and wife jointly, dies without child or descendant, owning lands inherited from the adopted mother, the surviving adopted father inherits them to the exclusion of the natural mother.

In the case of *Heidecamp v. Jersey City etc. Ry. Co.*, 69 N. J. L. 284, 101 Am. St. Rep. 707, 55 Atl. 239, where an action was brought for the wrongful death of an adopted child, for the benefit of the next of kin, it is affirmed that the next of kin of an adopted child is the next of kin by blood, and not the adopting parent, under an adoption statute which wholly fails to bestow upon adopting parents any right of inheritance from adopted children.

IV. Property Rights of Surviving Spouse.

Where one spouse alone adopts a child, or where a statute gives an adopted child the right of inheritance from one parent only, it would seem that the child was not entitled to inherit from the other spouse (*Webb v. Jackson*, 6 Colo. App. 211, 40 Pac. 467; *Sharkey v. McDermott*, 16 Mo. App. 80), nor from the adopting spouse to the

exclusion of the nonadopting spouse: *Stanley v. Chandler*, 53 Vt. 619. And where a child is adopted by a husband only, where the statutes provide that an adopted child shall be entitled to all the rights of a natural child in the estate of its adopting parent, such child does not become the child of his wife, so as to prevent her, upon the death of her husband, and her second marriage, from alienating land received from the estate of her first husband: *Keith v. Ault*, 144 Ind. 626, 43 N. E. 924. In Texas, the adopted child of a man who has no children or descendants, but who dies leaving a surviving wife, inherits one-half of the real estate constituting the community property of the husband and wife: *White v. Holman*, 25 Tex. Civ. App. 152, 60 S. W. 437.

If the statutes provide that where a man has no children by his second wife, but has children alive by his first wife, the fee of his real estate, on his death, shall vest in such children, subject to a life estate in the widow, and that an adopted child shall receive all the rights and interests in the estate of the adopting parents as if a natural heir, a child adopted by the deceased and his first wife inherits his land, subject to a life estate by the second wife: *Markover v. Krauss*, 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806. And it has been held that where a man, after the death of his wife, and the death of their child, adopts a son and subsequently marries again, and dies intestate, leaving such son and second wife surviving him, his real estate descends one-half to the adopted son, and one-half to the widow, and at her death her share does not descend to him, he not being a "child" of her husband "by a previous wife": *Isenhour v. Isenhour*, 52 Ind. 328.

Under a statute providing that a child adopted by a husband and wife will inherit from either as though a child in fact, the widow of a man who dies intestate after they have adopted a child is entitled to only one-third of the decedent's personalty, where the law provides that "if the intestate leaves issue, his widow shall have one-third, and, if no issue, one-half, of such surplus": *Atchison v. Atchison's Exrs.*, 89 Ky. 488, 12 S. W. 942. An adopted child is a child capable of inheriting within the meaning of a statute which provides that a widow shall take one-half of her husband's real property, as dower, if he dies leaving no child capable of inheriting: *Moran v. Stewart*, 122 Mo. 295, 26 S. W. 962, 132 Mo. 73, 33 S. W. 443; *Moran v. Moran*, 151 Mo. 558, 52 S. W. 378. And where an adoption statute declares that an adopted child shall inherit from its adopting parent as if born in lawful wedlock, an adopted child is "issue" within the meaning of another statute providing that in case a husband dies intestate leaving "no issue living," his widow shall receive a specified portion of his land: *Buckley v. Frazier*, 153 Mass. 525, 27 N. E. 768. And where a statute provides that in case a husband dies intestate, "leaving no child," his surviving wife may renounce the provision made for her and elect to take one-third of the estate, the word "child," as used in the statute, includes an adopted

child: *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480. Under a statute which declares that an adopted child shall have all the rights of a child and heir of the adopting parent, an adopted child has, as between herself and the widow of her adopting father, all the rights of an actual child in the distribution of his estate: *Appeal of Rowan*, 132 Pa. St. 299, 19 Atl. 82.

V. Rights Under Wills and Testaments.

An adopted child takes a legacy given to one of its adopting parents who dies before the testator, where the statute authorizing the adoption of children declares that the child becomes, to all intents and purposes, the child of its adopters, the same as if born to them in lawful wedlock: *Warren v. Prescott*, 84 Me. 483, 30 Am. St. Rep. 370, 24 Atl. 948, 17 L. R. A. 435. But it has been held that an adopted child is not entitled, on the death of his adopting parent, to a legacy bequeathed to him, under a statute providing that when a devise of real or personal property is made to any child or other relative of the testator, and such other child or relative shall die leaving issue surviving the testator, such issue shall take the estate: *Phillips v. McConica*, 59 Ohio St. 1, 69 Am. St. Rep. 753, 51 N. E. 445.

Where a testator gives his property to his three sons and one daughter, with a provision that in case of the death of one of such beneficiaries the share of such deceased shall go to his or her children, an adopted child of the daughter comes within the description of "children" and takes as a legatee in the event of her death: *Bray v. Miles*, 23 Ind. App. 432, 54 N. E. 446, 55 N. E. 510. This decision is supported by *In re Truman*, 27 R. L. 201, 61 Atl. 598, but is opposed by *Russell v. Russell*, 84 Ala. 48, 3 South. 900. So, an adopted child is entitled to a bequest, the use of which is given to its adopting mother during her life, the principal to be paid on her death to her "lawful issue," where the statutes give adopted children the legal status of descendants, save that they are not capable of taking property expressly limited to the heirs of the bodies of the adopting parents nor property from their lineal or collateral kindred: *Hartwell v. Tefft*, 19 R. L. 644, 35 Atl. 882, 34 L. R. A. 500.

If a child is adopted after the making of a will by his adopting parent, in which it is not mentioned, it takes the same share, in Illinois, in his estate as would a child born to him after the execution of his will: *Flannigan v. Howard*, 200 Ill. 396, 93 Am. St. Rep. 201, 65 N. E. 782, 59 L. R. A. 664. And under statutes providing that all rights, duties, and relations between a parent and child by adoption, including the right of inheritance, shall be the same as exist by law between parent and child by lawful birth, and that the subsequent birth of a legitimate child to testator before his death shall operate as a revocation of his will, the will of a testator is revoked by his subsequent adoption of a child: *Hilpire v. Claude*, 109 Iowa, 159, 77 Am. Rep. 524, 80 N. W. 332, 46 L. R. A. 171; *Glasco v. Bragg*, 111 Wis. 605, 87 N. W. 853, 56 L. R. A. 258.

HUDSON v. COLUMBIAN TRANSFER COMPANY.

[137 Mich. 255, 100 N. W. 402.]

CONTRACT.—The Meeting of Minds, which is essential to the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed intentions, which may be wholly at variance with the former. (p. 680.)

WAREHOUSEMAN — Burning of Goods—Insurance.—If a warehouseman contracts to store goods in a specified building, and the owner has them insured as located therein, but the warehouseman, without notice of the insurance, stores them in a different building, where they are destroyed by fire without negligence on his part, he is liable to the owner for their value. (p. 680.)

Hatch & Wilson, for the appellant.

Smedley & Corwin, for the appellee.

256 MONTGOMERY, J. This action is brought to recover the value of goods stored with the defendant as warehouseman, and destroyed by fire. The record contains thirty-eight assignments of error, but when the facts are stated as evidently found by the jury, the case lies within a narrow compass.

The parties are not quite agreed in their statement of the case, but an examination of the record convinces us that there was ample testimony tending to show that defendant, in March, 1901, contracted and used for storage the building known as 21 and 23 Campan street, in the city of Grand Rapids, and also controlled the fourth floor of an adjoining building, known as the Hopson-Haftencamp building.

In March, 1901, plaintiff made a contract to store the goods in question with defendant for hire, on the fourth floor of the building known as 21 and 23 Campau street. This statement is denied, but the question was submitted to the jury, and found in favor of the plaintiff. The plaintiff thereupon took out insurance on his goods as located in the building known as 21 and 23 Campau street, but whether this fact was communicated to the defendant is a matter of dispute; and, as this question was not submitted to the jury, the plaintiff's rights are to be determined upon the assumption that notice of the insurance was not given. The goods were taken from plaintiff's house, and were stored by defendant, not in the building known as 21 and 23 Campau street, but in the Hopson-Haftencamp building, where, without negligence on the part of defendant, they were destroyed by fire. The circuit judge charged the jury that, if the contract was as

claimed by plaintiff, he was entitled to recover, but that, if not satisfied by a ²⁵⁷ fair preponderance of evidence that such an agreement was made, there could be no recovery.

Complaint is made of the failure to present certain special questions to the jury. Two of these questions relate to whether the goods would have been damaged if they had been stored in the place agreed upon, and the probable extent of such damage. Clearly, if defendant is liable at all, the answers to these questions could not have affected the recovery, for, as to any damage which the goods would have sustained if stored in the place agreed upon, the plaintiff had secured indemnity by insurance, which was lost by defendant's breach of contract.

The other questions asked for the defendant's understanding of the agreement, and were preferred upon the theory that, as the minds of the parties must have met, the defendant's failure of understanding would answer plaintiff's claim of a contract. This is a fallacy. What is meant by "meeting of minds" is the agreement reached by the parties and expressed. As is well said in *Brewington v. Mesker*, 51 Mo. App. 348: "The meeting of the minds which is essential to the formation of a contract is not determined by the secret intentions of the parties, but by their expressed intention, which may be wholly at variance with the former." See, also, 9 Cyc. 244, 578; *Browne v. Hare*, 3 Hurl. & N. 484.

The question, then, is whether, under the facts as found by the jury, the plaintiff was entitled to recover. We think this question should be answered in the affirmative. The theory of the plaintiff's case is that the defendant broke its contract of bailment, and subjected the property to a risk never contemplated by plaintiff, nor assumed or assented to by him. In such a case the rule is general that the bailee assumes the risk of the destruction of the property. The defendant was guilty of a technical conversion of plaintiff's property: See *Lawson on Bailments*, sec. 20; *Martin v. Cuthbertson*, 64 N. C. 328; *Lane v. ²⁵⁸ Cameron*, 38 Wis. 603. A case precisely in point is that of *Lilley v. Doubleday*, L. R. 7 Q. B. D. 510, which case is cited with approval in *Bradley v. Cunningham*, 61 Conn. 485, 23 Atl. 932, 15 L. R. A. 679, and followed in *Line v. Mills*, 12 Ind. App. 100, 39 N. E. 870.

The other questions presented have been examined, but do not, we think, require further discussion. We discover no error in the case.

Judgment affirmed.

Moore, C. J., Carpenter and Hooker, JJ., concurred.

Grant, J., did not sit.

If Property in the Custody of a Bailee or warehouseman is destroyed accidentally, without any fault on his part, he is not generally liable: See Drudge v. Leiter, 18 Ind. App. 694, 63 Am. St. Rep. 359; note to Schmidt v. Blood, 24 Am. Dec. 155. But a warehouseman who advertises that goods consigned to him will be stored in a fire-proof building, is liable if he stores them in a wooden building which afterward burns: Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516.

HARRIS v. RORABACK.

[137 Mich. 292, 100 N. W. 391.]

DEEDS—Building Restrictions.—A restriction in a deed that the premises shall not be occupied “except for one dwelling-house to each lot,” is violated by the erection of a two-story building designed for two dwellings, one to occupy the ground floor and one the second floor, and each to have a separate entrance. (p. 683.)

William F. McCorkle, for the appellants.

William P. Corbett and Henry C. Walters, for the appellees.

293 CARPENTER, J. The parties to this suit are owners of lots on Woodland avenue, in the city of Detroit. The plat-
ters of this property placed in their conveyance of defend-
ants’ property, which ran to defendants’ immediate grantor,
the following restriction: “That the said second party, his
heirs and assigns, will not occupy said premises except for one
dwelling-house to each lot.” A similar restriction was placed
in the conveyance of the property owned by complainants,
and in all the conveyances on said avenue except one, and the
owner of that excepted lot has complied with the restriction.
Defendants have planned and started to build on their lot
a two-story building, designed for two dwellings—one to oc-
cupy the ground floor, and one the second floor—each of which
has a separate entrance and a separate cellar. Complain-
ants contend that this structure is forbidden by the above-
quoted language in the deed, and they bring this suit to en-
join its erection. They obtained a decree in the court below,
and defendants have appealed to this court.

The decision of this case depends upon the proper construction of the restriction in the deed. We cannot agree with defendants that the force of this language is in any way impaired by the fact that the land contract which preceded the deed contained the words "dwelling-house," instead of the words "one dwelling-house." If these two expressions have the same meaning, the land contract cuts no figure in this case. If they have different meanings, there is nothing to indicate that full force shall not be given to the language of the deed, which was the last expression of the parties. In my judgment, we can safely construe the restriction from its own language, and without looking outside that language. While there is authority for saying that, in construing this language, we should resolve doubts in favor of the defendants (see *Stone v. Pillsbury*, 167 Mass. 337, 45 N. E. 768, and authorities there cited), it is none the less our duty to give said language its obvious meaning. We are to construe the language in accordance with the intention of the parties ²⁹⁴ to the deed. In construing it, we should not assume that the restriction was inserted solely for the benefit of the grantor. The purpose of the restriction is to benefit not merely the grantor, but every owner of property and every resident on the street. Such a restriction assures purchasers that property will be devoted in a specified manner to residence purposes, and has a tendency to increase its value. And we think it not improper to say that it may fairly be inferred in the case at bar that this restriction and its general observance have increased the value of defendant's property.

In ascertaining the intention of the parties to the deed containing this restriction, we obtain, in our judgment, little aid by discussing defendants' contention, with which we do not agree, that "one" refers to "house," and not to "dwelling." We obtain infinitely more aid by looking at the sentence as a whole, and thus determining its obvious meaning. When the parties agreed not to occupy said premises, "except for one dwelling-house," they obviously intended to agree, and they did therefore agree, that no building should be thereon erected which could not be described as one dwelling-house. In the sense in which words are ordinarily used—and we must presume these words to be used in that sense—a building planned and designed for two or more dwellings cannot properly be described as one dwelling-house. I think we are bound to hold that by the language in question the parties to

this deed intended that no house except one planned and designed for a single dwelling should be erected. The case of *Gillis v. Bailey*, 21 N. H. 149, is an authority which supports our conclusion. *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556, 21 L. R. A. 391, relied upon by defendants, is opposed to this decision. It appeared in that case that, at the time the deed containing the restriction in question was made, flats or apartment houses like that which defendants were seeking to erect had been erected and were then in common use within a short distance of the lots purchased by defendants. This circumstance ²⁹⁵ which was given great, if not controlling, weight, distinguishes that case from the one before us, for here no such buildings had been erected in the vicinity at the time the deed containing the restriction was made.

The case of *Stone v. Pillsbury*, 167 Mass. 332, 45 N. E. 768, also relied upon by the defendants, is more clearly distinguishable. It was there decided that a building designed and planned as the residence of a single family might, without any change either in its exterior or interior, while used as a residence for a single family, also be used as a gold-cure sanitarium, without violating a restriction like the one in question. No such question is involved in this case. The question here is not how a building planned and designed as the residence of a single family shall be subsequently used, but it is whether a building designed and planned for two separate residences is properly described as one dwelling-house. As already stated, we think it is clear that it is not.

The decree of the court below will therefore be affirmed, with costs.

The other justices concurred.

For Authorities bearing upon the decision in the principal case, see the monographic note to Wakefield v. Van Tassell, 95 Am. St. Rep. 220.

GARDNER v. COUCH.

[137 Mich. 358, 100 N. W. 673.]

FALSE IMPRISONMENT—Justice's Liability.—Where a city charter authorizes justices of the peace to try and punish persons who violate the city ordinances, and an ordinance declares that vagrants shall be deemed disorderly persons and punished as provided, a justice is not liable for false imprisonment, because of irregularities in the proceedings, in convicting and sentencing a person for vagrancy. (pp. 687, 689.)

A. R. Macdonell and William A. Coutts, for the plaintiff.

Sharpe & Handy for the defendant.

³⁵⁸ MOORE, C. J. The question involved grew out of the charge of the judge to the jury, and for that reason we insert the material portions of it here:

³⁵⁹ “This is what is known as a suit for false imprisonment, the plaintiff suing the defendant to recover damages for an alleged illegal sentence of sixty days in the common jail of this county. The defendant admits the sentencing of this plaintiff to sixty days’ imprisonment, and he admits that this action in so doing was based upon the complaint and warrant which have been introduced in evidence, each charging plaintiff with being a vagrant. In that connection the defendant denies he ever committed this plaintiff to prison, but, on the contrary, claims he suspended sentence upon him. The claim of the plaintiff is that on the 8th of last December, after he had pleaded not guilty in the defendant’s court, when arraigned and called upon to plead to the charge of vagrancy, the defendant proceeded to declare him guilty, without any further plea, hearing or trial, and then sentenced him to sixty days in jail, proposing, in that connection, to suspend sentence if he would leave town; but that later a commitment was issued for him under this proceeding, and he was confined in jail. That is denied by the defense, and it is asserted that upon the arraignment the plaintiff pleaded guilty. A formal sentence was thereupon pronounced, with the overture of a suspension of the sentence if he would leave town.

“Now, such a proceeding as is claimed by plaintiff on the part of the magistrate would entitle the plaintiff to recover damages and you are instructed that to sentence a man who had pleaded not guilty without receiving any further plea, and without

giving him any hearing or trial, would be an arbitrary and unwarranted proceeding, without jurisdiction, and without color of law, and the office would not protect the individual in so doing. It would be entirely different from a case where there was an honest error of judgment in the performance of an official duty. The same rule should and does apply to justices' courts as to the higher courts in that particular. Where the subject matter is within the jurisdiction of the court, and an honest but erroneous conclusion is reached, although the party against whom the judgment is rendered should, by reason of the error, be injured, and entitled to have this judgment set aside, and he be restored to his former rights, yet he is not entitled to claim compensation and damages for such erroneous conclusion. But, on the contrary, if the judge of an inferior court acts in excess of his legal authority, without any authority, or claim of authority, ³⁶⁰ knowingly, arbitrarily, and without any color of right, his office would not protect him, and he is liable.

"It is for you to say, from all the disputed testimony in this case, whether or not, at the time this plaintiff was arraigned in justice's court before the defendant, he pleaded guilty to the charge. If he did not, and he was afterward sentenced and committed, the warrant being issued out of and by authority of defendant's court, and he imprisoned under it, he is entitled to recover—to recover such damages as the testimony shows he has suffered, including loss of time, injury to feelings, annoyance, mortification, and disgrace, which are to be determined by the jury, according to what seems to be just and right, from all the testimony. If the defendant only proceeded to sentence this plaintiff on a plea of guilty, after the same had been made in court before him, you are instructed that the proceedings and papers in court, although somewhat irregular, would protect him in the honest exercise of what he believed to be his official duty. This charge is a charge of vagrancy, over which the court had jurisdiction. There was a complaint and warrant in the case, and plaintiff pleaded to the charge. This being so, if he pleaded guilty, mere errors or irregularities appearing in such proceedings would not, as the case presents itself, render the defendant liable.

"Whether or not there was a commitment issued, and this plaintiff taken in custody under it, and confined in jail, is an issue of fact for you to determine. If there was a commit-

ment issued out of the defendant's court in the usual course of business under this sentence which was pronounced, even though not issued by the defendant himself, but by his clerk, in the performance of his duty under the sentence which had been pronounced, that commitment would be binding upon the defendant, so far as that phase of the case is concerned.

"Something has been said to you in regard to the sentence being excessive. If this plaintiff pleaded guilty, even though the sentence pronounced was excessive, the plaintiff would not be entitled to recover in this case on that ground, because he would have his remedy by other proceedings. He could be legally sentenced, upon a conviction for vagrancy, to the common jail, for thirty days; and, if the sentence were pronounced for sixty days, it would still be good for the thirty days. It would be a valid sentence for that limit of time, and at the expiration ³⁶¹ of that time he would be entitled to his release under other proceedings, and there would be no liability on the part of the magistrate by reason of the excessive sentence.

"Those are the questions of fact before you. You are to remember that in these proceedings the burden of proof is upon the plaintiff. In order to recover upon these issues, he must satisfy you by a preponderance of evidence that when arraigned in justice's court he pleaded not guilty; that he was sentenced without further proceedings looking to a determination of whether or not he was guilty; that he was not only sentenced, but he was committed and imprisoned under a commitment issued from defendant's court."

The plaintiff raises the following questions: 1. Were the complaint and warrant sufficient to give the defendant jurisdiction, as a justice of the peace, so as to protect him in causing the imprisonment of plaintiff? 2. Was the issuance of a commitment from defendant's court necessary to his liability?

He contends the answer to both of them should be in the negative.

The defendant was a justice of the peace in the city of Sault Ste. Marie. The charter of that city authorized him "to try and punish offenders for violations of the ordinances of the city as in such ordinances prescribed and directed": Act No. 468, Local Acts 1901, sec. 32. It was conceded on the trial that the defendant was acting under this provision of the charter. An ordinance provides, "All vagrants shall be deemed disorderly persons and punished as hereinafter pro-

vided." A complaint in the language of the ordinance was made against the plaintiff, and a warrant was issued. It is the claim of the defendant that the plaintiff pleaded guilty. This is denied by the plaintiff. It already appears that question was left by the judge to the jury, who found in favor of defendant. It is the claim here that the complaint and warrant did not state an offense, and were no justification to the magistrate, and that, in any event, he was liable for the time plaintiff was in jail after arraignment and before sentence.

³⁶² We do not think it necessary to decide whether the warrant is valid. The case is within *Brooks v. Mangan*, 86 Mich. 576, 24 Am. St. Rep. 137, 49 N. W. 633, *Curnow v. Kessler*, 110 Mich. 10, 67 N. W. 982, *Tillman v. Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215, and *James v. Sweet*, 125 Mich. 132, 84 N. W. 61. In these cases the discussion is so full and the collation of authorities so complete, we deem it unnecessary to do more than to refer to them. If anyone had occasion to complain of the charge of the court, it was not the plaintiff.

Judgment is affirmed.

The other justices concurred.

ON MOTION FOR REHEARING.

Per CURLAM. This is an action of false imprisonment. It appears from the testimony that plaintiff was arrested December 1, 1902, remained in custody until December 8th, and then tried, convicted, and sentenced to imprisonment for sixty days. In disposing of this case we held that it must be presumed, under the charge of the court, that the jury found that the plaintiff pleaded guilty, and therefore that he could not recover in this case. By this application for a rehearing appellant represents that this disposition of the case did not determine his contention that his imprisonment for the eight days before trial was illegal. We think he is right, and that, for the purpose of determining the validity of that claim, we must consider another question, viz., Was defendant liable in an action for false imprisonment because he issued the warrant for plaintiff's arrest? The complaint and warrant contained no detailed statement of the facts which constituted plaintiff's alleged offense. It merely charged in general language that plaintiff was a vagrant, in violation of a specified ordinance. We would be bound to hold that a conviction

under such a complaint and warrant would not justify a detention if plaintiff sought relief by ³⁶³ habeas corpus proceedings: See *Matter of Way*, 41 Mich. 299, 1 N. W. 1021. But does it follow that defendant, who was a justice of the peace, acting judicially, is responsible as a trespasser because he reached an erroneous decision? Plaintiff contends that it does, and he relies upon our decisions (see *Clark v. Holmes*, 1 Doug. (Mich.) 390; *Shadbolt v. Bronson*, 1 Mich. 85; *La Roe v. Roesner*, 8 Mich. 537; *Sheldon v. Hill*, 33 Mich. 171; *Stensrud v. Delamater*, 56 Mich. 144, 22 N. W. 272), which hold a justice to be a trespasser when he acts without or in excess of jurisdiction. We do not think these decisions applicable. In the case at bar defendant had jurisdiction of the subject matter, and it was his duty to judicially determine whether or not a warrant should issue. Had he determined that it should not issue, surely that determination would have been a judicial act, which might have been corrected if erroneous. His determination was none the less judicial because he erroneously decided that the warrant should issue. To hold him civilly responsible for such an erroneous decision would not only be unjust, but injurious to public interests. In deciding whether or not a warrant should issue, the magistrate should be free to act according to his judgment. If the law made a magistrate civilly responsible if he erroneously issues a warrant, it is obvious that he would be tempted to resolve all doubts against its issuance, and that, in consequence, public interests would suffer because crimes which should be, would not be, investigated or punished.

The distinction between the above cases and the case at bar is shown by a quotation from the opinion of Justice Christianity in *La Roe v. Roeser*, 8 Mich. 537: "This was not a mere error of judgment in the performance of his judicial duties, such as an erroneous opinion or judgment on the trial of a cause of which he had jurisdiction."

I think it may be said that no principle of law is better settled than that a judicial officer is not civilly liable for an erroneous judicial decision.

³⁶⁴ Says Justice Cooley: "Whenever, therefore, the state confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the state says to the officer, that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the

duties concern individuals, but they concern more especially the welfare of the state and the peace and happiness of society; that if he shall fail in the faithful discharge of them, he shall be called to account as a criminal, but that, in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages": Cooley on Torts, 2d ed., p. 477. See, also, Webb's Pollock on Torts, Am. ed., p. 138. This principle was applied in *Wheaton v. Beecher*, 49 Mich. 348, 13 N. W. 769. There, after this court had determined (see *Beecher v. Anderson*, 45 Mich. 543, 8 N. W. 539) that a warrant was so defective that it did not authorize an arrest, it was held that the parties who obtained that warrant were none the less exempt from responsibility in an action for false imprisonment. This proceeds upon the ground that the judicial determination by a magistrate having jurisdiction of the subject matter—who in that case was a justice of the peace—was their protection. It would be absurd to suppose that such judicial determination protected them, but did not protect him.

It results from these views that defendant is not responsible in damages for plaintiff's imprisonment during the eight days which occurred before his trial. The application for a rehearing must therefore be denied.

A Judge of a Court of Limited Jurisdiction is generally liable for false imprisonment where he transcends his jurisdiction in convicting and sentencing a prisoner tried before him, but not where he merely errs in judgment while acting within his jurisdiction: See the monographic note to *Tryon v. Pingree*, 67 Am. St. Rep. 423; *Glazar v. Hubbard*, 102 Ky. 68, 80 Am. Rep. 340; *State v. McDaniel*, 78 Miss. 1, 84 Am. St. Rep. 618.

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**SUPREME TENT KNIGHTS OF MACCABEES v. PORT
HURON SAVINGS BANK.**

[137 Mich. 627, 100 N. W. 898.]

EVIDENCE—Res Gestae.—If the Cashier of a Bank, who has drawn drafts on its correspondents, states, when questioned by the bank's officers, that the drafts were drawn to cover proper charges against an association, of which he is finance keeper, and that a draft from it will be deposited to cover the same, such statements are admissible as part of the *res gestae* in an action by the association to recover from the bank the proceeds of a draft so deposited, on the ground that they have been misappropriated by the cashier. (pp. 691, 692.)

EVIDENCE—Declaration by Agent in His Own Interest.—If the cashier of a bank, who has drawn drafts on its correspondents, states, when questioned by the bank's officers, that the drafts were drawn to cover proper charges against an association, of which he is finance keeper, and that a draft from it will be deposited to cover the same, such statements are not admissible to establish a claim by the bank against the association in an action by the association to recover from the bank the proceeds of a draft so deposited, on the ground that they have been misappropriated by the cashier, if the cashier was using the draft to cover up a deficit in his accounts and his statements were thus made in his own interest. (p. 693.)

Stevens & Graham and John B. McIlwain, for the appellant.

Lincoln Avery, P. H. Phillips, De Vere Hall and D. D. Aitken, for the appellee.

628 MOORE, C. J. This is an action of *assumpsit*. It was tried before a jury. The circuit judge directed a verdict 629 in favor of the plaintiff for \$56,223. The case is brought here by writ of error.

The plaintiff is a fraternal beneficiary association. From 1883 until 1901 Charles D. Thompson was its finance keeper. During the period from 1883 until November 30, 1900, he was assistant cashier of the defendant. Until the transactions arose involved in this case, Mr. Thompson had the confidence and esteem of the officers of the fraternal society, and also of the bank. On the morning of December 1, 1900, a draft for \$50,000 on a New York bank was delivered by Mr. Thompson to the defendant under circumstances which will be stated later, upon which draft defendant received \$50,000.

. It is the claim of plaintiff that the obtaining the funds for this draft by Mr. Thompson created a deficit of \$50,000 in his account of plaintiff's finance keeper and that the draft balanced his irregularities as assistant cashier of the bank. On

the other hand, it is claimed that the draft simply represented cash or its equivalent which was furnished by defendant to the plaintiff.

The record discloses that on Thanksgiving Day, November 29, 1900, Mr. Harrington, cashier of the bank, discovered Mr. Thompson had detached from the New York draft-book of the bank a draft without filling in the stub. Mr. Harrington immediately wired the New York bank an inquiry and a direction to withhold payment until further advised. After the close of business on November 30th, Mr. Harrington discovered Mr. Thompson had drawn a New York draft for \$15,000, which did not appear upon the business of the day. He at once sent for Mr. Thompson, and questioned him about the drafts. As to the first one, he said it was for \$20,000, and had been sent to the Bankers' National Bank of Chicago, one of the depositories of plaintiff, and placed to the credit of the Maccabees, and that his failure to fill up the stub was an inadvertence. As to the \$15,000 draft, he said it went to the Commercial Bank of Port Huron, another depository of the plaintiff, and was placed to the credit of the plaintiff.

⁶³⁰ This conversation was in the presence of Mr. Morran, the president of the bank. As before stated, on the morning of December 1st the draft for \$50,000 was given to the defendant bank, Mr. Thompson saying it covered the two drafts mentioned, and also \$15,000 cash of defendants, which he had used for Maccabee purposes, warrants for the plaintiff, and other items properly paid in its behalf. The cash was gone over at this time, and it is claimed the statement of Mr. Thompson was verified. After this was done the New York bank was telegraphed by Mr. Harrington to honor the two drafts. They were paid, and placed to the credit of plaintiff. The defendant bank realized \$50,000 on the draft delivered to it by Mr. Thompson.

If this was all there was of the transaction relating to the two drafts, it would seem to be very unjust for the plaintiff to repudiate the act of its finance keeper, and at the same time get the benefit of credits amounting to the sum of \$35,000 of the money of the defendant, which resulted from the transaction. It, however, is claimed by the plaintiff that these drafts were necessary to make good a deficit which existed on the part of the bank in its transaction through Mr. Thompson with the plaintiff. In support of this claim counsel have prepared a somewhat detailed statement of credits and debits

between the plaintiff and the bank commencing with an item of \$20,000 March 12, 1900, by which it is made to appear that it was necessary to include the two drafts to balance the account on November 30, 1900. The trouble with this statement of account is it does not commence early enough. If the commencement of the account had been January 12, 1898, it would show that up to November 30th defendant had received from plaintiff \$331,400, and had paid out a like amount, without including either of the drafts in controversy. Taking the record as we find it, we think it clear the circuit judge should have said to the jury that the amount of the two drafts should be deducted from any claim the plaintiff might have against defendant.

⁶³¹ This leaves the remaining \$15,000 to be considered. Before entering upon that discussion, we think it well to consider some legal questions presented by counsel. Stated briefly, it is the claim of plaintiff that defendant, in order to defend against the claim of plaintiff, must show it was a bona fide holder of the \$50,000 draft. On the part of the defendant it is claimed plaintiff must show mala fides on the part of defendant before it can sustain its action. In our view of the case, neither of these questions is involved. There can be no reasonable doubt Mr. McMorran, the president, and Mr. Harrington, the cashier, of the bank, knew the \$50,000 draft was procured with the funds of plaintiff. They also knew Mr. Thompson could not properly use any of those funds to pay his individual debt. In our judgment, the question as relating to the remaining \$15,000 is a simple one of fact, to wit, was it the individual debt of Mr. Thompson which the money paid, as claimed by plaintiff, or was it to reimburse the bank for money used by Thompson to pay the warrants or other items properly chargeable against the plaintiff, as claimed by defendant. This was a question to be submitted to the jury upon the testimony under proper instructions.

When the plaintiff traced \$50,000 of its funds into the hands of the defendants, as it did by showing defendant received a draft bought with its funds, of which defendant's officers had knowledge, and obtained the money thereon, it made a prima facie case. It then became the duty of the defendant to show plaintiff had received full value for this amount. We have already seen that, as the record is presented, it did account for \$35,000 of this amount.

It is claimed by plaintiff that Mr. Thompson's statement to the officers of the bank at the time of the transaction is not competent. Defendant claims it is competent, not only as part of the *res gestae*, but also as an admission which should bind the bank that the \$15,000 was used to pay the warrants of the plaintiff and other proper charges against it. We have no doubt the conversation was admissible as part of the *res gestae*. Whether it was ⁶³² admissible as tending to establish a claim against plaintiff presents a much more difficult question. Upon the proposition that it is admissible for that purpose, counsel cite *Oakland County Sav. Bank v. State Bank of Carson City*, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453; *State Sav. Bank of Ionia v. Montgomery*, 126 Mich. 327, 85 N. W. 879, and many other authorities. If the only persons interested in the transaction were the plaintiff and defendant, doubtless the contention of counsel is sustained by these authorities. But if the claim of plaintiff is true that Mr. Thompson was using this draft for the purpose of covering up a deficit in his account with the plaintiff, then he is a party in interest, and his statements would be made in his own interest. In *State Sav. Bank of Ionia v. Montgomery*, after a detailed analysis of several authorities and the citation of a great many others, it was held that the knowledge of the agent would not be imputable to the principal where in the particular transaction his interests were adverse to the interests of the principal. The same principle is involved here. Mr. Thompson may have been actuated by self-interest in making these statements, and for that reason they should not bind the plaintiff.

The other questions have been considered, but we do not deem it necessary to discuss them.

For the reasons stated, the judgment is reversed, and a new trial ordered.

Carpenter, Montgomery and Hooker, JJ., concurred.

Grant, J., did not sit.

Res Gestae are Those Circumstances which are the automatic and undisguised incidents of a particular act, and which are admissible when illustrative of such act, and which in contemplation of law are a part of the act itself: *Redmon v. Metropolitan St. Ry. Co.*, 185 Mo. 1, 105 Am. St. Rep. 558, and see the cases cited in the cross-reference note thereto. The question of *res gestae* is discussed at length in the note to *People v. Vernon*, 95 Am. Dec. 51-76.

THICK v. DETROIT, UTICA AND ROMEO RAILWAY COMPANY.

[137 Mich. 708, 101 N. W. 64.]

DECLARATION—How Taken Advantage of When not Specific.—If a declaration, while sufficient to sustain a judgment, should be more specific, the only course open to the defendant is to demur; he may not object to the admission of any evidence under it. (p. 696.)

SALES—Damages for Breach—Offer of Delivery.—A refusal by the buyer to carry out a contract of sale justifies the seller in treating it as broken and bringing an action for damages, without any delivery or formal offer of delivery. (p. 696.)

SALES—Damages for Breach.—A Seller may Show, in an action against the buyer for damages in refusing to comply with his contract to purchase ties, that, although he did not have the ties, he was able to procure them. (p. 697.)

SALES—Action for Breach of Contract—Evidence.—In an action for damages against the purchaser of ties for refusing to receive them, the seller cannot show that the purchaser subsequently bought ties of a third person, some of which were a part of the lot originally contracted for from the plaintiff. (p. 697.)

SALES—Inspection—Change of Contract.—A contract to sell ties which calls for their delivery at a time and place named, but makes no provision for inspection, is not changed by the seller requesting the buyer to send an inspector to the place where the ties are being obtained, and the buyer complying with the request, if the seller repudiates the inspection made by a person so sent, and the buyer declines to send another inspector. (p. 697.)

SALES—Inspection—Sight Draft with Bill of Lading.—Where a person sells goods not yet ascertained or in existence, and ships them to the buyer, terms cash on delivery, the buyer has a right to inspect them on their arrival before accepting and paying for them; and if a shipment is made with a sight draft attached to the bill of lading, there is no right of inspection before payment, and therefore not a sufficient tender of performance. (p. 698.)

Philip T. Van Zile, for the appellant.

J. E. Sullivan, for the appellee.

709 GRANT, J. Assumpsit by Joseph A. Thick against the Detroit, Utica and Romeo Railway for breach of a contract to purchase certain ties. There was judgment for plaintiff, and defendant brings error. Reversed.

The contract, for the breach of which this suit is brought, is evidenced by the following writings:

“Detroit, Mich., March 14, 1900.

“J. A. Thick.

“Dear Sir: We will take seventeen thousand (17,000) cedar ties, to be delivered on the M. C. R. R. at Center Line,

North Detroit, or Belt Line, as we may hereafter direct. Price for No. 1 standard cedar ties forty-one cents (41). We will take some No. 2 ties at twenty-five cents. Terms cash on delivery.

“Yours truly,

“DETROIT, UTICA & ROMEO RY.

“GEO. B. DAVIS, Pres.

“I accept the above order.

“J. A. THICK.”

710 Plaintiff owned no ties, but relied upon his ability to buy and furnish the same to the defendant. He furnished none, but claimed that he had contracted for some, had them ready for delivery, but that the defendant refused to receive them. Plaintiff testified that at Posen he contracted for twenty thousand ties; that he telegraphed to defendant's agent to send an inspector. Defendant's agent, Mr. Davis, telegraphed that he would send one, fixing time. The inspector came. Two carloads were inspected and loaded. The parties from whom plaintiff contracted to purchase were dissatisfied with the inspection, claiming that it was unfair, and refused to load any more cars under that inspector. Plaintiff then went to Detroit to see Mr. Davis. His version of what then occurred, and his reason for considering the contract broken by the defendant, are given by him as follows: “I told him that the tie inspector was an incompetent man. He didn't know a good tie from a bad one, and the men wouldn't load any more under his inspection; but they would get Woods for inspection—he was inspecting ties for the D. & M. and the Central Northwestern—or any other inspector who was a qualified inspector. He said: ‘We can get the Detroit Northwestern inspector, or Mr. Maltby's inspection.’ Mr. Davis said he didn't want Mr. Woods to inspect those ties, and said: ‘Do you want this man Duggan?’ I said: ‘Yes.’ And he said: ‘Would you be satisfied with his inspection?’ I said: ‘Yes.’ And he said: ‘All right; I will let him go up in the morning.’ And I said: ‘Well, to-morrow is Saturday.’ And he said: ‘Well, he can go up Monday morning.’ And I said: ‘All right.’ On Monday morning I went up to see if Mr. Duggan was going up, and said to Mr. Davis: ‘I don't see anything of Mr. Duggan.’ And he said: ‘No; I am not going to let him go up this morning. You have two cars loaded, haven't you?’ I said: ‘Yes.’ And he said: ‘You can ship them down.’ I said: ‘Yes; these cars are coming with a sight draft attached

to the bill of lading.' He said: 'That isn't cash on delivery.' I said: 'That is cash on delivery in my estimation, Mr. Davis. I am not going to ship down seventeen thousand ties, and put them into the railroad, and then let you go into litigation for three or four years, the same as the French road did.' ⁷¹¹ He said: 'You needn't ship any more ties. I won't send an inspector.' I says: 'If you don't want the ties, I can send them from other shipping points.' And he said: 'I don't want them at all. I won't let you furnish them with a sight draft attached to the bill of lading.' I said: 'I will not ship them any other way. That is the way my contract reads, and I think that is a sight draft attached. You don't need to pay for them until inspected and delivered.' He said: 'I won't accept them in that shape.' I said: 'I won't ship them, then.' I had no other deal with Mr. Davis."

Plaintiff made no further offer to furnish ties. The defendant after some time made a contract with other parties for ties, which were furnished. Plaintiff sued, and recovered verdict and judgment for breach of contract.

1. The declaration alleges a contract to buy of plaintiff, the ties to be delivered by him to defendant at Detroit, and to be paid for on delivery; the promise on the part of the defendant to accept and receive them; plaintiff's readiness and willingness to carry out the contract; and the refusal by the defendant to accept the ties selected by him in accordance with the agreement, and consequent loss of profits. The plea was the general issue. Upon the trial defendant objected to the admission of any evidence, for the reason that the declaration did not state a cause of action. The precise objection is that the declaration does not allege delivery, or offer to deliver, or ability to deliver, or that he was prevented from delivery by the defendant. The declaration should, perhaps, have been more specific; but if it is sufficient to sustain a judgment, the only course open to defendant was to demur: *Rowland v. Kalamazoo Superintendents of Poor*, 49 Mich. 553, 14 N. W. 494, and authorities there cited. The declaration alleges a selection of ties according to the contract and the refusal to accept them. Under plaintiff's version of the case a ⁷¹² delivery or formal offer of delivery was unnecessary. A refusal on the part of defendant to carry out the contract justified plaintiff in treating it as broken, and bringing suit for damages. We think the declaration states a cause of action, and that, if defendant desired a more specific one, it should have demurred.

2. We do not think it was error to permit plaintiff to show his ability to procure ties by purchase or otherwise to fill his contract.

3. About two months after the conversation above detailed between plaintiff and Davis, Davis, on behalf of the defendant, made a contract with other parties to furnish ties. Plaintiff was permitted to show that some of these ties were a part of the lot which plaintiff had contracted for at Posen. This evidence was wholly immaterial. It had no tendency to sustain the plaintiff's case. It was not contended that there were not good ties in that lot. Some of them passed the inspection of the inspector first sent there under the telegram from plaintiff to defendant. The admission of this evidence might not constitute error of sufficient gravity to reverse the case if there were no other errors.

4. The contract provided for no inspection. It was the duty of the plaintiff to deliver the ties at the place named. There was no subsequent agreement for inspection. Evidently plaintiff could not purchase the ties at Posen without an inspection satisfactory to the person from whom he purchased. Plaintiff's request by telegram to send an inspector, and defendant's compliance with the request, did not change the contract, or provide for a binding inspection. Plaintiff recognized this, for he repudiated the inspection. If the parties had agreed to an inspector, his inspection, in the absence of fraud or mistake, would have been conclusive. Under plaintiff's version defendant refused to provide and send another inspector. It was then clearly plaintiff's duty to deliver the ties at the time and place agreed upon. It was, therefore, error to submit to the jury the question of any change in the contract.

713 5. The circuit judge instructed the jury that a sight draft accompanying the bill of lading was equivalent to the payment of cash on delivery. This was error. The contract is unambiguous. All prior conversations were merged in it, and were inadmissible in evidence. It was the duty of the plaintiff to deliver ties of the character specified. It was the right of defendant to examine them before accepting and paying for them. Plaintiff had no ties at the time to deliver. Plaintiff might manufacture them, or might purchase them from others.

The law applicable to this case is stated by the supreme court of the United States in *Pope v. Allis*, 115 U. S. 363,

372, 6 Sup. Ct. Rep. 69, 73, 29 L. ed. 393, 398: "When a vendor sells goods of a specified quality, but not in existence or ascertained, and undertakes to ship them to a distant buyer when made or ascertained, and delivers them to the carrier for the purchaser, the latter is not bound to accept them without examination. The mere delivery of the goods by the vendor to the carrier does not necessarily bind the vendee to accept them. On their arrival he has the right to inspect them to ascertain whether they conform to the contract, and the right to inspect implies the right to reject them if they are not of the quality required by the contract."

Where goods are sold and shipped to the vendee, and the vendor draws a sight draft with bill of lading attached, the vendee is not entitled to examine the goods in the hands of the carrier until he pays the draft and procures the bill of lading. In such case the vendee's only remedy is, having paid for the goods, to rescind the sale and sue for the purchase price, or to retain the goods and bring suit for damages: 2 Daniel on Negotiable Instruments, sec. 1734c; *Whitney v. McLean*, 4 App. Div. 449, 38 N. Y. Supp. 793. The parties may agree that the vendee and drawee may inspect before acceptance and payment, but, unless they do, no such right exists; or, if the vendor accompanies his draft with an offer of inspection before acceptance, that is sufficient tender of performance.

Judgment reversed and new trial ordered.

The other justices concurred.

The Purchaser of a Commodity ordinarily has the right of inspection upon delivery before acceptance, and if it does not correspond in kind, quality, condition, or amount to that which was contracted for, he may reject it: *Livesley v. Johnston*, 45 Or. 30, 106 Am. St. Rep. 647; *Deutsch v. Dunham*, 72 Ark. 141, 105 Am. St. Rep. 21; *Kuppenheimer v. Wertheimer*, 107 Mich. 77, 61 Am. St. Rep. 317. Where goods are ordered of a certain quality, which the vendor undertakes to deliver to a carrier to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination: *Pierson v. Crooks*, 115 N. Y. 539, 12 Am. St. Rep. 831.

CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI.

TRADERS' INSURANCE COMPANY v. EDWARDS
POST NO. 22, GRAND ARMY OF THE REPUBLIC.

[86 Miss. 135, 38 South. 779.]

CONTRACTS—Contradictory Provisions—Evidence to Explain.
If a contract contains two inconsistent and contradictory descriptions of time for its operation, each of which is perfectly clear in itself, parol evidence is admissible not to vary the contract or make one for the parties, but to make clear what the contract really is. (p. 699.)

II. Dickson, for the appellant.

Dabney & McCabe, for the appellees.

¹⁴⁰ COX, J. The time for which appellant undertook to insure the society hall of appellee and its furniture and paraphernalia is fixed in the policy as being “for the term of three years, from January 14, 1903, at noon, to January 14, 1904, at noon.” This attempted statement of the time for the duration of the contract involves two descriptions, each of which is perfectly clear in itself, but which are mutually inconsistent and contradictory. It is a palpable case of equivocation in description, induced, doubtless, by clerical misprision. The court erred in not permitting the introduction of parol evidence to show which of the two periods named in the policy was the one in contemplation of the parties. Parol evidence is admissible in such a case, not to vary the contract nor to make a contract for the parties, but to make clear what the contract really was.

Reversed and remanded.

Whenever the Terms of a Contract are susceptible of more than one interpretation, or a latent ambiguity arises, or the extent and object of the agreement cannot be ascertained from the language employed,

parol evidence is admissible to show what was in the minds of the parties at the time of making the contract and to determine the object on which it was designed to operate: *Brown v. Markland*, 16 Utah, 360, 67 Am. St. Rep. 629. See, further, the monographic note to *Harris v. Murphy*, 56 Am. St. Rep. 659-672.

EX PARTE FRITZ.

[86 Miss. 210, 38 South. 722.]

FISH—State's Control of Taking.—The state has a right to regulate the time, manner, and extent of the taking of fish in all running streams and large or small lakes with outlets into other waters. (p. 701.)

FISH—Property in.—By reason of the migratory habits of fish, their ownership is in the public, and no individual has any absolute property right in them until they have been subjected to his control. (p. 701.)

FISH—Preservation by State.—It is not only the right of the state, but also its duty, to preserve for the benefit of the general public the fish in its waters, in their migrations and in their breeding-places, from destruction or undue reduction in numbers through the caprice, improvidence, or greed of the riparian proprietors, as well as trespassers. (p. 702.)

POLICE POWER—Production of Articles of Commerce.—The control of the state, in the exercise of its police power, over the production of the articles of commerce, is as absolute and unqualified as the control of Congress over their interstate distribution. (p. 703.)

FISH AND GAME LAWS —Interstate Commerce.—The state has ample authority to protect its fish and game, by adequate police regulation, although in doing so interstate commerce may be remotely affected. (p. 704.)

FISH—Delegation of Power to Regulate Taking of.—The state has a right to delegate to the boards of supervisors of the several counties its power to regulate the taking of fish. (pp. 705, 706.)

FISH—Ordinance Regulating Taking of—Special Legislation.—An ordinance of a board of supervisors of a county regulating the taking of fish therein, which is general in its terms, and applies alike to all lakes and streams in such county, is valid and not objectionable as being special legislation. (p. 706.)

CONSTITUTIONAL LAW —Jurisdiction—Game Laws.—A statute committing the judicial administration of the game laws to mayors and justices of the peace, whether the offenses against such laws are committed in their districts or not, is unconstitutional and void. (p. 706.)

Farley & Landerdale and Randolph & Randolph, for the appellant.

W. Williams and R. L. Dabney, for the appellee.

²¹⁶ COX, J. Louis Fritz was arrested on a charge of violating an ordinance of the board of supervisors of De Soto county which prohibited the catching of fish in any lake or stream in said county with any seine or net more than seventy-five feet in length or more than six feet in depth or that has smaller meshes than one inch. He sued out a writ of habeas corpus, and represented that he had been unlawfully deprived of his liberty, claiming that the ordinance under which he had been arrested was, for many reasons, unconstitutional and void. Upon the trial it appeared that he had caught fish in the manner prohibited by the ordinance in the waters of Horn Lake. Horn Lake is a considerable body of water, eight or ten miles in length and nearly a half mile wide, lying partly in Tennessee and partly in De Soto county, Mississippi. It has an outlet in Mississippi, through Mud Lake and a bayou, into the Mississippi river. It seems from the evidence that this outlet sometimes ceases to flow in time of drought, but it flows continuously during the rainy season, and in times of high water permits the passage of steamers into the lake. It was contended for relator below, and it is urged here, that, inasmuch as he owned the northern prong of Horn Lake, in Tennessee, and the northern shore of the southern prong, in Mississippi, and a considerable part of the southern shore, and owned the bed of a large part of the lake, and had secured from a number of the riparian owners in Mississippi the right to fish in their part of the lake, the fish in that part of the lake belonging to him, or in which he had secured ²¹⁷ the right to fish, were his property; that he had the right to take them in any manner he might see fit; that the public had no interest in the fish in his waters, and that the state of Mississippi was without power to regulate or in any wise restrict or control him in the exercise of his dominion over them.

We do not find it necessary to pass upon any of the several instruments or evidences of title by which he claims to establish his rights in Horn Lake, nor to determine to what extent, if any, he owns the bed of the lake. It is proper to state, however, in passing, that, conceding all he claims, it is not shown that he owns or has acquired the right to fish in the entire lake. It is perfectly clear that he does not own the fish in Horn Lake, and this would be true even if he owned the bed of the entire lake and all its waters. Fish are *ferae naturae*. They are incapable, until actually taken, of absolute ownership, except in artificial lakes or in small ponds that are entirely land-

locked. In all running streams, large lakes, small lakes with outlets into other waters, the right of the state to regulate the time, the manner, and extent of the taking of fish is unquestioned. It is part of the police powers of the state, which has never been parted with and cannot be surrendered. By reason of the migratory habits of fish, their ownership is in the public, and no individual has any absolute property right in them until they have been subjected to his control. It is not only the right of the state, but also its duty, to preserve for the benefit of the general public the fish in its waters, in their migrations and in their breeding places, from destruction or undue reduction in numbers through the caprice, improvidence or greed of the riparian proprietors, as well as of trespassers: *People v. Collison*, 85 Mich. 105, 48 N. W. 292; *West Point Water Power etc. Co. v. State*, 49 Neb. 218, 66 N. W. 6; *Weller v. Snover*, 42 N. J. L. 341; *People v. Reed*, 47 Barb. (N. Y.) 235; *People v. Doxtater*, 75 Hun, 472, 27 N. Y. Supp. 481; *State v. Blount*, 85 Mo. 543; *Gentile v. State*, 29 Ind. 409; *State v. Roberts*, 59 N. H. 484; *People v. Bridges*, 142 ²¹⁸ Ill. 30, 31 N. E. 115, 16 L. R. A. 684; *Peters v. State*, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. Rep. 499, 38 L. ed. 385; *Organ v. State*, 56 Ark. 267, 19 S. W. 840; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098.

Citation of authorities in support of the general position maintained in this opinion could be multiplied indefinitely. Indeed, we know of no well-considered case anywhere which denies or materially qualifies it. It is held with practical unanimity in all jurisdictions that animals *ferae naturae* are not the subject of private ownership until reduced to actual possession; that the ownership of such animals, so far as they are capable of ownership, is in the state, not as proprietor, but in its sovereign capacity, as the representative and for the benefit of all its people in common; and that the state may regulate and restrict the taking of such animals, or absolutely prohibit it, if deemed necessary for their preservation or for the public good. This being true, it follows that animals *ferae naturae*, not reduced to actual possession, are not property, within the contemplation of sections 14 and 17 of the constitution of this state, nor of article 14 of the constitution of the United States, and that statutes regulating and restricting their capture do not operate a taking of property without just

compensation nor a depriving of property without due process of law.

The relator contends that inasmuch as his purpose in the taking of the fish in Horn Lake was that he might ship them to Memphis, in the state of Tennessee, to be there sold, any statute or ordinance restricting him in respect to the extent to which he might take them would be an interference with interstate commerce, and therefore void. The contention is without merit. The supreme court of the United States has held in a number of cases that the grant to Congress of the power to regulate interstate commerce does not carry with it any right ²¹⁹ to regulate the production of commodities, even though the purpose of their production be their sale beyond the limits of the state wherein they are produced. The control of the state, in the exercise of its police powers, over the production of the articles of commerce, is as absolute and unqualified as the control of Congress over their interstate distribution: *Kidd v. Pearson*, 128 U. S. 1, 9 Sup. Ct. Rep. 6, 32 L. ed. 346; *United States v. E. C. Knight Co.*, 156 U. S. 1, 15 Sup. Ct. Rep. 249, 39 L. ed. 325. In recognition of this general doctrine, and especially of the police power of the state for the preservation of game, the supreme court of the United States has upheld a state statute which made it an offense to have in possession, for the purpose of transportation beyond the state, birds which had been lawfully killed within the state during the open season. As an original proposition, we would have hesitated to go so far in upholding the power of the state as against the control of Congress over interstate commerce; and it is worthy of remark that the supreme court, in so holding, overruled and disregarded the opinion to the contrary of the supreme courts of Kansas and Idaho, saying: "It is, indeed, true that in *State v. Saunders*, 19 Kan. 127, 27 Am. Rep. 98, and *Territory v. Evans*, 2 Idaho (Hasb.), 658, 23 Pac. 115, 7 L. R. A. 288, it was held that a state law prohibiting the shipment outside of the state of game killed therein violated the interstate commerce clause of the constitution of the United States; but the reasoning which controlled the decision of these cases is, we think, inconclusive, from the fact that it did not consider the fundamental distinction between the qualified ownership in game and the perfect nature of ownership in other property, and thus overlooked the authority of the state over property in game killed within its confines, and the consequent power of the state to follow such property, into whatever hands it might

pass, with the conditions and restrictions deemed necessary for the public interest. Aside from the authority of the state, derived from the common ownership of game, and ²²⁰ the trust for the benefit of its people which the state exercised in relation thereto, there is another view of the power of the state in regard to property in game which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less effectively called into play because by doing so interstate commerce may be remotely and indirectly affected. Indeed, the source of the police power as to game birds (like those covered by the state here called in question) flows from the duty of the state to preserve for its people a valuable food supply. The exercise by the state of such power, therefore, comes directly within the principle of *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. Rep. 154, 39 L. ed. 223. The power of the state to protect by adequate police regulation its people against the adulteration of articles of food (which was in that case maintained), although in doing so commerce might be remotely affected, necessarily carried with it the existence of a like power to preserve a food supply which belongs in common to all the people of the state, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the state, and subject to the conditions which it may deem best to impose for the public good": *Geer v. State of Connecticut*, 161 U. S. 519, 16 Sup. Ct. Rep. 600, 40 L. ed. 793. We have quoted at some length from the opinion in the above case, because it goes to the greatest extreme in upholding the power of the state over game, and establishes beyond all controversy or cavil the right of the state to do whatever it may deem advisable to preserve for its people this source of food supply. The same reasoning applies with equal force to fish, and leaves nothing more to be said with reference to the power of the state to legislate for their preservation.

It is earnestly insisted that, conceding to the state power to regulate the taking of fish, it cannot delegate this power to the boards of supervisors of the several counties. In support of ²²¹ this contention it is urged that inasmuch as the powers of government are, under our system, divided into three distinct departments, and each of them confined to a separate magistracy—to wit, those which are legislative to one, those which are judicial to another, and those which are executive to an-

other—and inasmuch as the legislative power has been vested in the legislature, and inasmuch as the board of supervisors forms a part of the judicial department of the government, as shown by its being treated in article 6, together with the other courts, under the title “Judiciary,” the giving to the boards of supervisors of power to regulate the taking of fish would violate these fundamental principles of our system and tend to confound the functions of the several magistracies by imparting to one, wholly judicial, powers in their nature essentially legislative, and exclusively vested in the state legislature. The answer to this argument is that the board of supervisors is not within the scope and operation of the principles invoked. It is not, strictly speaking, a judicial body. Its jurisdiction is now, and has always been, mixed, being in part legislative, in part judicial, and in part executive. It exercised this mixed jurisdiction under the constitution of 1869, and, with its jurisdiction unimpaired, was continued, by the constitution of 1890, as the chief agency for the management of the police, fiscal, and civil affairs of the several counties. Comparatively only a small part of its jurisdiction is conferred directly by the constitution. The mass of its powers is conferred by legislative grant, under authority therefor conferred by the constitution. Under the constitution of 1869, and also of 1890, the board of supervisors has performed many duties which are essentially legislative in their nature—as, the levying of taxes; the support of schools; the making of regulations for the depasturing of cattle and the cultivation of crops without fences; the establishment of quarantines and regulations of hygiene; the inspection of articles of food; the drainage of swamp lands; ²²² the licensing or prohibition of the liquor traffic; the working of convicts on county farms; the regulation of the taking of oysters, fish, and game; and many others. Power to do none of these things is conferred in express terms directly by the constitution. Power to do them all has been delegated by the legislature in pursuance of the power given to prescribe other duties than those named in the constitution to be performed by the board of supervisors. Having been delegated by the legislature under constitutional warrant, they have become as much a part of the jurisdiction of the board of supervisors as if the power to do them had been expressly and specifically conferred by the constitution itself. To hold otherwise would be to rob the board of supervisors of the great mass of

its jurisdiction and practically destroy its usefulness, as well as render nugatory the implied grant by the constitution to the legislature of power to impose upon it duties not prescribed in the constitution. Legislation imposing duties of a similar kind upon the board of supervisors has been heretofore upheld by this court, and we see no reason now for departing from long-recognized principles, and thereby subverting a public policy which gives so large a measure of local self-government to the several counties of the state, and whose wisdom has been so fully vindicated in the beneficent results which have attended its operation: *Barataria Canning Co. v. Ott*, 84 Miss. 737, 37 South. 121; *Ormand v. White*, 85 Miss. 276, 37 South. 834.

Relator's contention that the ordinance under which he was arrested is obnoxious to the inhibitions of our constitution against special legislation cannot be upheld. The ordinance is general in its terms, applying to all the lakes and streams in De Soto county, and was adopted in pursuance of authority conferred by a general act of the legislature.

It appears that relator was held under a *capias* issued by B. F. Jones, mayor of Hernando, and ex-officio justice of the peace, and it is conceded that the offense charged was not committed ²²³ within the territorial limits of his jurisdiction. Relator cannot be held under this *capias*. So much of the Code of 1892, section 2128, as commits the judicial administration of the game laws to mayors and justices of the peace, whether the act be done in their respective districts or not, is unconstitutional and void: *Riley v. Jams*, 73 Miss. 1, 18 South. 930, and cases there cited. But the said section makes the breach of any regulations, order, or resolutions of the board of supervisors touching fish and game a misdemeanor; and any person guilty of such misdemeanor may, of course, be proceeded against before any justice having local jurisdiction. Upon this one point alone the learned judge who heard relator's petition was in error.

Reversed, relator discharged, and proceedings quashed.

Fish do not Belong to the Owner of the Soil covered by the water in which they are, though he may have an exclusive right to fish therein. His property in them is qualified and can be rendered absolute only by their capture: *State v. Theriault*, 70 Vt. 617, 67 Am. St. Rep. 695, and cases cited in the cross-reference note thereto. See, too, *Ex parte Kenneke*, 136 Cal. 527, 89 Am. St. Rep. 177; *State v. Snowman*, 94 Me. 99, 80 Am. St. Rep. 380.

A State may Prohibit the Taking or Sale of Fish within its borders, and if fish are caught in another state, brought into, mingled with, and become a part of the mass of the property of the state where their sale is prohibited, the person who imports them and violates such law must suffer the penalty prescribed thereby: *State v. Schuman*, 36 Or. 16, 78 Am. St. Rep. 754. See, in this connection, *Roth v. State*, 51 Ohio, 209, 46 Am. St. Rep. 566; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, and note.

SMITH v. LACEY.

[86 Miss. 295, 38 South. 311.]

BANKRUPTCY—Judgment to Enforce Attachment Lien.—A discharge in bankruptcy does not prevent an attaching creditor from taking judgment against the debtor in such limited form as may enable him to reap the benefit of his attachment, and such creditor may enter such a qualified judgment against the bankrupt as will charge his sureties on the forthcoming bond in attachment. (p. 707.)

ATTACHMENT LIEN.—The lien of an attachment is not displaced by the execution of a forthcoming bond on attachment. (p. 708.)

Williamson & Wells, for the appellants.

Green & Green, for the appellees.

²⁹⁸ **WHITFIELD, C. J.** The case of *Goyer Co. v. Jones*, 79 Miss. 253, 30 South. 651, has no application here. That was a case of an appeal bond, and, of course, stood upon an entirely different principle from that occupied by the sureties in a forthcoming bond for attached property. The case is controlled in all its aspects by *Hill v. Harding*, 130 U. S. 699, 9 Sup. Ct. Rep. 725, 32 L. ed. 1083. The court say: "The question not then passed upon, and now presented, is whether, since he has obtained his discharge in bankruptcy, there is anything in the provisions of the bankrupt act to prevent the state court from rendering judgment on the verdict against him, with a perpetual stay of execution, so as to prevent the plaintiffs from enforcing the judgment against him, and leave them at liberty to proceed against the sureties in the bond or recognizance given to dissolve an attachment made more than four months before the commencement of the proceedings in bankruptcy. Such attachments being recognized as valid by the bankrupt act (U. S. Rev. Stats., sec. 5044), a discharge in bankruptcy does not prevent the attaching creditors from taking judgment against the debtor in such limited form as may enable them to reap the benefit of their attachment. When

the attachment remains in force, the creditors, notwithstanding the discharge, may have judgment against the bankrupt. . . . The judgment is not against the person or property of the bankrupt, and has no other effect than to enable the plaintiff to charge the sureties in accordance with the express terms of their contract, and with the spirit of that provision of the bankrupt act which declares that 'no discharge ²⁹⁹ shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise': U. S. Rev. Stats., sec. 5118; *In re Albrecht*, 17 Nat. Bank. Reg. 287, Fed. Cas. No. 145; *Hill v. Harding*, 116 Ill. 92, 4 N. E. 361; *Barnstable Sav. Bank v. Higgins*, 124 Mass. 115."

Under Code of 1892, section 147, the lien of the attachment was not displaced by the execution of the forthcoming bond: *Jacobson v. Horne*, 52 Miss. 185; *Robinson v. Soule*, 56 Miss. 549.

Reversed and remanded.

An Attachment of real estate is not dissolved by proceedings in bankruptcy begun by the defendant more than four months thereafter: *Stickney etc. Coal Co. v. Goodwin*, 95 Me. 246, 85 Am. St. Rep. 408.

Upon Giving the Attachment Bond to release property from attachment, the attachment is dissolved and the action proceeds to judgment in personam: *Bunneman v. Wagner*, 16 Or. 433, 8 Am. St. Rep. 306. See, however, *Stevenson v. Palmer*, 14 Colo. 565, 20 Am. St. Rep. 295; *Treat v. Dunham*, 74 Mich. 114, 16 Am. St. Rep. 616.

AMERICAN EXPRESS COMPANY v. JENNINGS.

[86 Miss. 329, 38 South. 374.]

CONTRACTS—Breach—Damages.—Upon the breach of a contract the damages recoverable are such as may fairly and reasonably be considered either as arising naturally from such breach, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of a breach of it. (p. 711.)

CONTRACTS — Breach—Special Circumstances—Measure of Damages.—If the special circumstances under which a contract is made are known to both parties, the damages resulting from its breach, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach under the special circumstances so known, but if such special circumstances are unknown to the party breaking the contract, he can only be supposed to have had in contemplation the amount of in-

jury which would arise generally from such breach, not affected by the special circumstances. (p. 711.)

CONTRACTS—Breach—Damages—Notice of Special Circumstances.—To hold one of the parties to a contract to extraordinary damages for its breach, it is necessary that at the time or before the contract was made, he should have had notice of the exceptional circumstances that may warrant them and under which the contract is made. (pp. 711, 712.)

CARRIERS—Contract with Notice of Special Circumstances.—If a common carrier receives an article for transportation with notice of special circumstances under which it is sent, he is conclusively presumed to have contracted with reference to enlarged liability in case of a breach of the contract. (p. 712.)

CARRIERS—Negligence in Transportation of Goods.—Damages arising from merely negligent delay in the transportation of freight by a common carrier are generally and correctly treated as arising *ex contractu*, and cannot be increased by bringing the action in form *ex delicto*. (p. 713.)

CARRIERS—Delay in Transportation of Goods—Damages.—If machinery necessary to the operation of a cotton-gin is sent by the owner by means of a common carrier for repairs, and after being repaired is redelivered to the carrier without, in either event, giving him notice of any special circumstances in the case, his failure to deliver the machinery to the owner does not render him liable for special damages arising from the enforced idleness of the gin, nor for the time lost by its owner in making inquiry about the machinery. (p. 713.)

D. A. Scott, for the appellant.

A. J. McCormick, for the appellee.

³³⁵ COX, J. The appellee here, who was plaintiff below, was engaged during the fall of 1903 in operating a cotton-gin in the town of Scobey. Some time near the middle of December he broke a piston rod—the same being necessary to the operation of ³³⁶ his gin machinery—and sent the same, under a hurry order, to the Adams Machine Company, at Corinth, for immediate repair and return. The rod was repaired and certain other necessary parts added by the Adams Machine Company, and all were delivered to the Southern Express Company, consigned to appellee at Scobey, Mississippi, marked “C. O. D. \$16.00,” on the fifteenth day of December. The articles so consigned were received by the American Express Company, a connecting line (appellant here and defendant below), at Memphis on December 15th, and on the same day were forwarded to appellee at Scobey, Mississippi. They were in some unaccountable way lost in transit, were never found, and consequently never delivered. On January 1st appellee, having been definitely informed that the missing pieces were lost and could not be found, ordered duplicates, which were

forwarded to him, and received at Scobey on January 7th. In the meantime appellee's gin had been standing idle because the machinery could not be run without the piston rod and other repairs which had been lost as above set out. The Adams Machine Company filed a claim against appellant for the lost shipment when they received the second order from appellee, and later received from appellant twenty dollars and fifty cents in full of all damages. Of this they sent appellee four dollars and fifty cents, the value of the piston rod, which sum, on the advice of his attorney, who had made demand of appellant for the damages suffered by appellee, he returned. Appellee then sued appellant for damages suffered in consequence of appellant's failure to promptly transport and deliver the piston rod and attachments, and received a verdict and judgment for four hundred and nineteen dollars.

The judgment must be reversed. Instruction No. 1 for plaintiff is erroneous, in that it assumes that the property consigned to him belonged to him, when the evidence, as to the greater part of it, shows the contrary.

Instruction No. 3 for plaintiff is erroneous, in that it authorizes the jury, in determining the rental value of his machinery, ⁵³⁷ to take into consideration any time lost by plaintiff in going to the depot or office of the defendant and making inquiry about the machinery lost. The time so lost could have no relation whatever to the rental value of the machinery, and is not properly an element of damage in this case.

Instruction No. 4 asked for defendant should have been given. Defendant was entitled to even a more favorable statement of the law than was contained in this refused instruction. Certainly it could not be made liable for special or extraordinary damages unless notice of the importance of the shipment and prompt delivery had been made at some time before the shipment had been lost or had been misplaced or miscarried.

Instruction No. 5 for defendant, as modified by the court, is clearly erroneous; but, as the original instruction is not itself correct, in the absence of any proof in the record that the contract of affreightment with the Southern Express Company was a through contract, of whose terms the conducting carrier, the American Express Company, had the right to avail itself, defendant could not complain of the modification.

Inasmuch as the case must be tried anew, it is proper that we state the law with regard to the measure of damages applicable to this case and others of like character. In the leading

case of *Hadley v. Baxendale*, 9 Ex. 341—a case in its facts very much like the case at bar—the court said: “Now, we think the proper rule in such a case as the present is this: Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (i. e., according to the usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. ³³⁸ Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of the contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them.” This luminous statement of the law as to special extraordinary damages has been very generally adopted in the jurisdictions administering the common law: 8 Am. & Eng. Ency. of Law, 584, 585, notes; 1 Sutherland on Damages, 3d ed., sec. 45; 14 Cyc. 34; 3 Wood on Railroads, 454; 2 Beach on Railways, sec. 948. It was adopted by this court in the leading case of *Vicksburg etc. R. R. v. Ragsdale*, 46 Miss. 458, and has been uniformly adhered to since. The rule, as above stated, is established not only in authority, but also in reason. If one of the parties to a contract is to be made liable for extraordinary damages, it is right that before the contract is made he should have notice of the exceptional circumstances that may warrant them, in order that he may decline, if he wish, to make a contract to which such enhanced liability may attach or may make special stipulations for increased compensation. He

has the right to do either, and is entitled to notice to that end. If he, however, enter into the contract, or if, being a common carrier, he receive an article for transportation, after having received from the other party notice of ³³⁹ the special circumstances, he is conclusively presumed to have contracted with reference to the enlarged liability. It is also to be remarked that he is entitled to notice of the special circumstances, in order that he may use special diligence and employ extra precautions to guard against the increased risk.

Counsel for appellee, while conceding the correctness of the rule as a general proposition, contends that "it makes no difference whether the carrier had notice of the special purpose to which the consignee intends to put the machinery at the time of the contract of affreightment, provided such notice is given it during the period of transportation, and in such event the carrier will be liable for special damage accruing for unreasonable delay after such notice is given." The only one of the five cases cited in support of this proposition which seems clearly to support it is the case of *Gulf etc. Ry. v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320; but the supreme court of Texas, on a rehearing of this case, admitted error in the former decision, and delivered a strong opinion repudiating the modification of the rule contended for by counsel, and declaring that "it is not enough to give notice to the carrier after the contract is made, and the shipment has started in its transportation, because the liability of the carrier cannot be increased by the subsequent knowledge of facts that did not exist in the contemplation of the parties at the time the engagement was entered into. It then became an effort upon the part of one of the contracting parties to inject a stipulation into the contract after it was entered into that increases the liability of the other, that was not mutually considered when the engagement was made": *Gulf etc. Ry. Co. v. Gilbert*, 4 Tex. Civ. App. 366, 22 S. W. 760, 23 S. W. 320. The modification contended for it is not supported by authority, is not founded in reason, and will not receive the sanction of this court.

It is contended, again, by counsel for appellee that the rule requiring notice of special circumstances in order to the recovery ³⁴⁰ of extraordinary damages does not apply in this case, because the gravamen of the declaration is that of neglect or breach of duty in the course of the general employment of appellant, the action being of tort, and not for a breach of

contract. We cannot concur in this. Damages arising from merely negligent delay in transportation of freight by a common carrier are generally and correctly treated as arising ex contractu. The rule for their admeasurement is well established in our jurisprudence, and cannot be modified, and the damage recoverable largely increased, by the simple expedient of changing the form of the action. Especially must this be true in a jurisdiction that pays but little attention to the forms of pleadings, but looks to the substance of the cause. This court, in an action ex delicto, has held that the rule announced in *Hadley v. Baxendale*, 9 Ex. 341, would be applicable in case of failure to carry and deliver freight in reasonable time, where such failure arose from the mere negligence of the carrier, but that wanton and gross neglect of their duties by common carriers, and reckless disregard of the rights of shippers, and willful refusal to deliver, if alleged in the declaration and sustained by the proof, would authorize a verdict not only for compensatory, but also for exemplary, damages: *Silver v. Kent*, 60 Miss. 124. This limitation of the general rule is eminently correct, but neither the averments of plaintiff's declaration nor the facts in evidence bring his case within it.

If upon another trial of this case it shall be developed that the Southern Express Company made a contract for through shipment, contracting for both itself and its connecting line, the American Express Company, special damages will not be allowed unless it shall appear that, before the articles were received by the Southern Express Company for shipment, it had notice of the special circumstances of plaintiff's situation and of the great importance to him of prompt carriage and delivery. If it shall appear that the Southern Express Company³⁴¹ contracted only for itself, and not for itself and connecting line, then special damages will not be allowed unless it shall appear that before the articles were received by defendant, the American Express Company, it had notice, at the place where it received the shipment, of the special circumstances of plaintiff's situation and of the great importance to him of prompt carriage and delivery. Notice to defendant's agent at Scobey at the time of the shipment of the piston to the Adams Machine Company for repairs will not suffice.

Reversed and remanded.

For Authorities upon the Question involved in the principal case, see *Swift River Co. v. Fitchburg R. R. Co.*, 169 Mass. 326, 61 Am. St.

Rep. 288; *Rocky Mount Mills v. Wilmington etc. R. R. Co.*, 119 N. C. 693, 56 Am. St. Rep. 682; *Savannah R. R. Co. v. Pritchard*, 77 Ga. 412, 4 Am. St. Rep. 92; *Hutchinson Mfg. Co. v. Pinch*, 91 Mich. 156, 30 Am. St. Rep. 463; *Lonergan v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365.

WHITFIELD v. BURKE.

[86 Miss. 435, 38 South. 550.]

POWERS OF SALE—Duty of Purchaser.—If, by deed or will, a life tenant is invested with power to sell land for the purpose of reinvesting the proceeds, no obligation devolves upon the purchaser to see that the reinvestment is in fact made. (p. 715.)

R. C. Beckett and J. J. McClellan, for the appellants.

N. Cayce and E. T. Sykes, for the appellees.

⁴³⁷ MAYES, S. J. In the year 1854 William Whitfield died, leaving a will, by the eighth article of which he devised to William W. Whitfield, his son, certain lands in Lowndes county, for the term of his natural life, with remainder to the children of the devisee. The fifteenth article of the will contained the following language: "Nevertheless, I hereby authorize my sons, if they desire, or if either of them are desirous, to sell the real estate devised to him for the purpose of purchasing other lands or other productive property, to sell the real estate for the reasons before given, and the title shall be good to the purchaser. The proceeds of the sale, however, is to be invested in other productive and valuable property, and is to be held under the limitations and conditions of all the property so held by them."

The bill in this case alleges that the said William W. Whitfield alienated the lands so devised to him, in the year 1859, by a deed, the terms of which purported to convey the fee, and that the defendants to the bill held by subsequent conveyances under that deed. The bill also alleges that William W. Whitfield died in the year 1903, and that complainants are the remaindermen entitled under their grandfather's will. It avers, among other things, as follows: "Complainants further show that this conveyance executed by William W. Whitfield to the said James W. Sykes was not executed for the purpose of reinvestment of the proceeds of the same in other property, as named in item fifteen of such will of William Whitfield,

⁴³⁸ nor were the proceeds of such sale, as a matter of fact, invested in the other property, as named in item fifteen of such will of William Whitfield." This bill was demurred to. The chancellor sustained the demurrer, and from such decree an appeal was allowed to this court, on the prayer of complainant, to settle principles.

The controlling question presented is whether in a case where, by deed or will, the life tenant is invested with power to sell for the purpose of reinvesting the proceeds, the obligation devolves upon the purchaser to see that the reinvestment is in fact made. In *Wormley v. Wormley*, 8 Wheat. 421, 5 L. ed. 561, it is said: "There is much reason in the doctrine that where the trust is defined in its object, and the purchase money is to be reinvested upon trusts which require time and discretion, or the acts of sale and reinvestment are manifestly contemplated to be at a distance from each other, the purchaser shall not be bound to look to the application of the purchase money; for the trustee is clothed with a discretion in the management of the trust fund, and if any persons are to suffer by his misconduct, it should be rather those who have reposed confidence than those who have bought under an apparently authorized act." The same question, essentially, has arisen under various conditions, and will be found decided the same way in the following cases: *Redford v. Clark*, 100 Va. 115, 40 S. E. 630; *Redheimer v. Pyron*, Speers Eq. 134; *Webb v. Chisolm*, 24 S. C. 487; *Keister v. Scott*, 61 Md. 507; *Van Bokkelen v. Tinges*, 58 Md. 53; *Doran v. Wiltshire*, 3 Swan. 699. See, also, notes to *Elliott v. Merryman*, 1 White & Tudor Lead. Cas. Eq. 118, 119. The case of *Baird v. Boucher*, 60 Miss. 326, relied on as authority by appellants, is not in point. The nature of the confidence committed to the donee of the power in that case was essentially different from the large discretion which is given to one who is authorized to sell and reinvest. The widow was there ⁴³⁹ authorized to sell if at any time she should think it best to remove from the premises. She did not remove, but continued to live on the place, notwithstanding her deed. Her deed was made to two of her daughters, with whom she continued to live, the court holding that they were implicated in an arrangement intended to oust the other remaindermen from their interest in the estate. Of course, if it could be shown that the purchaser participated in the making of an unauthorized conveyance under such a power, the title acquired by him would be defeasible, as was

the case in *Wormley v. Wormley*, cited above, and in other cases not necessary to cite here. But no such case is made by the bill.

The decree of the court below is affirmed.

For Authorities upon the Question decided in the principal case, see the monographic note to Tyler v. Herring, 19 Am. St. Rep. 281-284.

FIDELITY AND DEPOSIT COMPANY v. STURTEVANT COMPANY.

[86 Miss. 509, 38 South. 783.]

MORTGAGES OF CHATTELS—After-acquired Property—Description.—A mortgagor who has an actual interest in praesenti in certain personal property may mortgage not only that property, but also such other property as the mortgagor may thereafter acquire, provided such future acquisitions are to be used in and about the business, or are attached or appurtenant to, and necessary for, such business, or are the natural products arising from the operation of such business, and also provided that the mortgage definitely and specifically describes the property to be acquired. (p. 720.)

MORTGAGES OF CHATTELS—After-acquired Property—Description.—A chattel mortgage covering all of the mortgagor's property and franchises of every nature and description, whether then owned or thereafter to be acquired, including all equipments, machinery, etc., in a certain town and elsewhere, together with the factories, tenements and appurtenances belonging to the property, and the reversion, remainders, tolls, rents and profits, and all the estate, title and interest in law or in equity, which the mortgagor "now owns or may hereafter acquire," in the property, is not sufficiently definite in its description to convey, as against third persons, the after-acquired property of the mortgagor. (p. 722.)

ATTACHMENT—Lien of—Forthcoming Bond—If property has been levied upon by writ of attachment and a forthcoming bond given, the surrender of such property by the attachment defendant voluntarily, to a third person having no valid prior right thereto, does not defeat the attachment lien nor release the surety on the forthcoming bond. (p. 722.)

Johnson & Neill, for the appellant.

Chapman & Quin, for the appellee.

517 HOUSTON, J. The appellee sold and delivered to the Moorhead Cotton Mills, a corporation of Moorhead, Sunflower county, Mississippi, certain machinery on credit, without express reservation of title. After the purchaser had failed to pay for same at the time stipulated, appellee instituted, on

January 30, 1903, suit and proceedings in the circuit court against it, under Code of 1892, chapter 79, the appellee (plaintiff below) making the requisite affidavit under the said statute. The sheriff duly executed ⁵¹⁸ the writ of seizure and took said machinery into his possession on January 31, 1903, but released and restored same to said cotton-mills on February 2, 1903, upon their executing proper forthcoming bond, with the appellant as surety. When said court convened, the defendant made no defense whatever to the suit, and did not appear; but appellant, as said surety, on April 20, 1903, filed a special plea, setting up that on July 1, 1901, the Moorhead Cotton Mills, executed (without stating to whom) its certain deed of trust covering all of this property; that on the first Monday of February, 1903, default having been made in the payment of the debt thereby secured, all of the property of said Moorhead Cotton Mills, including this machinery, was sold and delivered to third parties (without stating to whom); and that it is not now in the control of said cotton-mills or this surety, and is not subject to any judgment in favor of plaintiff. To this plaintiff filed a replication, alleging that said deed of trust (which is made an exhibit to the replication) was executed on July 1, 1901, but not filed for record until September 14, 1901; that this machinery was sold and delivered to said cotton-mills on August 29, 1901, and that the purchase money due therefor remains unpaid, and is the demand here sued on, and that said property was levied on and seized under the writ of seizure herein, while it was still in the hands, possession and control of said cotton-mills; that said deed of trust was not a paramount or prior lien to the purchase money lien of plaintiff on said property, which had been seized under the writ in this suit; that said deed of trust was utterly void as to "after-acquired" property, because of insufficiency and too great generality of description; that, after its filing and delivery, the mortgagee therein parted with no new consideration to defendant cotton-mills; that the alleged foreclosure was merely in pais; and that said cotton-mills voluntarily and wrongfully surrendered possession of said property on which plaintiff had a paramount ⁵¹⁹ lien, and for the forthcoming of which said cotton-mills and said appellant as surety had executed their bond in this proceeding, which was then still pending undetermined. To this replication the appellant, as such surety, interposed a demurrer, which, being overruled, and the cotton-mills and said surety

declining to plead further or make further defense, judgment final was entered against them, from which the said surety alone appeals, the principal not joining therein.

The deed of trust under which it is claimed the cestui que trust acquired a lien on this machinery was executed by the said cotton-mills to the International Trust Company to secure one hundred bonds of one thousand dollars each, aggregating one hundred thousand dollars, dated July 1, 1901, and payable twenty years from date. The description of the property therein is as follows: "All and singular its [the Moorhead Cotton Mills'] property and franchises of every nature and description whatever, whether now owned or hereafter to be acquired, including all its equipments and personalty, and all its lands, buildings, machinery and real estate in the village of Moorhead, county of Sunflower, state of Mississippi, and elsewhere, and all its franchises, rights, and privileges, and all and singular the lots, pieces or parcels of land, with all and singular the buildings and improvements thereon, situated, lying, and being in the village of Moorhead, county of Sunflower, state of Mississippi, bounded and described as follows [here follows a particular description of the lots and parcels of land situated in the village of Moorhead], together with all and singular the factories, tenements, hereditaments, and appurtenances belonging to the property hereby conveyed, or in any wise thereto appertaining; and the reversion, remainder, tolls, incomes, rents, issues and profits thereof; and also all the estate, right, title, and interest, property, possession, claim and demand, whatsoever, as well in law as in equity, of the party of the first part of, in and to the same, and any and every part thereof; and also all and every other estate, ⁵²⁰ right, title and interest, property and appurtenances which the said party of the first part now owns or may hereafter acquire." Now, at the time this deed of trust was executed (July 1, 1901) the grantor did not own or have in its possession this machinery, which was not sold to it until after August, 1901; so that, of course, no lien or right of any kind was given on it to the International Trust Company under the provision as to the property "now owned" by the grantor; and if the deed of trust gave any lien on or right to said machinery, it must exist under that provision of the deed of trust as to "after-acquired property." But when the appellee sold and delivered this machinery to the Moorhead Cotton Mills it had (so far as appears from this replication or

record) no actual notice of any such deed of trust, nor did it have constructive notice of that deed of trust, because it was not filed for record until September 14, 1901. The replication also alleges—and, of course, the demurrer admits—that after its filing and delivery the mortgagee parted with no new consideration to said cotton-mills, and before any foreclosure or sale under said deed of trust, and while the property was still in the hands, possession and control of said cotton-mills, the first vendee, that appellee, the seller, had exercised his right given him by the statute, and acquired his purchase money lien by the levy of the writ of seizure on the property, and said cotton-mills, with this appellant as surety, had executed a forthcoming bond for it. While, of course, it is settled law in this state that a party can, under proper restrictions and limitations, give a deed of trust on property to be thereafter acquired by him, still this court said in *Cayce v. Stovall*, 50 Miss. 400, cited by counsel for appellant: “We do not wish to be understood as having committed ourselves to the broad doctrine that a mortgage of chattels thereafter to be acquired is unlimited, and in all circumstances to be sustained.” And in *Everman v. Robb*, 52 Miss. 660, 24 Am. Rep. 682, after reviewing the cases announcing the doctrine⁵²¹ of equitable liens on things not in esse at the date of the contract, the court says: “A careful study of the cases will disclose: 1. That in each instance the contract had reference to some particular designated property which may, in the ordinary course of things, and with reasonable certainty, come into existence; 2. The assignor or mortgagor must, at the date of the contract, have an actual interest in or concerning the subject. There must be an interest in *praesenti*, of which the future acquisition is the product, or in such wise incident to or connected with it, constituting a tangible and substantial predicate of a contract.” Learned counsel for appellant expressly recognize this as a correct statement of the law, and, after saying that there are certain restrictions thrown around the doctrine that a party can give a valid mortgage on after-acquired property, and that he cannot mortgage generally all of his property to be acquired within a given time after the date of the instrument, they give excerpts from *Deeley v. Dwight*, 132 N. Y. 59, 30 N. E. 258, 18 L. R. A. 298, note, where almost the exact language is used as that above quoted from *Everman v. Robb*, 52 Miss. 660, 24 Am. Rep. 682. Certainly the instant case does not fall within that class where,

at the date of the contract, the mortgagor, having an actual interest in praesenti in the subject of which the future acquisition was the product, may give a valid lien on the products of said property already owned by him, because such products, though not in esse, have a potential existence. There the thing hypothecated springs out of, or is the product of, the property, which, at the date of the deed of trust, is owned, or leased, or in possession of the grantor by consent of the owner. For instance, as shown by the court in *McCown v. Mayer*, 65 Miss. 537, 5 South. 98, there may be a valid sale or mortgage of the wine the owner's vineyard is expected to produce, or of the crops produced on the land, the milk of the owner's cows for the next year, or the future young animals, or the wool that may be ⁵²² grown on sheep which are then owned by the grantor, but not on sheep which he might thereafter acquire. And even in such cases the mortgagor must have at the time an actual interest in or concerning the property, of which the future acquisition is the product, and that property must be definitely described or designated. Under this head, or subdivision, fall the following cases, among others: *McCown v. Mayer*, 65 Miss. 537, 5 South. 98; *Everman v. Robb*, 52 Miss. 600, 24 Am. Rep. 682; *Russell v. Stevens*, 70 Miss. 685, 12 South. 830. Of course, the Moorhead Cotton Mills, at the date of this deed of trust, were neither the actual owners nor were they the potential owners of this machinery; and, of course, it was not the product of property then owned by said mills. As well said by counsel for appellee, "machinery cannot grow machinery" like sheep grow wool or lands produce crops. It is evident, therefore, that this deed of trust and this case do not fall under this division.

There is, in this state, another well-recognized class of cases where after-acquired property may be mortgaged under well-defined limitations and restrictions. A mortgagor who has an actual interest in praesenti in certain property may mortgage not only that property, but also such other property as the mortgagor may thereafter acquire, provided always said future acquisitions are to be used in and about the business, or are attached or appurtenant to and necessary for said business, or are the natural products arising from the operation of said business, constituting a tangible, substantial and existing predicate for the contract. And even then this doctrine is subject to the limitation that it must be shown that the description of the property is definite, and the instrument itself must specifi-

cally describe it, either as property which is acquired in and belongs naturally, if not necessarily, to the original business, or as property which would be put in a certain building, place, or locality. This doctrine, with its limitations and restrictions, has been so fully and lucidly expressed and enunciated ⁵²³ by Justice Chalmers in the case of Mississippi Valley Co. v. Chicago etc. R. R. Co., 58 Miss. 896, 38 Am. Rep. 348, as to render it unnecessary to do more than refer to that case, and to say it has been twice approvingly cited—in the cases of Williams v. Crook, 63 Miss. 9, and Packwood v. Atkinson, 79 Miss. 646, 31 South. 337. In the first two cases just mentioned descriptions in deeds of trust not as vague, indefinite or general as the one in the instant deed of trust are positively pronounced and specifically condemned as too general and insufficient to operate to convey or give a lien on the property, and those deeds of trust were held utterly void as to third persons.

Without going into a detailed analysis of the description in this deed of trust under discussion, which we deem unnecessary, it must be apparent, upon a careful reading of the same, that it cannot be held to meet the requirements of the law in regard to “after-acquired property.” It will be noted that this deed of trust fails to show that the property thereafter to be acquired by said mortgagor should be used in and about the cotton-mills or manufacturing business of the corporation, or should be the natural product arising from the operation of same, or that it should be attached or appurtenant to, or necessary for, said business; and neither the replication nor the record anywhere shows that, as a matter of fact, this machinery in controversy was ever used in or about said cotton-mill business, or that it was ever attached or appurtenant to the cotton-mill machinery, or was necessary for the operation of said business; in fact, it was seized and sold, so far as this record discloses, as separate, distinct and independent pieces of machinery. Again, this deed of trust contains no restriction whatever as to the amount or character of the after-acquired property which it is to cover, or as to the uses and purposes for which, or as to the time within which, it should be acquired, or as to the locality where it was to be placed. It fails to give any of the ⁵²⁴ essentials or any fact which might render the description sufficiently definite to insure identification or to aid in distinguishing the property from all other property of the same kind. The debt secured by this deed of trust was not

due for twenty years and was not barred for twenty-six years, and it might be renewed and run longer; and yet it attempts to cover all property of every kind and character, no matter for what purposes it is to be acquired or used, or whenever acquired, or wherever situated, whether in the state of Mississippi or elsewhere, and wherever it might be placed after it was acquired. The description of the mortgage in the case of *Sillers v. Lester*, 48 Miss. 513, cited by counsel for appellant, expressly and specifically limited the locality where the after-acquired property was to be placed to the Asia plantation, and the time within which the property was to be acquired to the year 1870. This mortgage, in our opinion, being null and void in respect to after-acquired property, as to third persons, of course the sale of the machinery thereunder was void. Besides, it was made subsequent to the acquisition by the appellee of his purchase money lien by the levy of the writ of seizure, under Code of 1892, chapter 79, while said property was, as alleged in the replication, in the hands, possession and control of the first vendee: *Frank v. Robinson*, 65 Miss. 162, 3 South. 253.

Nor is appellant's case aided by the Moorhead Cotton Mills having surrendered possession of this machinery, on which appellee had previously acquired said lien. The replication alleges that this possession was surrendered voluntarily and wrongfully, and it was done subsequent to the levy of the writ of seizure and to the execution by said cotton-mills and this very appellant of a forthcoming bond for this property. At the very time of this voluntary surrender of the machinery it was in custodia legis. No legal proceedings were had in the premises to get lawful possession of it; and certainly its voluntary ⁵²⁵ surrender by the mortgagor to a mortgagee who had no valid lien, or to any third person, could not defeat the rights of the prior valid lien of appellee, nor release this appellant surety from the obligation of its valid bond for the forthcoming of said property.

We think the demurrer to the replication was rightfully overruled.

Affirmed.

Mortgages of After-acquired Personalty are discussed in the monographic notes to *Gregg v. Sanford*, 76 Am. Dec. 723-733; *Burrill v. Whitcomb*, 100 Me. 206, ante, p. 498.

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY v. GRANT.

[86 Miss. 565, 38 South. 502.]

EVIDENCE—Pleading and Practice.—Under a statute providing that all affirmative defenses must be specially pleaded or notice of them given under the general issue, evidence on the part of the defendant railroad company, when it is sought to recover against it for personal injury, is inadmissible to show that the plaintiff was traveling on a free pass containing a stipulation not to hold such company liable for an injury, when the company has not pleaded such facts nor given notice thereof under the general issue. (p. 724.)

EVIDENCE—Order of Proof.—Affirmative matter in avoidance of plaintiff's cause of action is not admissible when it is sought to inject it into plaintiff's direct testimony and before he has closed his case. (pp. 724, 725.)

CARRIERS OF PASSENGERS—Free Pass—Contract Against Liability for Negligence.—A common carrier cannot contract against liability for damages arising in consequence of its own negligence, even in the case of a passenger riding on a free pass, and who has released the carrier from liability for the negligence of its servants. (p. 725.)

DAMAGES—Measure of Discretion of Jury.—The amount of damages to be awarded in a case involving the consideration of both physical and mental pain and suffering is peculiarly a matter for the jury, and its verdict must stand unless grossly excessive. (pp. 725, 726.)

Mayes & Longstreet and C. N. Burch, for the appellant.

McLaurin & Thames and A. J. McLaurin, for the appellee.

508 COX, J. The decision of this case hinges upon the determination of the question whether the trial court erred in sustaining the objection of plaintiff, who is appellee here, to the introduction of a letter from plaintiff in words as follows: "Hardee, Miss., 3, 28, 1904. Major J. M. Kemp, Superintendent, Greenville, Miss.—Dear Sir: I have an occasion to go to Baton Rouge pretty soon, and I would appreciate a pass very much. Date it from April 2nd to 22nd. Respectfully, Alex. Grant, Agent"; and also to the introduction of a pass sent him in response to the above letter, styled, "Employé's Ticket, Pass check for Alex. Grant from Hardee, Miss., to Baton Rouge, La.," which provided that "the person accepting this ticket, in using the same, agrees not to hold the company liable for any damage to his person or property, under any circumstances whatever," and recited that "employés' passes must only be issued to employés of the

Yazoo and Mississippi Valley Railroad Company, or of the railway mail service, and of the express, telegraph, news and sleeping-car companies which have regular contracts for service on the Yazoo and Mississippi Valley Railroad.”

Plaintiff in his declaration alleges that a train of defendant, on which he was a passenger, was wrecked by reason of the unsound and unsafe condition of defendant's roadbed, occasioned by rotten or defective cross-ties and a bad frog, and that plaintiff, in the said wreck, received certain severe injuries. The declaration charges that the said defective condition of its roadbed was known to defendant, or could have been by reasonable ⁵⁶⁹ inquiry or inspection, and had been so for a long time, and that the defendant was willfully, recklessly and capriciously negligent in the conduct and management of its business, to the great injury and damage of plaintiff. Defendant pleaded the general issue only, and did not give notice of affirmative matter in avoidance.

Under the pleadings the court could not do otherwise than exclude the letter and pass when offered in evidence. It is provided by Code of 1892, section 686, that “if the defendant desire to prove under the general issue in an action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing, annexed to or filed with the plea, otherwise such matter shall not be allowed to be proved at the trial.” While, as a rule, great liberality is allowed in pleading and procedure, this statute is mandatory, and must be strictly complied with. The effect of section 686 is to require every affirmative matter to be pleaded specially or given notice of, so as to distinctly inform the opposite party of the precise ground of contest on which he is to be met by his adversary: *Tittle v. Bonner*, 53 Miss. 578. The evidence offered and excluded had no tendency to disprove either the negligence of defendant or the resulting injuries of plaintiff. Its utmost and sole effect would have been to show a release of all claim for damages, which was an affirmative fact in avoidance. The exclusion of such evidence under the general issue, if notice in writing be not given, was the chief purpose of section 686. Again, the court did not err in excluding the proffered evidence, because offered at the wrong time. Plaintiff was testifying, and it was sought to inject the letter and pass into his testimony. While it was proper to permit plaintiff, on cross-examination, to be questioned about them (and this was

not refused), it would have been improper to permit defendant at this stage to introduce its defense, and have it considered by the jury, before the plaintiff had closed his case, and, indeed, before his own testimony was concluded. Defendant failed to offer the letter and pass after ⁵⁷⁰ plaintiff had rested, and has no right to complain of a ruling of the court which, under any view of the evidence offered, was perfectly correct at the time it was made.

But even if the evidence excluded had been offered under a proper pleading and at the proper time, it would still have been incompetent. It is definitely settled in this state that a common carrier cannot contract against liability for damages arising in consequence of its own negligence. This is the law even in the case of a passenger riding on a free pass, and who has released the carrier from liability for the negligence of its servants: *Illinois Cent. R. Co. v. Crudup*, 63 Miss. 291. It is contended by counsel for appellant that the case last cited does not hold that the acceptance of a free ticket does not debar the right to sue in such case, and that the pronouncement by the court in that case that such a contract is against public policy is mere dictum. We do not so read. The decision in that case rests upon two distinct grounds, a want of consideration for the waiver of damages being one and the violation of public policy being the other. The decision of the court might have been rested upon either. It was in fact rested upon both. It is supported by what seems to be the great weight of authority, and is in perfect harmony with the decisions of a great number of courts of last resort in the United States. The opposite view is held in England and by the supreme court of the United States and by some of the state courts, but we adhere to that view of public policy which is announced in the case last cited. Those desiring to see a marshaling of the two conflicting lines of decision upon the question considered are referred to briefs of counsel in the case.

The sum for which judgment was rendered, ten thousand dollars, is large; but when the very serious injuries suffered by plaintiff and the severe pain endured by him are considered, we cannot say that it was excessive. The amount of damages to be awarded in a case of this kind, involving the consideration of both physical and mental pain and suffering, is peculiarly a matter for the ⁵⁷¹ jury. The verdict, if excessive at all, is not so grossly excessive as to indicate passion,

prejudice or corruption upon the part of the jury, and therefore will not be disturbed.

Affirmed.

A Carrier Owes to a Person Riding on a Free Pass the same obligation as to care and vigilance as it does to a passenger for hire, and it cannot contract against liability to him for injuries caused by its negligence: See Williams v. Oregon Short Line R. R. Co., 18 Utah, 210, 72 Am. St. Rep. 777; monographic note to Illinois Cent. R. R. Co. v. O'Keefe, 61 Am. St. Rep. 88.

GARDINER v. HINTON.

[86 Miss. 604, 38 South. 779.]

COTENANCY—Conveyance by One Cotenant—Adverse Possession.—A holding of exclusive possession by a purchaser for the statutory period of limitation, under a deed in severalty from one cotenant of the whole tract to a stranger to the title, vests a full and complete title in him, as against all of the cotenants not laboring under any disability. (pp. 730, 731.)

COTENANCY—Conveyance by One Cotenant—Adverse Possession—Record of Deed.—A purchaser who is a stranger to the title, and who holds exclusive possession of the whole tract for the statutory period of limitation under a deed in severalty, from one cotenant, obtains a full and complete title as against all of the cotenants not laboring under any disability, and the fact that such deed is not placed of record until long after it is executed, and that suit is instituted by a cotenant to recover the land within the statutory period of limitation from the filing of the deed for record, is immaterial. (p. 731.)

COTENANCY—Conveyance by One Cotenant—Adverse Possession.—A vendee who is a stranger to the title and who purchases the whole tract under a deed in severalty from one cotenant, and then goes into and holds open, continuous and exclusive possession under a claim of right to the whole tract for more than the statutory period of limitation, acquires full and complete title thereto as against all of the cotenants not laboring under any disability, regardless of the question of notice, actual or constructive, to such cotenants. (pp. 731, 732.)

Shannon & Street, S. Deavours, O. C. Hunt and Mayes & Longstreet, for the appellants.

Hardy & Arnold, Brame & Brame and J. P. Thornton, for the appellee.

⁶¹¹ TRULY, J. The question presented by this record is whether appellant can successfully interpose the plea of adverse possession. Code 1892, section 2734, provides: "Ten

years' actual adverse possession by any person claiming to be the owner for that time, of any land, uninterruptedly continued for ten years by occupancy, descent, conveyance or otherwise, in whatever way such occupancy may have been commenced or continued, shall vest in every actual occupant or possessor of such land a full and complete title," with certain exceptions saving the rights of minors and those suffering from unsound minds. The record proves in the instant case, beyond peradventure, the actual, open and notorious possession by the appellants or their vendors for more than the statutory period before the institution of this suit, ⁶¹² on the 20th of February, 1903. That John Creel entered into possession in 1885 under an unrecorded warranty deed conveying the entire tract in fee simple is not denied. That his vendee, the Kamper-Lewin Manufacturing Company, and its vendee, John Kamper, and his vendees, Eastman Gardiner and others, appellants, entered into possession and actual occupancy in 1891, is not denied. Since that date the proof establishes that the occupancy and possession of the property in controversy by the appellants has been open and notorious, marked by every possible assertion of sole and absolute title—the construction of valuable improvements, the regular payment of all taxes, the selling of lots located on the lands, and an absolute control and supervision, exercised in the same manner and to the same extent of an owner holding by an indefeasible title. That appellants or their immediate vendors recognized, or, in fact, knew or had any grounds to suspect, that anyone other than themselves claimed any interest in or title to the lands at the date of their purchase and entry, is neither contended by counsel nor suggested by the record. This is a full compliance with all statutory requirements as to the nature, extent and duration of the occupancy and possession necessary to vest by adverse possession full and complete ownership. Unless, therefore, appellee can show that her case falls within some recognized legal exception which prevents the application of the statute, her claim must fail. The soundness of the general proposition that adverse possession, as defined by the statute, if uninterruptedly continued for the statutory period, vests full and complete title, is not questioned. But it is urged that the general rule has no application to the instant case, because it is said the possession of appellant was not adverse to appellee until the deed from Isaiah Creel to John Creel, conveying the estate in severalty, was placed of record;

that appellee, having no actual notice of any adverse claim by appellants or their vendors, only received constructive notice by and from the date of the filing of the deed for record, and as this only occurred ^{¶13} in 1895, less than ten years before the institution of the suit, the bar of the statute was not complete. This argument is founded upon the well-defined and firmly established principle that the possession of one cotenant inures to the benefit of all. Nowhere, perhaps, is the rule expressed with more lucidity and legal precision than in *Hignite v. Hignite*, 65 Miss. 447, 7 Am. St. Rep. 673, 4 South. 345, where this court, through Cooper, C. J., says: "A tenant in common out of possession has a right to rely upon the possession of his cotenant as one held according to the title, and for the benefit of all interested, until some action is taken by the other evidencing an intention to assert adverse and hostile claims. If one enters upon the land of a sole owner, and without his consent, he must know that such possession exists, and, within the time permitted by law, take steps to vindicate his right. But the possession of a cotenant is a lawful possession, and of and by itself is not evidence of an ouster." The appellee contends that the legal principle just quoted is applicable to, and should control the determination of, this case; that appellee, in default of actual and constructive notice of an assertion of hostile claim of exclusive ownership, had a perfect right to rely upon the possession of those holding under her cotenant as being subordinate to, and for the benefit of, the joint title; and that, without such notice and in the absence of actual ouster, no character or duration of use and occupancy would ever ripen into a title adverse to her claim as cotenant. The cases of *Hignite v. Hignite*, 65 Miss. 447, 7 Am. St. Rep. 673, 4 South. 345, *Alsobrook v. Eggleston*, 69 Miss. 833, 13 South. 850, and *Bentley v. Callaghan's Exr.*, 79 Miss. 304, 30 South. 709, are cited and relied on as supporting the doctrine and showing its applicability to the instant case. To this argument it is replied by appellants: Conceding the accuracy of the general proposition that one cotenant can never, unless in an exceptional case of actual ouster, acquire title to the joint property by adverse possession, that rule has no application to the instant case, for two reasons: ^{¶14} 1. That appellants rely upon adverse possession—a possession adverse from its inception, an occupancy hostile from the moment of its commencement; that neither these appellants nor any of

their vendors ever recognized any claim of appellee as cotenant; that none of them ever occupied the relation of cotenant toward appellee; and that the original entry into possession was not in subordination to the claim of appellee. 2. That the deed executed by Isaiah Creel, the tenant in common, to John Creel, of the estate in severalty, was in itself the assertion of an adverse title, and that this deed, even though unrecorded, when coupled with the actual occupancy of the lands, was a sufficient predicate on which to base the claim of adverse possession; and, the occupancy having continued for the statutory period, the title vested by operation of law, without regard to the "way such occupancy may have been commenced or continued."

We find ourselves unable to agree with the argument presented on behalf of appellee. The facts of this case do not bring it within the scope of the rule which prevents one cotenant from acquiring a title in himself to the common estate without either an actual ouster or actual or constructive notice of the assertion of the hostile claim. We maintain that doctrine in its fullest extent, and with unimpaired force, in cases when properly applicable. But in the instant case there is no effort on the part of any cotenant, or anyone who ever occupied that position toward appellee, to acquire a paramount title to the common estate. Here from the moment of the entry the possession was antagonistic to the claim of appellee or any third person. The occupancy of John Creel in 1885 was founded on an instrument which, by its very terms, constituted such an act of ouster as would have justified appellee in bringing ejectment for the property. And since that time every moment of occupancy has been a reiteration of this assertion of hostile claim of exclusive ownership. No case can be found in our reports advancing a contrary view. The cases cited by ⁶¹⁵ appellee are easily and clearly distinguishable. The Hignite case is one where a cotenant in possession sought to acquire a hostile title to the whole interest in the land, and, without giving notice of his intention, assert the same against his cotenant. The Alsobrook case is one where one in possession in recognition of the rights of his cotenants, holding under a deed conveying only a half interest in the land, endeavored to set up this character of occupancy as an assertion of an adverse holding against his cotenants. The Bentley case also presented the instance of one cotenant seeking to found claim of title to the whole interest in the land upon an

occupancy which was "by law presumed to be permissive of his cotenants." An analysis of those cases shows that in each instance it was an effort on the part of one cotenant to acquire for himself an absolute title to the common estate. This, under universally recognized principles, he was not permitted to do, and we have no purpose to vary or modify the views announced in any one of those opinions.

The case at bar presents no question of an attempt on the part of any cotenant, or any person who ever occupied the relation of cotenant, to assert any paramount title in himself. Had John Creel entered into actual occupancy of the land in 1885 without any deed, and remained in open, exclusive, notorious possession, claiming adversely as owner, at the end of ten years such possession would have vested in him full and complete title at least to the land actually occupied: *Welborn v. Anderson*, 37 Miss. 155. Had the deed from Isaiah to John Creel never been executed and the deed from John Creel to the Kamper-Lewin Manufacturing Company passed no legal title, still it would have constituted color of title; and as Kamper and these appellants entered into possession in 1891 under such color of title, and remained in the actual adverse possession, under the circumstances set forth in this record, their title would have been fully vested by operation of law before the institution of this suit: *Nash v. Fletcher*, 44 Miss. 609; *Hanna v. Renfro*, 32 Miss. 125. This being true, we are unable to see how the fact that the deed from Isaiah to John was not placed of record until 1895, and that suit was instituted within ten years after the date of the filing thereof, can possibly avail the appellee. That deed contained no recognition of appellee's title, was in subordination of no assertion of interest by appellee, contained no provision which would put appellants on notice that it was a deed of one cotenant conveying the entire estate in fee. It was itself the assertion of a hostile title, an act of disseisin, and a constructive ouster of the other cotenant. And in this connection it is worthy of note that in the *Alsbrook* case, in deciding that the cotenants out of possession were entitled to recover that portion of the land held by Wade under a deed in severalty from the other cotenant, it is expressly stated that such sale was "less than ten years before this suit was commenced," thus impliedly, at least, committing the court to the generally accepted doctrine that a holding of possession for the statutory period under a deed in

severalty from one cotenant to a stranger to the title vests a full and complete title: Sedgwick and Wait on Trial of Title to Land, sec. 287; Freeman on Cotenancy and Partition, sec. 224; Tyler on Ejectment and Adverse Enjoyment, p. 882; Larman v. Huey's Heirs, 13 B. Mon. 436; Roberts v. Morgan, 30 Vt. 319. Had the deed from Isaiah to John Creel never been placed of record, appellant's open, exclusive and continuous occupation of the land as owner would at the end of ten years have ripened into a valid title: Stovall v. Judah, 74 Miss. 747, 21 South. 614.

It should be observed that more than ten years elapsed between the execution of the deed to John Creel, 13th of February, 1885, and its filing for record, 22d of June, 1895. But, aside from this, it was from the date of its record simply an additional evidence of the hostile title asserted by appellant. It was no inferential recognition, as in the Alsobrook case, of the title of any cotenant. On the contrary, its terms expressly negative the idea that any right or interest is outstanding in any third person. "When one tenant in common of land conveys the whole estate in fee, with covenants of seisin and warranty, and the grantee enters and holds exclusive possession thereof, such entry and possession are a disseisin of the cotenant": 45 Cent. Dig., "Tenancy in Common," sec. 39; Washburn on Real Property, sec. 883.

The entry by John Creel under a claim of title to the entire tract started the running of the statute of limitations. The operation of the statute was not interfered with by the placing of the deed of record. The bar of the statute was complete when ten years' continuous, exclusive, adverse possession had expired, without regard to the "way such occupancy may have been commenced or continued."

It is urged by appellee that the fact that the deed from her cotenant conveying the entire estate was not placed of record until within less than ten years of the institution of the suit becomes material, because until that time there was no ouster and no constructive notice to appellee of adverse claim. Adverse possession in this class of cases does not depend upon actual notice. The principle which requires actual notice, or acts of repudiation equivalent thereto, applies only to cases where there is some relation between the occupant and the holder of the legal title, which imposes upon the occupant the obligation of giving notice, either actually or "shown by such acts of repudiation of their claim as are equivalent to actual

notice," as a condition precedent to the assertion of any hostile claim by him. This distinction is plainly foreshadowed in *Bentley v. Callaghan's Exr.*, 79 Miss. 304, 30 South. 709. Such familiar cases as landlord and tenant, trustee and beneficiary, tenants in common, and the like, are examples in which the rule applies. But that principle does not control in a case where the occupancy is from its inception the assertion of a hostile title, and there is no fiduciary relationship between the parties. Such, in our judgment, is the instant case.. "When the vendee of one tenant in common sets up claim in his own right to the whole tract of land, and enters ⁶¹⁸ and holds possession open and continuously for more than the statutory period, his possession is adverse, and a recovery by the other tenants in common is barred, although they had no actual notice of the adverse character of the possession": *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579, 2 S. W. 774; *Rutter v. Small*, 68 Md. 133, 6 Am. St. Rep. 434, 11 Atl. 698.

From the entry by John Creel, in 1885, down to the institution of this suit, in 1903, the continuous occupancy of this land has been actual, open, notorious and adverse, uninterrupted by any assertion of claim by others, and exclusive and undisturbed. It is true that appellee contends that, having notice that the lands had been partitioned and a certain allotment made to her and her brothers as cotenants, she was ignorant of her rights, and hence had no opportunity of asserting her own or contesting appellant's claim. Assuming this to be true, and waiving all consideration of the legal presumption that, being a party to the partition proceedings, she was advised thereof, it cannot avail for her benefit. It is the policy of our law, devised to render secure the title to land, that in cases like this "actual adverse possession" is presumptive notice to all parties in interest of the claim of the occupant: *Wilson v. Williams' Heirs*, 52 Miss. 487. In this case the nature of the occupancy, the extent of the possession, the character of the control, the rights of ownership exercised over the land, in the eyes of the law, constitute notice to the world; and having been uninterruptedly continued for the statutory period, appellants' title was at the institution of the suit "full and complete."

Wherefore it follows that the decree must be reversed and the cause remanded.

If a Cotenant Conveys the Entire Property, this constitutes an ouster of his co-owners, and the possession of the grantee is adverse to them all: *Beal v. McMenemy*, 68 Neb. 70, 93 Am. St. Rep. 427; *Murray v. Quigley*, 119 Iowa, 6, 97 Am. St. Rep. 276; *Soper v. Lawrence Brothers Co.*, 98 Me. 268, 99 Am. St. Rep. 397; *Sudduth v. Sumeral*, 61 S. C. 376, 85 Am. St. Rep. 883, and cases cited in the cross-reference note thereto. See note to *Joyce v. Dyer*, 189 Mass. 64, ante, p. 603.

Possession may be Adverse without the true owner having actual notice of the adverse claim: See *Jangraw v. Mee*, 75 Vt. 211, 98 Am. St. Rep. 816, and cases cited in the cross-reference note thereto.

JOHNSON v. WALKER.

[86 Miss. 757, 39 South. 49.]

BASTARDY.—Dismissal of a bastardy action without prejudice is not a bar to a subsequent action upon the same cause. (p. 735.)

BASTARDY—Jurisdiction—Venne.—A justice of the peace within the county has authority to issue a warrant and jurisdiction to try a bastardy case, even though the affidavit for the warrant was made before a justice of the peace for another district, and the defendant was a householder and resident in neither of their districts. (p. 735.)

BASTARDY—Jurisdiction—Complaint.—It is no ground for objection to a complaint in a bastardy case that it was sworn to before a justice of the peace other than the one before whom the action was commenced. (p. 735.)

BASTARDY—Practice—Waiver of Error.—If the statute provides that the court shall, in bastardy proceedings, cause an issue to be made up as to whether the reputed father is the real father, it is no ground for setting aside a finding that he is, that such formal issue was not made up, if the parties waive that question by proceeding to trial upon the complaint and defendant's affidavit denying that he is the real father. (p. 735.)

BASTARDY—Presence of Child in Court.—In a bastardy proceeding the mere presence of the child in court is not prejudicial error to the defendant, when no profert of such child is made, or offered to be made to the jury, and no reference to it, or its presence, is made by counsel to the jury. (p. 736.)

EVIDENCE—Declaration of Woman Made in Travail.—Declarations of a mother made during travail relative to the paternity of her child are admissible in bastardy proceedings. (p. 737.)

BASTARDY—Mother's Denials of Pregnancy.—In bastardy proceedings the exclusion of evidence that the plaintiff denied up to the time of her confinement that she was pregnant, or that she had ever had carnal connection with any man, is not prejudicial error. (p. 738.)

BASTARDY—Evidence of Prior Arrest.—In bastardy proceedings, the defendant cannot complain of testimony by plaintiff that she had caused him to be arrested on a former charge of seduction, especially when such testimony is brought out under cross-examination after the court has ruled that such testimony is not admissible. (p. 739.)

W. J. East, for the appellant.

J. F. Dean, for the appellee.

⁷⁵⁹ HOUSTON, J. This is a proceeding under chapter 15 of the Code of 1892, by appellee against appellant. On August 16, 1904, appellee, a single ⁷⁶⁰ woman, resident in Tate county, was delivered of a child therein. The next day she made affidavit before J. H. Wallace, a justice of the peace of district No. 5 of said county, under Code of 1892, section 249, alleging that appellant was its father. On the return-day she appeared before Wallace, withdrew the affidavit, and dismissed her suit, the judgment reciting that the dismissal was "without prejudice." On the same day she made another affidavit before McKinnon, justice of the peace of district No. 3, taken before C. P. Varner, another justice of the peace of district No. 4 of said county, and he issued his warrant upon it. On the return-day thereof appellant made a motion to dismiss the case because of the above facts, alleging and proving also that defendant below was a householder and resident of district No. 5. This motion being overruled, Varner, after trial, required him to give bond for his appearance in the circuit court. In the circuit court plaintiff below filed her declaration. Defendant renewed his motion, which, being overruled, he traversed the allegations of said declaration. Trial being had upon the merits, the jury returned a verdict for one thousand dollars. Judgment was entered thereon, ordering defendant to pay said sum at once, or to execute his bond for one thousand dollars, payable to the state, to pay on the first day of January, 1905, and annually thereafter, for nine years, the sum of one hundred dollars for the support and education of said child, etc. After motion for new trial was overruled, defendant prosecuted this appeal.

We think the motion to dismiss was properly overruled. That the dismissal "without prejudice" before Wallace, justice of the peace, did not bar the appellee from instituting another suit, and was not *res adjudicata*, is settled by *Wilson & Gray v. May Pants Co.* (Miss.), 37 South. 813. Counsel for appellant cites 3 Encyclopedia of Pleading and Practice, 300, to the effect that an adjudication in this proceeding is a bar to a subsequent prosecution on the same charge; but the same authority adds this, "But it seems that, unless the judgment is on the merits, it cannot be pleaded in bar," and cites decisions of several states, and they ⁷⁶¹ and the footnotes fully

sustain the proposition that it is not a bar unless the case is tried on its merits: See, also, footnotes to 5 Cyc. 674; *Mooney v. State*, 96 Ill. App. 622; and *Weatherford v. Weatherford*, 56 Am. Dec. 221, note.

Justice of the Peace Varner had authority to issue the warrant and jurisdiction to try the case, even though the affidavit was made before the justice of the peace of another district, and the defendant was a householder and resident in neither of their districts. Code of 1892, section 2395, has no application to this character of proceedings. Code of 1892, chapter 15, is sui generis. Section 249 thereof provides that "the mother can make complaint before any justice of the peace of the county where she may be delivered," etc. No affidavit and no written complaint are expressly required by the statute. But even if an affidavit were required, it can be made before a justice of the peace other than the one who issues the warrant and tries the case: Code 1892, sec. 934; *Mooney v. State*, 96 Ill. App. 622; 3 Ency. of Pl. & Pr. 296-298.

As to an issue not being made up, even if there is any necessity for a formal issue or formal pleadings, other than the denial by defendant of the charge (as it is said there is not in the last two authorities cited), the issue was properly made up in the instant case, within the contemplation of Code of 1892, section 252. The affidavit and declaration of the plaintiff were filed, alleging that the defendant was the father of the child, and the defendant filed his affidavit in the circuit court, traversing this allegation. Besides, defendant went to trial on this issue, without making objection until after judgment in his motion for a new trial.

The assignment of error as to the child being brought into court is untenable. There is diversity of opinion as to whether the child may or may not be exhibited before the jury for their inspection as evidence in the case to show its resemblance to defendant, by comparing the features and appearance of the two, and as to whether counsel may ⁷⁶² not draw attention to and comment on this resemblance. Among others, the states of Iowa, North Carolina, and Massachusetts permit this to be done: See *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 589, 24 N. W. 489; *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871. We are not called upon in this case to express any opinion as to which is the better and sounder doctrine, as this record shows affirmatively that, as soon as the mother brought the child into the courtroom, plaintiff's counsel directed plaintiff's

father in an undertone to have it removed, which was done by plaintiff's sister, who was only about thirty feet away; that the child was in the presence of the jury for only about two minutes; that no profert of the child was made to the jury, and none offered to be made; nor was any reference to the baby made by counsel in the presence and hearing of the jury, and no attention called to it in any way. The authorities are uniform on the proposition that this does not constitute error—certainly not reversible error. In *Hutchinson v. State*, 19 Neb. 266, 27 N. W. 113, the mother held the child in her arms in plain view of the jury during the entire time that she was testifying as a witness, to which due objection and exception was taken. The court said, *inter alia*: "It must be apparent to any mind that the mere presence of the child could have no prejudicial effect upon the rights of defendant."

Nor do we think that the admission of the evidence as to the declaration made by complainant during travail relative to the paternity of the child constituted reversible error. This question has never been adjudicated by this court. The decisions are not uniform as to the admissibility of such declarations, but the better doctrine seems to be that they are admissible for the purpose of corroborating her evidence. 5 *Cyclopedia*, 660, 661, while saying that "declarations of the prosecutrix tending to corroborate her testimony are generally inadmissible," immediately adds, "Accusations of the defendant during her travail may, however, be shown in corroboration of her evidence," citing 763 cases. See, also, *Benton v. Starr*, 58 Conn. 285, 20 Atl. 450; *Harty v. Malloy*, 67 Conn. 339, 35 Atl. 259; *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *Robbins v. Smith*, 47 Conn. 182; *Reed v. Haskins*, 116 Mass. 198. Wigmore, who is recognized as one of the highest authorities on the subject of evidence, in his valuable new book, says: "There is no reason why this should not be the general rule." And this, on common-law principles: 2 *Wigmore on Evidence*, p. 1340, sec. 1141. While the text of 2 *Encyclopedia of Evidence*, page 244, cited in the able and exhaustive brief of counsel for appellant, seems to deny the competence of such evidence, yet, in the note thereto (pages 245, 246), it uses this language: "The mother is a competent witness to show in corroboration of her testimony that in the time of her travail she accused the defendant of being the father of the child." Also, that "declarations of the complainant made during travail as to the paternity of the child are admissible

in corroboration of her testimony." Counsel in his brief says, "The doctor could not tell what she said," and cites *Weatherford v. Weatherford*, 56 Am. Dec. 219, note, and *Eddy v. Gray*, 4 Allen (Mass.), 435. These cases only hold that the declarations which the attending physician made to her during travail relative to her condition or peril are admissible. They do not apply to what she might have said to him. In the instant case the record does not show that Dr. Orr said anything whatever to her about her condition or peril. He asked her how long she was going to stick to the fact that it was Sidney Johnson. She replied: "Until I die."

It follows that instruction No. 4, given the plaintiff, was not error. It only tells the jury that they may consider the declaration of plaintiff, that defendant was the father of the child, in connection with all the other testimony in the case, and give it such weight as they may deem proper. Nor do we think that Code of 1892, section 257, militates against or excludes the conclusion that such declarations are admissible. By its express language that section purports to deal with, and as a matter of fact only ⁷⁶⁴ and merely deals with, the admissibility, after or "when the mother is dead," of her declarations in her travail, and was simply intended to extend the doctrine of admissibility to the period after her death, and in the contingency that she should die, and to provide that in the event of such a contingency they might, if proved to be her dying declarations, be received in evidence, not as corroborative merely, but as original substantive evidence, when the trial of the case occurred after her death. It left the question as to their admissibility when she was living, at the time the case was tried, just as it was before its passage. Without this statute the mother's deathbed declarations as to the paternity of the child were generally held to be inadmissible: 5 Cyc. 661, note. The sole and only object of the statute was to extend the doctrine as to dying declarations to such declarations of the mother in bastardy proceedings, and to place beyond controversy their admissibility, not merely as corroborative, but as original and substantive, evidence.

In our opinion, the testimony of Mrs. Perkins, that appellee, during her travail, told witness that appellant was the father of her child, was admissible. This being so, the jury already having before it this competent evidence as to that statement, we are unable to see from this record how the subsequent

testimony of Dr. Orr and Mrs. Florence Walker, the mother of appellee, relative to this same matter, and only cumulative, could operate so judicially upon the rights of defendant with the jury as to warrant us in reversing this case. The court expressly instructed the jury, at defendant's request, that they should carefully weigh and consider with great caution these statements made by the plaintiff as to who was the father of the child, and that such statements and declarations made by the plaintiff, in the absence of the defendant and without his knowledge or sanction, are not binding upon him and cannot affect his interest, and further instructed them "that they should also carefully weigh the plaintiff's evidence," as "this is a case where the charge is easy to fabricate and difficult to defend." 765 By these instructions the declarations complained of became almost as "fangless serpents and shorn Samsons," so far as being able to work harm to defendant was concerned. At least these cautionary instructions, with others, were quite as liberal to the defendant as he was entitled to, and must have minimized the effect of this corroborative evidence.

We find no reversible error in the other exceptions to the ruling of the court on the evidence. Even if appellee did deny up to the date of her confinement that she was enceinte or that she had ever had criminal conversation with any man, this was but natural, and what every young girl of eighteen years would have done, as every juror of any intelligence would know, and its exclusion could not be prejudicial error. The evidence fails to show any such criminal relations, and the verdict of the jury settles that there were none at the period of conception. Nor was the exclusion of the testimony of defendant that he and plaintiff never renewed their engagement to marry after it was canceled during Christmas of 1902. He had previously sworn to this before the jury without objection, and also afterward, and thereby secured the benefit of it. Besides, he expressly admits that they were engaged about two or three years before October, 1904, and that he visited her often for several years, and still continued to visit her "about like he had before this engagement was canceled." He further admits that he was with the appellee alone at night, at the very times, places, and under the circumstances detailed by her as being the times and places when and where he, after having previously failed to subdue her chastity, as she swears, under promise of marriage, persuaded

her to yield to him, polluted her chastity, blasted her honor and hope, and blighted her future happiness and life. As is so often the case, her love for him seemed too strong for her virtue, as it is often too strong for law and morality. And these times were at or very near the proper period of conception according to the ordinary course of nature with respect to the birth of the child; and there was no evidence that the period ⁷⁶⁶ of her gestation was extraordinary or unusual. In fact, he admits nearly every material fact and circumstance testified to by her, except the actual acts of intercourse. *McClellan v. State*, 66 Wis. 335, 28 N. W. 347, was a strikingly similar case to the instant one. The court there said "that the defendant had been alone with her on occasions which he admitted, and had driven home with her several times late at night. This evidence and these circumstances corroborate the testimony of complainant, and we cannot say that the jury were not warranted in finding defendant guilty beyond a reasonable doubt. It was only material that defendant had intercourse with her at or near the proper time which, in the course of nature, might have made him the father of the child." The complainant was only eighteen years old, and she would not at all likely become a willing or swift witness against an innocent man. Cold, willful, and corrupt perjury would not be likely to reside in the tender and untutored nature of such a young girl.

Relative to the appellant's complaint that the court allowed appellee to testify to the fact that she had appellant arrested, charging him with seduction, and that the jury must have considered this in determining upon their verdict, this record shows that appellant's counsel himself asked appellee this very question on cross-examination; and, although appellee's counsel objected and the court sustained the objection, appellant's counsel, without reserving an exception, continued to question her in regard to it without further objection from counsel for appellee or further ruling by the court. Under such circumstances we fail to see how appellant can now successfully or consistently complain of this.

As to the other exceptions to the evidence respecting the conduct of this once spotless and stainless, but now sorrow-stricken, disgraced, and deflowered young girl, the "glass of whose virginity" was broken by this appellant (as she swears, and as the jury has found) before the bud of girlhood could bloom or blossom into the beautiful flower of womanhood, and

whose ⁷⁶⁷ honor and happiness are ruined and wrecked and lost forever, we content ourselves with quoting and commending the language of that great jurist, William L. Harris, in his opinion found in Anonymous, 37 Miss. 58: "The interests of justice do not require it, nor is the good of society promoted by permitting the errors of a woman's whole life (perhaps sorely repented of by her, though never forgiven by the community) to be dragged from her own lips, and perpetuated in judicial history, for the mere gratification of her seducer. It is a sufficient stigma upon the age that, while it consigns to unattonable infamy the inexperienced victim who has yielded herself to his gratification, he bears no part, in public estimation, or at least a very inconsiderable one, in the degradation, ruin and lifelong wretchedness he has produced. The state has a deep interest in the equality of punishment, as well as the inducement to reformation, in cases of this character; and the disparity of suffering and inequality in social position, already existing, should neither be augmented nor countenanced by tribunals established to administer justice." We think the court was sufficiently liberal to the appellant in regard to permitting evidence as to the conduct and character of appellee in this case.

We find no reversible error in the action of the learned lower court, in the modification of the instructions asked by defendant or in granting those requested by the plaintiff. Instruction No. 6 granted the plaintiff was in the very language of Code of 1892, section 258, and was correct. Even if instruction No. 3 given for the plaintiff was error (as we do not think it was), it was cured by the very liberal charges given for the defendant, especially charge No. 1, relating to the same phase of the case: Scarver v. State, 53 Miss. 407; Skates v. State, 64 Miss. 644, 60 Am. St. Rep. 70, 1 South. 843. Even in a murder charge, an erroneous instruction for the prosecution will not cause the reversal of a death sentence, if the instructions for the accused so clearly explain the law that the jury cannot be misled: Nelson v. State, 61 Miss. 212.

⁷⁶⁸ On account of the commendable zeal and earnestness displayed by counsel for appellant in behalf of his client, and the importance of our decision to all parties concerned, we have given an unusually careful consideration to this case; but the consideration has not resulted in our being able to affirm that the right result has not been reached by the jury, and that the same result would not inevitably be reached on

a new trial, which would necessitate a rehearing and a rehashing of the harrowing and not morally healthy details of this most unfortunate case, without any corresponding good, so far as we are able to judge, after looking back over a completed trial and carefully scanning and conning this record. The testimony is conflicting, the jury has passed upon these controverted questions of fact, and, in view of our inability to say that it was unwarranted in arriving at the conclusion evidenced by its verdict, or that it is manifest from the whole record that its finding is clearly wrong, we feel constrained to let the verdict and judgment stand: *Kansas City etc. R. R. Co. v. Cantrell*, 70 Miss. 329, 12 South. 344; *Yazoo etc. R. R. Co. v. Williams*, 67 Miss. 18, 7 South. 279; *McAlexander v. Puryear*, 48 Miss. 420; *Mississippi etc. R. R. v. Mason*, 51 Miss. 234; *Buckingham v. Walker*, 48 Miss. 609.

Affirmed.

DECLARATIONS OF MOTHER IN TRAVAIL AS EVIDENCE.

I. Admissibility of, in General, 741.

II. By Whom Declarations may be Proved, 744.

III. Sufficiency of Declaration, 744.

IV. What is Time of Travail, 745.

I. Admissibility of, in General.

In a number of states, it is uniformly maintained, regardless of statutory enactments, that in a bastardy proceeding, the declarations of the mother of the child made at the time of, and during her travail, as to whom she accuses of being its father, are admissible in evidence. In these states it was formerly necessary, as a condition precedent to a bastardy proceeding, in order to render the mother a competent witness against the alleged father, that she should have accused him, during the time of her travail, of being the father, and continued constant in such accusation: *Warner v. Willey*, 2 Root, 490; *Mann v. Maxwell*, 83 Me. 146, 21 Atl. 844; *Drowne v. Stimpson*, 2 Mass. 441; *McManagil v. Ross*, 20 Pick. 99; *R. R. v. J. M.*, 3 N. H. 135. But since the parties to suits have been made competent witnesses by statute in all civil actions, the necessity of requiring the mother, in the time of her travail, to accuse the putative father, no longer exists: *Robbins v. Smith*, 47 Conn. 182; *Hawes v. Gustin*, 2 Allen, 402; *Leonard v. Bolton*, 148 Mass. 66, 18 N. E. 879. In a late case in Massachusetts, it was held that a complaint for bastardy need not allege that the complainant accused the respondent of being the father of the bastard during her travail, and continued constant in such accusation, and, at the trial of the complaint, the complainant may testify to the fact of the accusation at the time of her travail, and of her constancy in such accusation, although

the complaint does not contain such allegations: *Bowers v. Wood*, 143 Mass. 182, 9 N. E. 534. "Under the statutes from 1786 to 1860, it was held that a complaint, upon which a respondent charged with being the father of a bastard child was to be tried before a jury, must allege particularly not only that the complainant had been delivered of a bastard child of which she alleged the respondent to be the father, but that she had accused him in the time of her travail of being the father of the child of which she was about to be delivered, and that she had continued constant in such accusation. As no prosecution under the statutes could be supported without proof of these facts, it was required that they should be distinctly alleged: *Drowne v. Stimpson*, 2 Mass. 441; *Stiles v. Eastman*, 21 Pick. 132; *Rice v. Chapin*, 10 Met. 5. The statutes to which we have referred were enacted before the passage of the act making parties in civil proceedings competent witnesses. The bastardy process is a civil proceeding, and the complainant is a competent witness under the statute of 1857, chapter 305, which provided that parties in civil proceedings may be witnesses: *Murphy v. Spence*, 9 Gray, 399. In 1860, the General Statutes were passed, by which the law regulating bastardy proceedings was materially changed and it has remained substantially as then enacted. Section 16 of the Public Statutes, chapter 85, provides that the mother of the child shall be admitted as a witness in support of the complaint. It also provides that if, when she makes her accusation, upon examination under oath, she accuses any man of being the father of such bastard child, and if, in the time of her travail, she accuses the same man of being the father of the child, of which she is about to be delivered, and has continued constant in such accusation, the fact of such accusation in time of travail may be put in evidence upon the trial to corroborate her testimony. Under this section, the complainant does not depend upon the accusation made in time of travail, and the continued constancy in such accusation. It therefore becomes unnecessary to allege it in the complaint. The allegations, if otherwise good, are sufficient without it. The proof may satisfy the jury of the respondent's guilt without this evidence. The statute makes it evidence to corroborate the testimony of the complainant. It is not required to allege such corroborative facts in the complaint": *Bowers v. Wood*, 143 Mass. 182, 9 N. E. 534. To the same effect is *Burns v. Donoghue*, 185 Mass. 71, 69 N. E. 1060, where it is said that "if the complainant has, in the time of her travail, accused the same man of being the father of her child, whom she accused in the examination before the magistrate, and has continued constant in such accusation, her accusation in time of travail may be put in evidence . . . upon the trial to corroborate her testimony." The complainant's accusation of the respondent during her travail as the father of her child is competent evidence to corroborate her testimony, although no complaint was made or examination had until after the delivery of the child: *Leonard v. Bolton*, 148 Mass. 66, 18 N. E. 879. And generally declarations of the complainant

made during travail, as to the paternity of the child, are admissible in evidence in corroboration of her testimony: *Robbins v. Smith*, 47 Conn. 182; *Wilson v. Woodside*, 57 Me. 489; *Mann v. Maxwell*, 83 Me. 146, 21 Atl. 844; *Heath v. Heath*, 58 N. H. 292; *Easley v. Commonwealth (Pa.)*, 11 Atl. 220.

On the other hand, in a few states, the rule prevails that, upon common-law principles and independent of statute, in a prosecution for bastardy or other proceeding, declarations made by the prosecutrix while in travail, that the defendant was the father of her child, are incompetent and inadmissible: *State v. Hussey*, 7 Iowa, 409; *State v. Spencer*, 73 Minn. 101, 75 N. W. 893; *State v. Tipton*, 15 Mont. 74, 38 Pac. 222; *Richmond v. State*, 19 Wis. 307. Evidence of what the complainant in a bastardy case said during her travail as to who was the father of her child is not admissible to confirm her testimony on the trial, is the rule maintained in *Richmond v. State*, 19 Wis. 307. And in *State v. Hussey*, 7 Iowa, 409, it was held that on the trial of an indictment for the defilement of a female by force, menace and duress, her declarations, at the time of her travail, as to who was the father of her child, and in relation to the circumstances of the sexual intercourse, when the child was begotten, are not competent evidence, and more especially so when she is present, and testifies as a witness. *State v. Tipton*, 15 Mont. 74, 38 Pac. 222, after holding that in a prosecution for bastardy, declarations made by the complainant, while in travail, that the defendant was the father of her child, are incompetent as evidence, said that "there is no principle or statute under which it can be held that it is competent for a party to prove in court what he himself has said out of court, and not under oath, when such matter is simply evidence in his favor, and is nothing more than a prior iteration of the testimony which he may now give upon the trial. That would be to allow a party to prove, by witnesses on the trial, that he had theretofore, out of court, and not under oath, stated to some one facts which were material to his case. Such declarations are not competent testimony." In the late case of *State v. Spencer*, 73 Minn. 101, 75 N. W. 893, the court, in speaking on this subject said: "The declarations were statements made by the person who at least had a direct pecuniary interest in the result of the action (*State v. Nestaval*, 72 Minn. 415, 75 N. W. 725) in her own favor, and tending to prove her case. The evidence was hearsay of a most injurious character, and it was not within any of the few exceptions to the general rule that hearsay evidence is not admissible. The statements were not made under oath, and they could not be raised to the dignity of competent evidence by being repeated under oath by the person to whom they were made. It has been held in some states under peculiar statutes enacted when parties in interest were not competent to testify in their own behalf, that such statements, especially when made while the female is in travail, are competent, and perhaps this has been held in one or two states independently of such statutes. . . . But the only reasonable rule is

that evidence of such declarations, made out of court, and not under oath, are incompetent and inadmissible": *State v. Spencer*, 73 Minn. 101, 75 N. W. 893.

II. By Whom Declarations may be Proved.

In those states where the doctrine is established that declarations of the mother, made by her while she is in travail, as to who is the father of her child, are admissible, they may be proved by herself on the trial of a bastardy proceeding. In other words, the mother of the child is a competent witness at the trial of a complaint for bastardy, to show that in the time of her travail she accused the defendant of being the father of her child: *Payne v. Gray*, 56 Me. 317; *Savage v. Reardon*, 11 Gray, 376; *Reed v. Haskins*, 116 Mass. 198; *Bowers v. Wood*, 143 Mass. 182, 9 N. E. 534; *R. R. v. J. M.*, 3 N. H. 135.

And it is also competent, on the trial of a bastardy case, to corroborate the evidence of the complainant by the evidence of a witness who was present at the time of her travail, that she then accused the defendant of being the father of her child: *Hawes v. Gustin*, 2 Allen, 402. If such declarations were made at that time to a mother by her child, they may be proved or corroborated by the testimony of the former: *Robbins v. Smith*, 47 Conn. 182; *Burns v. Donoghue*, 185 Mass. 71, 69 N. E. 1060. Evidence showing that the plaintiff, in the time of her travail, made to the persons attending her a declaration and accusation that the defendant was the father of her child is admissible: *Mann v. Maxwell*, 83 Me. 146, 21 Atl. 844; *Heath v. Heath*, 58 N. H. 292. The voluntary statement made by a complainant in a bastardy proceeding to her nurse, during the time of her travail, without being interrogated in relation thereto, that the child of which she is about to be delivered "is the child of the" respondent, and that "he knows that it is his child," is admissible in evidence: *Wilson v. Woodside*, 57 Me. 489. And upon the trial of an indictment for bastardy, the physician who attended the prosecutrix is competent to testify to her declarations as to the paternity of the child, made by her while in child labor, although the physician was not sure that she was in extremis: *Easley v. Commonwealth (Pa.)*, 11 Atl. 220.

The declaration made by the mother as to who is the father of her child is admissible in evidence if made to a person attending her in time of her travail, though such person's attendance does not continue throughout the whole period of travail, and such declaration need not be repeated to the attendant or attendants who succeed: *Long v. Dow*, 17 N. H. 470.

III. Sufficiency of Declaration.

The declaration made by the mother at the time of her travail, as to who is the father of her child, is sufficient if it is capable of being understood by plain reference to the surrounding circumstances and antecedent events. Thus, a declaration made by the mother at such

time, "I have told the truth, but W. has not," may be sufficient to be admissible in evidence, if it may be understood by the aid of such reference: *Rodimon v. Reding*, 18 N. H. 431. Or if the complainant, in the time of her travail, states that the child is P. T.'s, or not anyone's, the person referred to being the defendant, the accusation is sufficient to be admissible in evidence.

IV. What is Travail.

The accusation by a woman of a particular man as the father of her child, made at any time after the pains of her labor have begun, and before the delivery of the child, is an accusation in time of travail, and declarations thereof made at such time are admissible in evidence in bastardy proceedings: *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *Rodimon v. Reding*, 18 N. H. 141. And if a woman after her bastard child is born, but before the umbilical cord is severed, accuses a man of being the father of the child, this is an accusation made by her in the time of her travail, and her declaration of such accusation is admissible in evidence: *Tacey v. Noyes*, 143 Mass. 449, 9 N. E. 830. The declarations must be made in travail which commences with the pains which precede and terminate with or soon after childbirth, and may commence twenty-four hours before that event: *Long v. Dow*, 17 N. H. 470.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

ROBBINS v. BOULWARE.

[190 Mo. 33, 88 S. W. 674.]

PROBATE SALE.—The Fee of the Homestead of a Widow may, subject to her right, be sold by order of the probate court for the payment of the debts of the deceased husband. (p. 749.)

PROBATE COURT.—The Judgments and Proceedings of the probate courts of Missouri are entitled to the same credit and presumptions accorded to courts of general jurisdiction. (p. 751.)

PROBATE SALE—Unverified Petition.—Although the statutes require that a petition for the sale of lands of a decedent be verified by affidavit, the absence of such an affidavit is a mere irregularity which does not deprive the court of jurisdiction and render the proceedings void or subject to collateral attack, the parties interested being in court by due process. (p. 751.)

PROBATE SALE—Time of Publication of Notice.—The statute of Missouri requiring notice of the sale of lands of a decedent to be published for four weeks before the term of court at which the order of sale is to be made, does not require that the publication shall be for the four weeks immediately preceding the term. (p. 752.)

PROBATE SALE — Insufficient Notice — Collateral Attack.—Where a probate court finds and adjudges that a notice of the sale of a decedent's land was published for four weeks, which is the time prescribed by statute, the judgment cannot be assailed collaterally on the ground that only twenty-two days' notice was given. (p. 755.)

PROBATE SALE—Publication of Notice—Defective Proof.—Where a probate court, in its order for the sale of a decedent's land, expressly recites that notice of the sale was duly published, the order is not subject to collateral attack because the proof of publication was made by the publishers as a firm. (p. 755.)

Berkheimer & Dawson, for the appellant.

W. H. Boulware, for the respondent.

³⁸ FOX, J. Appellant has filed an abstract of the entire record in this cause. In the brief, however, there is no detailed statement as to the contents of the abstract, but we

find, after a careful consideration of the record and a verification of it, that the respondent has made a fair statement of the general outlines of this cause, and with some modifications we have adopted it.

This is an action in ejectment brought by plaintiff, now appellant, against the defendant, now respondent, to recover a five-eighths interest in and to forty-nine and five-tenths acres in the northwest quarter of section 15, township 63 north, range 6 west, situate in Clark county, Missouri.

It is admitted and agreed by counsel that the common source of title is William N. Brown. That he died on the thirty-first day of December, 1877, intestate, seised of the land, and that he left as his heirs at law his children, Newton A. Brown, Daniel E. Brown, Henry B. Brown, Rhoda Davis, Nettie Bash, Minie Barclay, Anna B. Robbins. That he left his widow, who died July 26, 1891. That one hundred dollars is the reasonable rental value of the premises per year. That the defendant has been in the possession of this real estate since March 1, 1896.

William N. Brown, the common source of title, died intestate, December 31, 1877, leaving surviving him his widow, Mary A. Brown, and appellant, and other heirs at law. That thereafter, at the May term, 1878, of the probate court of Clark county, Henry D. ³⁹ Brown was duly appointed administrator of said estate, gave bond and entered upon the discharge of his duties as such up to the February term, 1888, of said court, when upon the application to said court by A. D. Lewis, a creditor of said estate, by petition, upon due notice to said Henry D. Brown, such proceedings were had in said court that letters theretofore granted to him were by the said court revoked on account of his failure to discharge his duties as such administrator, and for failure to pay off the legal demands allowed against said estate. That thereafter, and on November 30, 1888, no one of kin appearing to administer, the probate court duly appointed Henry C. Schaffer, public administrator, to take charge of and administer said estate.

On application of Mary A. Brown, widow, at the November term, 1888, of said probate court, by petition, such proceedings were had in said court that at the February term, 1889, the whole of said real estate was set off to her as her homestead herein, which she occupied as such up to the date of her death, which occurred July 26, 1891.

Henry C. Schaffer, public administrator in charge of said estate, on December 1, 1888, filed his petition praying for the sale of said real estate, subject to the homestead rights of the widow therein, and on the twenty-fourth day of December, 1888, at the November term of said court, an order of publication was directed and ordered by said court notifying all parties interested that at the next February term, 1889, of said court and on the first day of said term, being the second Monday in February, 1889, and on the eleventh day of said month, an order would be made to sell the whole or such part as may be necessary to pay the debts of said estate unless the contrary be shown.

At said February term, 1889, the order of sale was duly made by an order of record in said probate court. That thereafter the said administrator, after having the ⁴⁰ same appraised by three disinterested persons at the price of three hundred dollars, as shown by said appraisement, in pursuance of the terms of said order, and at the May term of said court, after having advertised the same, sold said land at public vendue, and E. H. Connable, being the highest and best bidder therefor, became the purchaser thereof and same was duly sold to him for the sum of four hundred dollars. The sale was duly reported to the court and said sale was approved and deed regular on the face of it, containing all the necessary statutory averments, ordered made to him for said real estate, which was done May 25, 1889. On the seventh day of December, 1895, the said E. H. Connable for a valuable consideration executed, acknowledged and delivered to respondent, M. Q. Boulware, a deed for said premises and respondent has had possession thereof, according to the admission in the record, since March 1, 1896.

This presents in a general way what was done in respect to the sale of this land. As to the defects disclosed by the record in the petition, and insufficiency of the publication of notice of application for sale and notice of sale, and the proof of publication, we will fully treat of them during the course of the opinion.

This case was, by agreement, tried before the court, no instructions asked or given by either party, and the finding and judgment was for respondent, and against the appellant, and the latter brings this case here for review by appeal from the judgment of the lower court.

Numerous errors are assigned by appellant as grounds for the reversal of this judgment. The legal propositions submitted to us for consideration, by learned counsel for appellant, may thus be briefly stated:

1. It is insisted that the land in controversy, being the homestead of the widow, was not subject to ⁴¹ sale under the order of sale by the probate court, during the lifetime of the widow.

2. That the sale of the real estate by the administrator was void, for the reason that the truth of the allegations of the petition was not properly verified by affidavit of the administrator.

3. That the probate court did not acquire jurisdiction of the persons interested in said land by reason of the insufficiency of the notice of publication, and the proof thereof by the publishers, hence the order of sale was void and of no force and effect.

4. That the sale by the administrator is inoperative to pass the title by reason of the insufficiency of the notice of said sale.

5. That there was unreasonable delay in the application to the probate court for the sale of this land and for that reason this sale should not be upheld.

We will treat the propositions in the order named.

1. Upon the first proposition involved in this controversy, the question as to the right to sell this land in controversy, which was the homestead of the widow, by order of sale of the probate court, for the payment of the debts of William N. Brown, must be treated as settled and no longer an open question in this state, since the conclusions of this court were announced upon that proposition in the case of *Keene v. Wyatt*, 160 Mo. 1. It will be observed that this case expressly disapproved the rulings in the cases of *Broyles v. Cox*, 153 Mo. 242, and *In re Powell's Estate*, 157 Mo. 151, cited by appellant in this cause, so far as such rulings were in conflict with the conclusions reached in *Keene v. Wyatt*.

2. The next insistence on the part of the appellant is directed to the absence of the signature of the officer administering the oath to the administrator, and the affidavit attached to the petition for the sale of real estate. The affidavit is in proper form and duly signed by the administrator and blank space for the signature ⁴² of the probate judge, who presumably would administer the oath. It is insisted that this failure in respect to the affidavit was fatal to the peti-

tion and rendered the order of sale made in pursuance to this prayer void. We are unable to assent to this contention on the part of the appellant.

In *Rugle v. Webster*, 55 Mo. 246, there was a petition presented to the county court of Polk county, which was exercising probate jurisdiction, for the sale of certain lands belonging to the estate of the deceased. While the petition made all the necessary averments, it was defective in not being accompanied with an account of the administration and a list of the debts owing to and unpaid by the estate and remaining unpaid, as the statute in force at that time required. The affidavit as to the truth of the allegation in the petition, which the statute required to be made, was not made by the administrator in person, but was made by an attorney instead. The court upon this petition ordered the sale of the land and the sale was made in pursuance of it, and at the next term of the county court of Polk county the sale was approved. The deed by the administrator, which was regular in form, was executed and acknowledged to purchaser at the administrator's sale in pursuance to the sale made. The heirs of the deceased in that case brought suit in ejectment, as in this case, to recover the land, and it was urged that the failure of the administrator to make the affidavit and to accompany his petition with an account of the administration and list of the debts due to and unpaid by the estate were such defects in the petition as rendered the order made upon it void. Wagner, J., speaking for the court, in response to the contentions made in that case, thus clearly stated the law: "Although the proceedings may have been irregular and the affidavits not made in literal compliance with the law, yet there are not such jurisdictional facts as would render them wholly void. Sufficient cause might have existed for a reversal in a direct ⁴³ proceeding brought for that purpose, but certainly there is no ground for a collateral impeachment. In the case of *Overton v. Johnson*, 17 Mo. 442, it was held that the accounts, lists, inventories and appraisements which the statute requires to be filed with a petition for the sale of a decedent's real estate are not necessary to give the court jurisdiction, and that a failure to file them would not render the sale void. The court, speaking through Gamble, J., said: 'The jurisdiction is acquired by filing a petition praying the court to do an act or make an order which under the statute the court is competent to do. Whether the petition is in proper

form, or sets forth sufficient facts, or is accompanied with the proper evidence, the court will decide in the exercise of its jurisdiction.' It was for the court, when the petition was presented, to determine its sufficiency, and if it made an erroneous decision, the proper remedy was by appeal."

To the same effect is *Wilkerson v. Allen*, 67 Mo. 502, where the same question arose as to the sufficiency of the affidavit, and it was again held that it was a mere irregularity and was not such a jurisdictional fact as would render the proceeding void. These cases are fully supported in other jurisdictions: *Coon v. Fry*, 6 Mich. 506; *Overton v. Cranford*, 7 Jones, 415, 78 Am. Dec. 244; *Trumble v. Williams*, 18 Neb. 144, 24 N. W. 716; *Kleinecke v. Woodward*, 42 Tex. 311; *Myers v. Davis*, 47 Iowa, 325.

Probate courts of Missouri are established by the organic law, the constitution of the state, and their judgments and proceedings are entitled to the same credit and presumptions accorded to those of general jurisdiction: *Noland v. Barrett*, 122 Mo. 181, 43 Am. St. Rep. 572, 23 S. W. 692.

The order of sale by the probate court in this cause is predicated upon the allegations in the petition, and while there is a requirement by the statute that the petition be verified by affidavit, the absence of such affidavit, in our opinion, was a mere irregularity, and did not deprive the probate court of jurisdiction of the proceedings. ⁴⁴ If the parties interested in said land were in court by due process, the absence of the affidavit in due form was a matter that could be contested upon the presentation of the petition, but that such irregularity does not render the judgment and proceeding void and subject to an attack in a collateral proceeding, we think is too clear for discussion. There is a broad distinction between the proposition involved as presented in this case and the questions involved in the cases of *Barhydt v. Alexander*, 59 Mo. App. 188, and *Kincaid v. Griffith*, 64 Mo. App. 673, cited by appellant. In those cases it will be observed that it was a proceeding under the statute to revive a judgment procured before a justice of the peace, and the affidavit required to be filed was the very basis of the proceeding, without which there could be no jurisdiction. Hence, in order to confer jurisdiction, it was essential that an affidavit in substantial compliance with the statute should be first filed.

3. This leads us to the consideration of the third proposition, which is the most vital one presented by counsel for

appellant, as to the sufficiency of the process by which the parties interested in the sale of the land in controversy were brought into the probate court. It is insisted by appellant that the publication of the notice of application for sale of the real estate in the issues of the paper of January 11, 18, 25 and February 1, 1889, notifying all parties in interest to appear on the second Monday of February, which was February 11th, was not a compliance with the provisions of the statute, and was insufficient to give the probate court jurisdiction of the persons interested in said estate. This publication was made under the provisions of section 148 of the Revised Statutes of 1879, which, so far as it is applicable to this case, provides that the notice "shall be published for four weeks in some newspaper in the county in which the proceedings are had . . . before the term of court at which said order will ⁴⁵ be made." It is argued by appellant that in order to comply with the statute above cited, it was necessary in this case that there should have been a publication in the issues of the paper of February 8, 1889. In other words, it is insisted that this statute means that the publication of the notice shall be for the four weeks immediately preceding the term of the court, and in support of this insistence we are cited to the case of *Young v. Downey*, 145 Mo. 250, 68 Am. St. Rep. 568, 46 S. W. 1086. We cannot agree to this contention by the appellant, and the case to which our attention is expressly directed furnishes no support for such contention. This statute simply requires that the publication of the notice shall be for four weeks, or in other words, twenty-eight days before the term of the court at which the petition for the order of sale is to be presented. The mere fact that ten or eleven or twenty days should elapse between the last publication and the term of the court, by no means vitiates the publication of the notice. The statute does not provide that the publication of the notice shall be for the four weeks immediately preceding the term of court, but it simply provides that it shall be published for four weeks before the term of the court, and if the publication is made for four weeks or twenty-eight days, and if ten or twenty days elapse between the last insertion of the publication and the term of court to which the application is to be made, this is a publication of the notice in compliance with the statute herein referred to, as much as if the publication had been made for the four weeks or twenty-eight days im-

mediately preceding the term of court to which the petition would be presented. In the case of *Young v. Downey*, 145 Mo. 250, 68 Am. St. Rep. 568, 46 S. W. 1086, it was simply said, that the first publication was on September 18, 1876, while the October term of the probate court began on the second day of that month, so that the length of time from the first publication to the first day of court was only twenty-four days, four days less than four weeks. It was there held that the requisite notice was not given ⁴⁶ and the court was without jurisdiction to make the order of sale. With the announcement of the conclusions in that case we are entirely satisfied, but that is not this case. The publication of the notice in the proceeding now under investigation was for four weeks before the term of the court to which the publication was to be made for the sale of the real estate, and it is apparent that between the date of the first publication of the notice, on January 11, 1889, to the first day of the term of the court, which was February 11, 1889, there was a period of thirty-one days, and the notice of publication in this case does not fall within the class of publications denounced by this court in *Young v. Downey*. The publication of the notice in this case fully complied with the statute: *Russell v. Croy*, 164 Mo. 69, 63 S. W. 849; *Ratliff v. Magee*, 165 Mo. 461, 65 S. W. 713; *Young v. Downey*, 145 Mo. 250, 68 Am. St. Rep. 568, 46 S. W. 1086; *Young v. Downey*, 150 Mo. 317, 51 S. W. 751.

4. This brings us to the fourth contention of appellant, in which it is insisted that the administrator's sale was inoperative to pass the title to the purchaser of this land, for the reason that the notice of said sale was not given in accordance with the statute in force at the time the sale took place. It may be conceded that only twenty-two days' notice was given of this sale, when in fact the statute required four weeks' notice prior to said sale in some newspaper printed in the county where the land was situated, if there be one. It must be observed in the discussion of this proposition that at the May term of the probate court of Clark county, Henry C. Schaffer, administrator of the estate of William N. Brown, deceased, made his report of the sale of this real estate. In said report the administrator states that he "did on Saturday, the twenty-fifth day of May, 1889, between the hours of 10 o'clock A. M. and 5 o'clock P. M., of that day, at the south

door of the courthouse in the city of Kahoka, in said county, and during the sitting of the probate court, held in and for said county, expose to sale at public auction to the highest ⁴⁷ bidder, upon the terms mentioned in said order, the real estate above described, having had the same first duly appraised by William McDermott, R. M. Boulware and R. J. Wood, three disinterested householders of said county, they having first been duly sworn as appears by the affidavit of said appraisers, and their certificate of appraisement herewith filed, marked Exhibit 'A,' and having given four weeks' notice of the estate to be sold, and of the time, terms and place of sale by advertisement published in the 'Gazette-Herald,' a newspaper published in this state, as appears by the affidavit of E. B. Christy, the publisher thereof, herewith filed marked 'B,' and at said sale aforesaid E. H. Connable was the highest and best bidder for five hundred and fifty dollars, and the same was stricken off to him." This report of sale as made by the administrator was by the probate court of Clark county, by an order entered of record, duly approved and confirmed, and the administrator was ordered to execute, acknowledge and deliver to said E. H. Connable a deed in due form of law, conveying to said E. H. Connable all the right, title and interest which the deceased had in the same at the time of his death.

By the notice of publication heretofore considered, all of the parties interested in said estate were in court at the time of the approval of this report. The approval of the report was a final judgment from which an appeal would lie, and the record discloses that no appeal was taken. Under that state of facts we are simply confronted with this proposition: The probate court having found and adjudged that the notice of sale had been published for four weeks, and said judgment being by a court whose judgments and decrees are entitled to the same credit and presumption as courts of general jurisdiction, can it be attacked in this collateral proceeding and held void for the reason that insufficient notice of the sale of the real estate had been given by the administrator? We have reached the ⁴⁸ conclusion that it cannot, and this conclusion is based upon the rulings of this court from its very earliest history down to the present time. It was said by this court at a very early period of its organization, in *McNair v. Hunt*, 5 Mo. 300, in discussing the question of notice of sales, that "it appears from the cases cited that, in Spain,

thirty days' notice were at some remote period required, and probably still are, but for what reason the crown of Spain could require thirty days' notice to be given in this then colony, I am unable to see. But even if that were the law, I should say that the fact of the sale was merely voidable, and could not be now questioned in a collateral suit."

The order of sale in cases of this character occupies the same relation to a sale by an administrator that a judgment or decree does to an execution sale by a sheriff: *Evans v. Snyder*, 64 Mo. 516. In the case of *Curd v. Lackland*, 49 Mo. 451, it was expressly ruled that the insufficiency of the notice of sale by a sheriff was simply an irregularity, and where the deed was regular upon its face, such sale was not inoperative by reason of the insufficiency of the notice of sale. In the case of *Jackson v. Magruder*, 51 Mo. 55, it was said by this court that "the judgment of the county court, approving the report of sale, cured the defect, if any, in the advertisement. That was a final judgment from which an appeal might have been taken, and it could not be impeached in a collateral proceeding like this." In *Young v. Schofield*, 132 Mo. 650, 34 S. W. 497, while the point involved in this case was not in judgment before the court in that case, the rule announced in the cases herein referred to, that the failure to give the usual and proper notice under sheriff's sale at most amounts to but an irregularity, was fully recognized. Sherwood, J., speaking for this court, thus expressly recognized such ruling. He said: "But granting that the failure to notify John C. Young of the issuance of the execution to Marion county was a noncompliance with the statute, ⁴⁹ as it undoubtedly was, was it such a failure as amounted to anything more than an irregularity? We are of the opinion that it was not, and in this we do but follow frequent rulings as to the usual notice not being given of ordinary sheriff's sales: *Draper v. Bryson*, 17 Mo. 71, 57 Am. Dec. 257; *Curd v. Lackland*, 49 Mo. 451. See, also, *Harness v. Cravens*, 126 Mo. 233, 28 S. W. 971."

We take it that it is unnecessary to pursue this subject further. That where the judgment of the probate court is regular and recites that proper and legal notice was given for four weeks prior to the sale, such judgment cannot be assailed in this collateral proceeding, and if the plaintiff was injured by reason of the conduct of the parties in procuring the order

of sale and the sale being made upon insufficient notice, those were wrongs that must be remedied by a direct proceeding to set aside the judgment and sale.

The same may be said as to the complaint of appellant as to the proof of publication by Christy & Waggener, the publishers of the paper in which the publication was made. The probate court in its order of sale of this real estate expressly recites the fact to be that due publication of the process had been made, and that recital is no more open to controversy in a collateral proceeding than where it occurs in a judgment of the circuit court. The affidavit as made by Christy & Waggener was in proper form, the defect being that they, as a firm, undertook to make oath as to the matters contained in the affidavit. This was purely an irregularity and the recital in the order of sale and the judgment approving the sale cannot be held void by reason of such irregularity. In *Raley v. Guinn*, 76 Mo. 263, plaintiffs resorted to ejectment to recover land in Schuyler county, under a tax deed executed by the collector of said county on the eleventh day of February, 1887, at a sale which occurred on the sixth day of October, 1874. Henry, J., speaking for the ⁵⁰ court, proceeding to discuss the questions involved, says: "The first point made by defendant's counsel is that the judgment is a nullity, because the printer failed to attach to a copy of the paper his certificate, under oath, of the due publication of the delinquent list, for the time required by law. This the statute (Wag. Stats. 1872, sec. 185, p. 1197) requires, and also that he shall deliver it to the collector, who at the time judgment is prayed, is required to file it as a part of the record of the court." The learned judge in disposing of the point as raised, during the course of the opinion, thus expressed the views of the court upon that question: "The county court of Schuyler county by its judgment found, and it is expressly recited therein, that the collector had given due notice, and that recital is no more open to controversy than where it occurs in a judgment of the circuit court. By the express terms of the statute the judgment of the county court has the same force and effect as one rendered by the circuit court, and that a judgment of the latter reciting 'that defendant was duly served with process,' cannot be collaterally assailed, is too well settled to require any citation of authorities to support the proposition. *Voorhees v. Bank of United States*, 10 Pet. 449,

9 L. ed. 490, a leading case on the subject, has been followed in this, and in most, if not all, the states of the Union." We have carefully considered the cases cited by appellant as to the essential requisites to an affidavit, and an examination of the cases makes it manifest that they have no application to the case at bar. Where the affidavit furnishes the basis of the action, as in the cases heretofore referred to—the revival of judgments before justices of the peace and in attachment proceedings—it may be said that it must substantially comply with the requirements of the law, but it certainly will not be seriously contended that the affidavit to a proof of publication is of such character as makes it essential that the law shall be literally complied with in order to confer jurisdiction upon a court. ⁵¹ The affidavit to a publication by the publisher of it is merely to inform the court that such publication was duly made, and if a court of competent jurisdiction, when it comes to pass upon the question, expressly recites that the order of publication was properly published, that ends the contest as to the truth of that fact in a collateral proceeding.

In a very early period of the history of this court, commencing with the case of *Speck v. Wohlien*, 22 Mo. 310, very strict rules were announced in respect to the observance of the provisions of the statute in the administration of estates in the probate court; however, this rule which prevailed for a number of years in this state has been abandoned on the ground that the same presumption of validity must be entertained in respect to the judgment and orders of the probate court in matters of administration of estates, as are accorded to the judgments and orders of the circuit court. That we may fully appreciate the advanced position of this court upon the subject of proceedings and judgments of the probate court, a brief quotation from the case of *Camden v. Plain*, 91 Mo. 117, 4 S. W. 86, will be justified. In speaking of the probate court of Johnson county, in that case, it was said: "Said court was a court of record having exclusive original jurisdiction within that county in all cases arising under the general laws of the state, relating to the administration of estates, and when in such a case, wherein it became necessary to determine a question of fact, that court, thus having jurisdiction of the subject matter, also in the manner required by law, by its order of publication, acquired jurisdiction

over all persons having an interest in the determination of that question of fact, renders judgment thereon, such judgment must be conclusive on all parties in interest, in collateral proceedings. The doctrine that the judgments and orders of probate courts are entitled to the same presumptions of verity as is accorded to courts of general jurisdiction, proceeding⁵² according to the course of the common law, has been, by the recent decisions of this court, well established, and may now be said to be placed beyond question." To the same effect is *Covington v. Chamblin*, 156 Mo. 574, 57 S. W. 728. It was there announced, in no doubtful terms, that "the order approving the sale of the real estate in question was a final judgment of the probate court, impervious to collateral attack, and subject to impeachment, in a direct proceeding for that purpose only, for defects apparent upon the face of the record going to the jurisdiction of the court, or for fraud."

It is finally urged as a reason why the judgment in this case should be reversed that there was unreasonable delay in the application for the sale of the real estate by the administrator. It is sufficient to say upon this proposition that we have carefully examined the disclosures of the record in this cause. It is apparent that this case was not tried in the lower court upon the theory that there was any unreasonable delay in the application for sale of the real estate, and the question is now presented for the first time. The record shows that the first administration upon the estate in controversy was by Brown, a son of the deceased; that he did not make any application to sell it; and it is further disclosed that upon complaint to the probate court his letters of administration were revoked. Upon the removal of Brown as administrator, the widow of the deceased immediately proceeded in the probate court to have the land in controversy set out to her as a homestead, which was done, and she remained in possession of the homestead up to the time of her death. We are unable to see any injury resulting to the heirs of the deceased, who were claiming this land, by reason of the delay in the application to sell it. When we consider the entire record, the delay in the institution of this suit and assertion of claim to the property in dispute, the appellant is in no position to make complaint as to any delay in the administration of her father's estate.

⁵³ This case was submitted to the court without the aid of a jury, no instructions were asked or given, and finding no

reversible error upon the record as presented, the judgment should be affirmed, and it is so ordered.

All concur, except Burgess, P. J., not sitting.

The Orders and Judgments of Probate Courts are usually accorded the same favorable presumptions and immunity from collateral attack as are those of courts of general jurisdiction: See *Stucky v. Watkins*, 112 Ga. 268, 81 Am. St. Rep. 47, and cases cited in the cross-reference note thereto. Proceedings in probate for the sale of a decedent's land are generally considered conclusive and immune from collateral attack: *J. B. Watkins Land etc. Co. v. Mullen*, 62 Kan. 1, 84 Am. St. Rep. 372, and cases cited in the cross-reference note thereto. If the court has no jurisdiction, however, the proceedings are subject to collateral attack: *Stark v. Kirchgraber*, 186 Mo. 633, 105 Am. St. Rep. 629; *Smith v. Wildman*, 178 Pa. St. 245, 56 Am. St. Rep. 760.

On the Authority of a Probate Court to Order the Sale of a decedent's homestead to pay debts, see *Miller v. Davis*, 69 Ark. 1, 86 Am. St. Rep. 167, and cases cited in the cross-reference note thereto; *Broyles v. Cox*, 153 Mo. 242, 77 Am. St. Rep. 714; *Keyes v. Cyrus*, 100 Cal. 322, 38 Am. St. Rep. 296.

DRAKE v. KANSAS CITY.

[190 Mo. 370, 88 S. W. 689.]

MUNICIPAL CORPORATION—Coal-hole in Sidewalks.—Where a city grants permission to an abutting property owner to maintain a coal-hole in the sidewalk, the duty immediately arises, both on the part of city and the persons constructing it, to use ordinary care to see that it is safe for public use; and if the construction is such that the cover is likely to be displaced, the city is liable to a pedestrian who falls into the hole, although it is without actual notice of the defect, for it has constructive notice from the beginning. (pp. 768, 769.)

MUNICIPAL CORPORATION—Latent Defect in Sidewalk.—It is no part of the duty of persons passing along a sidewalk to look for latent defects therein; it is the duty of the city and its officers to look for defects. (pp. 769, 770.)

MUNICIPAL CORPORATION—Coal-hole in Sidewalk.—Where a pedestrian falls into a coal-hole in the sidewalk, and it appears that on the morning of the accident the occupant of the adjoining property had raised and propped up the cover of the hole, but had done the same thing every day for some two months previous, the city is chargeable with notice of such continuing act, and cannot escape responsibility on the ground that the raising of the cover by such third person caused the accident. (p. 772.)

L. A. Laughlin and R. J. Ingraham, for the appellant.

Frank P. Walsh, Virgil Conkling and E. R. Morrison, for the respondent.

³⁷³ MARSHALL, J. This is an action for twenty-five thousand dollars damages for personal injuries received by the plaintiff on the 24th of May, 1900, in consequence of stepping into a coal-hole in the sidewalk on the south side of Thirteenth street, between Tracy and Forrest avenues, in Kansas City, and in front of house No. 1211 East Thirteenth street. There was a verdict and judgment for the plaintiff for fifteen thousand dollars, and after proper steps the defendant appealed.

The petition alleges that Thirteenth street is a public highway of the defendant city and that at the time of the accident the sidewalk, as maintained by the defendant, was in an unsafe and dangerous condition, in this, "that a certain coal-hole therein, being a circular aperture from one to two feet in diameter, was improperly, unskillfully and negligently constructed, maintained, suffered and permitted to be and remain in the sidewalk; ³⁷⁴ that the cover of said coal-hole was too light for the purposes for which it was used; that the rim around the under side of said cover was too shallow and not of sufficient depth for the purpose for which it was used; that the said rim was too small in diameter, causing the said cover to be in a loose condition when put in its place; that a certain iron frame upon which said cover rested was at or near the level of the balance of the sidewalk, so that when the covering was placed in position, said iron cover protruded above and over the balance of the sidewalk; so that said cover and frame were defective, unsafe, dangerous and insecure and said cover did not sit firmly over said hole, and was thus liable to turn and become displaced by persons stepping upon or against the same, thus opening said hole, and entrapping and affording an unsafe and insecure footing to persons passing over the same"; that the defendant knew, or by the exercise of ordinary care could have known, of the unsafe, dangerous and defective condition of the sidewalk, which condition existed for a length of time reasonably sufficient for the defendant to have ascertained and corrected the same; that while plaintiff was walking upon said sidewalk and exercising ordinary care, and was ignorant of the defective and unsafe condition thereof, he stepped on the cover of said coal-hole, which, in consequence of the defects stated, turned in said frame and plaintiff's leg dropped into said hole, and plaintiff fell violently upon the edge of said cover and upon the sides of said coal-hole, and was injured in a manner,

and to a permanent extent, which, it is only necessary to say, was of the most painful and serious character that could be inflicted upon a man.

The answer admits the character of the defendant city, denies every other allegation of the petition, and pleads contributory negligence of the plaintiff. The case was taken on change of venue from Kansas City to Carroll county, Missouri.

The case made is this: ³⁷⁵ It was admitted that the place where the coal-hole was located was in a sidewalk of a public street of the defendant city. The coal-hole apparatus was produced in court and by stipulation of counsel it was admitted to be in the same condition that it was in at the time of the injury, except that the rim had been surrounded by cement by the defendant. The plaintiff was a man fifty-five years of age at the time of the accident and was engaged in the advertising business, earning from twelve to fifteen hundred dollars a year. He lived at 1306 Michigan avenue, which was east of the place of the accident. On the day of the accident, at about 9:15 o'clock A. M., he was proceeding west on Thirteenth street on his way down town to his business, and while so doing he fell into the coal-hole and received the injuries complained of.

The plaintiff says that the coal-hole was in the middle of the stone sidewalk, and that the top thereof was lying flat, and that he stepped upon it and that it gave way or slipped, so that his foot went into the coal-hole and he fell astride of the cover. He says he saw the coal-hole before he stepped on it, and that the cover was lying perfectly flat in its place.

Mrs. Max Cohn, whose testimony was taken by the defendant, but read by the plaintiff, testified that she boarded at 1215 East Thirteenth street, the house next door to the premises in front of which the coal-hole in question was located; that she occupied the third-story front room, and was sitting at the front window, and first saw the plaintiff standing in front of her boarding-house, and the next she saw he was in the coal-hole; that Thirteenth street, at that point, is thickly built up; that she had seen the cover over the coal-hole slightly raised before the day of the accident, and sometimes it was not in its regular position.

Luther B. Keebaugh, a witness whose deposition was taken by the defendant but read by the plaintiff, testified that he lived at 1215 East Thirteenth street, ³⁷⁶ that he passed the

coal-hole six or eight times a day for several years before the accident and had frequently seen the cover of the coal-hole out of place, with some obstruction placed over the top of the coal-hole; that he had often heard the cover over the coal-hole rattle when persons stepped onto it; that the cover over the coal-hole stood a little above the level of the walk; that that portion of the city was thickly built up and the street was a much-traveled street.

Albert Stedman, a witness for the plaintiff, testified that he was hauling brick for the building of some flats on the other side of the street; that just before the accident he noticed that the cover to the coal-hole was a little off of the hole and one side tipped down about an inch and a quarter or two inches; that it was in such condition about five minutes before the accident; that he did not see the accident but saw the plaintiff in the coal-hole immediately after he had fallen into it, and assisted him to get out of it; that the cover of the coal-hole tipped toward the west and did not rest on the rim of the coal-hole.

J. O. Hogg, a witness for the plaintiff, testified that he was an architect and had experience in providing for coal-holes and covers thereon; that he examined the coal-hole in question after the accident; that there is an iron frame about a quarter of an inch thick that is put in a coal-hole cut into the stone sidewalk; that the cover was between fifteen and sixteen inches in diameter and was about nine-sixteenths of an inch thick; that there was a rim below the under part of the cover; that the same extended about one-fourth of an inch above the sidewalk, that the cover did not fit tight in the frame; that the rim was too shallow, so that the cover projected above the sidewalk; that when a person stepped upon the cover it would fly up out of the frame; that the cover should have been heavier, and the rim should have been deeper to prevent the cover from slipping.

Hugh Matthews, a witness for the plaintiff, testified ⁸⁷⁷ that he was engaged in the business of manufacturing coal-holes, covers and rims, and was a practical machinist and molder; that the coal-hole, cover and rim in question were not properly constructed, the rim being too shallow, and that it should have had lugs on the end or side of it to keep it from slipping; that when the cover is too light, it tips easily when a person steps on it.

The witness, in the presence of the jury, gave a practical demonstration by stepping on the cover of the coal-hole, which had been produced in court, and the cover would tip or slip when stepped on. That he had never seen a coal-hole like the one in question before, and that it was unlike the other coal-holes used in Kansas City.

M. Gleason, a witness for the defendant, testified that he was a member of the police force, and at the time of the accident his beat covered the place of the accident, and that he was at that time on duty; that he did not see the accident but he met the plaintiff as he was being carried away; that he examined the coal-hole and found the cover in position and stepped upon it and found that it was solid; that he had never seen the cover out of place before; that he passed the coal-hole six or seven times a day and frequently stepped on it, and that it did not tilt or slip.

Jacob Miller, a witness for the defendant, testified that he lived at 1301 East Thirteenth street, and had lived there for about four years prior to the accident, and had passed by the coal-hole many times; that in passing he frequently saw the coal-hole open, but that there was always a chair or some kind of a guard to warn people; that he had frequently walked over the coal-hole cover and that it never slipped or gave way.

Nora Miller, a witness for the defendant, testified that at the time of the accident she was living at 1211 East Thirteenth street; that the house was a four-story house and had fourteen rooms, and that she kept boarders ³⁷⁸ there; that she knew the coal-hole in question; that on the morning of the day of the accident she propped up the cover of the coal-hole, from beneath, with a board, so that the cover tilted or was raised at the western side thereof, the cover resting on the rim on the north and south sides; that the east side of the cover did not rest on the rim; that she so propped it up about 6 o'clock in the morning to let fresh air into the coal cellar; that she was not at home at the time of the accident, having left the house about half-past seven, and did not return until about 9 o'clock, and when she returned she learned of the accident, and found the cover in its proper position resting on the rim; that for six weeks or two months before the accident she had been in the habit of so propping up the cover over the coal-hole so as to ventilate the cellar.

Mrs. Miller Samuels, a witness for the defendant, testified that at the time of the accident she boarded at 1215 East

Thirteenth street; that she was standing at the front window and saw the accident; that when she first saw the plaintiff he was walking slowly toward the west looking, she supposed, at the building in the process of construction across the street; that the cover of the coal-hole at that time was lifted, and was raised about six to ten inches above the rim; that she could not see what held it up; that when plaintiff reached the coal-hole, he stumbled or fell, she could not tell which; that she could not see where the cover went as he fell, but after his fall she saw it lying on the opposite side of the hole; that she had never observed the cover to the coal-hole before that time.

Mrs. Lelah Keebaugh, a witness for the defendant, testified that at the time of the accident she lived at 1215 East Thirteenth street; that she did not see the accident; that on the morning of the accident she had observed the cover to the hole; that it was raised up; that it was propped up with a stick, which left an opening of quite a space in the top of the coal-hole; that she had ³⁷⁹ seen the cover out of place prior to the day of the accident; had seen it raised or tilted up, and had also seen it lying on the side of the coal-hole; that when one stepped heavily on the top of the coal-hole, it would move slightly to one side, and if the person did not step off of it, his leg would go down in it; that the coal-hole in front of her house was like the one in question here, and that when a person stepped on one side of it the other end would fly up.

M. S. Howell, a witness for the defendant, testified that the rim of the coal-hole was about flush with the sidewalk.

At the close of the plaintiff's case, the defendant demurred to the evidence, the court overruled the demurrer, and the defendant excepted.

1. The first error assigned by the defendant is the action of the trial court in overruling the demurrer to the evidence at the close of the plaintiff's case.

Defendant admits that the general rule of law is that it is the duty of a city to keep the sidewalks in a reasonably safe condition for public use, and that it is liable for injuries from defects therein, of which it had actual notice or which had existed for such a length of time, prior to the accident, as, "by the exercise of ordinary care, it could have ascertained, and which it had a reasonable time to remedy." But defendant contends that the defect complained of in this case was a latent defect, which by an inspection of the side-

walk from the surface thereof, such as a person of ordinary care would have made, under similar circumstances, would not have been discovered, and therefore this case falls within the principles announced by this court in *Carvin v. City of St. Louis*, 151 Mo. 334, 52 S. W. 210, *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921, and *Buckley v. Kansas City*, 156 Mo. 16, 56 S. W. 319.

This case is easily distinguishable from the three cases relied on by the defendant. In the *Carvin* case there was no defect in the construction of the water ³⁸⁰ meter which caused the accident. The cause of the accident in that case was the accumulation of a small amount of dirt around the flange of the rim of the water meter, on which the cover rested, which raised the cover thereof out of its proper position, and caused it to slip when the plaintiff stepped on it. There was no structural defect in the water meter and it did not appear that the dirt had been allowed to remain on the flange for so long a time as to impute notice to the city.

In *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921, the sleepers under the sidewalk were rotten, the rain had washed the earth away from below the sidewalk, and when the plaintiff stepped on the plank sidewalk, it gave way and he fell. The condition of the sleepers and the gully, so washed beneath the sidewalk, were latent defects, which an inspection from the surface of the sidewalk would not have disclosed.

In *Buckley v. Kansas City*, 156 Mo. 16, 56 S. W. 319, the defect was a crack in the flange, which supported the glass covering over the area-way, and so far as then appeared to this court, the cracks were latent defects, which could not have been discovered from an examination from the surface of the sidewalk.

In the case at bar, however, the defect could have been discovered from an examination or inspection of the coal-hole and its cover made from the surface of the street. The plaintiff tried the case upon the theory of the petition, that the cover to the coal-hole was too light; that the rim around the bottom of the cover was too shallow and too small in diameter, causing the cover to be loose when in its place, and that the iron framework upon which the cover rested was at or near the level of the sidewalk, so that the cover, when placed in position, protruded above and over the walk and did not fit firmly over the hole, but was liable to turn and become dis-

placed by persons stepping upon or against the same, thereby opening the hole and causing the person to fall into it.

³⁸¹ The contention of the plaintiff is that the defect complained of was a structural defect and could have been discovered by an examination or inspection made from the surface of the sidewalk, and that it had existed from the beginning. Thus it easily appears that this case does not fall within the principles laid down in the three cases relied on by the defendant.

There was ample evidence offered by the plaintiff to support the allegations of the petition and the theory upon which the plaintiff tried the case in the court below.

The question, therefore, only remains whether or not the city is liable for such defects in its sidewalks.

Roe v. Kansas City, 100 Mo. 190, 13 S. W. 404, was an action for damages caused by the plaintiff falling in a trap-door on the sidewalk. It appeared that the hinges of the door had been broken and that it was in such condition that by stepping upon some parts of it, it would tip up, and that the accident to the plaintiff occurred in that way. The defect in the door had existed for some months before the accident. The plaintiff recovered in the trial court and the judgment was affirmed by this court.

Barr v. Kansas City, 105 Mo. 550, 16 S. W. 483, was an action for damages caused by the plaintiff falling into a sewer, the cover or grating over which had been improperly constructed and of such a character as to make it too short and too narrow to properly cover the opening. The trial court instructed the jury that it was the duty of the city to provide a reasonably safe and sufficient covering for the hole and that it was liable if it failed so to do. This court said: "If the city officers had actual knowledge of the displacement of the cover and failed to securely cover it within a reasonable time before the accident, they were guilty of negligence. If the hole was open and patent for such a length of time before the accident as that the city officials by the exercise ³⁸² of ordinary care and diligence could have discovered it, and they did not, they were guilty of negligence. . . . The hole could have been securely covered within the hour of the discovery of its condition; besides the displacement was not the result of an accident or the wrongful act of another, but the natural consequence of defects in its original construction by the city, of which it was charged with

notice from the beginning, and which it was under a continuing duty to repair.”

This case was again before the court, 121 Mo. 22, 25 S. W. 562, and it was said: “The case was submitted to the jury on two grounds of negligence of the defendant: 1. A failure to provide a reasonably safe covering for the man-hole; 2. Negligence in leaving the hole uncovered. It is now insisted on behalf of the defendant that there was no evidence of negligence in failing to provide a suitable covering, and hence the issue was improperly submitted to the jury.” The opinion then describes the character of the man-hole and the grating or cover over the same, and then concludes as follows: “This evidence gives a perfect and complete description of the casting and the cover, and it was not necessary to call witnesses to testify in terms that the cover was too small and therefore dangerous. Had such evidence been introduced it would doubtless have been objected that it was not a proper case for expert evidence. The casting and its cover being described, it was for the jury to say whether the cover was reasonably safe. This casting and cover were placed on the surface of a street where it was subject to jars from vehicles, and the conclusion that the cover was too small or not properly supported is a reasonable one—one which the jury could draw from the evidence. There was therefore no error in submitting this issue to the jury.”

Benjamin v. Metropolitan St. Ry. Co., 133 Mo. 274, 34 S. W. 590, was an action for damages for injuries received from falling into a coal-hole in front of the defendant's premises, located ³⁸⁸ on a sidewalk. The plaintiff stepped on the cover over the coal-hole which turned and slipped out of place, by reason of which her foot went into the hole and she was injured. The negligence charged was the improper construction of the coal-hole and cover, and in all essential respects the defect complained of was as serious as that here involved. There, as here, a third person had been permitted by the city to construct and maintain the coal-hole for private benefit and use. This court said: “The principle is well settled that a city, which authorizes excavations in its streets, is not entitled to notice of the dangerous condition in which they have been left, in order to hold it liable for injury to third persons occasioned thereby.”

The theory of the plaintiff's petition and case is, that the casting constituting the top and cover of the coal-hole was

necessarily a dangerous construction, in this, that the cover was too light; that the rim around the under side of the cover was too shallow and too small in diameter, which caused the cover to fit loosely into the iron framework; that the iron framework was at or near the level of the sidewalk, so that the top of the cover, when placed in position on the top of the iron framework, protruded over the edges thereof, and prevented it from fitting firmly over the hole and rendered it liable to turn and become misplaced by persons stepping upon it. The evidence shows that the construction was an unusual one and such as is not in common use in Kansas City. From the description contained in the petition and disclosed by the evidence, it is apparent that it was unlike coal-holes and their covers such as are described in other cases, where there is a flange projecting from the inside of the iron framework on which the cover rested, and where the cover fits entirely inside of the iron framework and is so constructed as to be on the level with the sidewalk. Thus it appears that in this case the construction was that there was a rim underneath the cover, and that instead of the ³⁸⁴ cover fitting into the iron framework it rested on the top thereof, and the edges of the cover extended over the iron framework. From which it is apparent that if the cover was not of sufficient weight, or if the rim underneath it was not deep enough, as the evidence shows was the case here, the result would be that when a person stepped on one edge of the rim it would necessarily cause the opposite side of the cover to rise up, the rim on the bottom of the cover to become disengaged from the iron framework and the lid to slip so as to allow persons to be precipitated into the hole. The defects complained of were shown by the testimony of the experts to be such as would likely produce results such as happened in this case, and in addition thereto, the practical demonstration made by the witness, Matthews, clearly showed that the construction was liable to result just as happened in this case.

It thus appears that this case is wholly unlike the three cases relied on by the defendant, and that there was sufficient evidence to take the case to the jury upon the allegations and proofs made by the plaintiff.

The necessities and convenience of abutting owners may be such as to warrant a city in authorizing such owners to construct and maintain coal-holes in the sidewalks, but their pres-

ence and nature necessarily call for greater care and closer inspection by the city and its officers than ordinary sidewalks demand where no such conditions exist. Where such permission is granted by the city, the duty immediately arises, both as to the city and the persons constructing the same, to use ordinary care to see that they are so constructed as to be reasonably safe for public use. If the construction is such that it is improper or unsafe and the cover is liable to be displaced, the city is not entitled to actual notice, for it has constructive notice from the beginning: *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483; *McGaffigan v. City of Boston*, 149 Mass. 289, 21 N. E. 371; *Tiedeman on Municipal Corporations*, sec. 298; *Roe v. Kansas City*, 100 Mo. 190, 13 S. W. 404.

³⁸⁵ There was therefore no error in overruling the defendant's demurrer to the evidence.

2. The second error assigned is, the action of the trial court in modifying and giving defendant's instruction No. 5. That instruction as asked was as follows: "The court instructs the jury that there is no evidence in this case of actual knowledge upon the part of any official of the defendant city of the alleged defective construction of the coal-hole, rim and cover. [And though you may find and believe from the evidence that said coal-hole, cover and rim were defectively constructed, yet, if you further find that such defective construction could not have been discovered by a person exercising ordinary care and prudence walking over said sidewalk, then your verdict should be for the defendant city.]" The court modified this instruction by striking out the portion in brackets. It is contended that by so striking out such portion, the court authorized a verdict for the plaintiff, or refused to direct a verdict for the defendant, even though the defect was a latent one.

The contention is untenable. The first instruction given for the plaintiff covered the whole theory upon which the plaintiff's case was predicated, and declared that the defendant was liable if the original construction was necessarily a dangerous one, and if the coal-hole in such condition had existed for a sufficient length of time for the defendant to have discovered and corrected the same. The theory of the defendant's instruction No. 5, as asked, was that if the defect was such that it could not have been discovered by a person exercising or-

dinary care and prudence while walking over the sidewalk, the defendant was not liable, even though the original construction may have been a dangerous one.

The instruction, as asked, did not correctly state the law. Persons passing along a sidewalk may or may ³⁸⁶ not discover latent defects in the sidewalk, but it is no part of their duty to look for them. It is the duty of a city and its officers to look for defects. For this reason, the court properly struck out that portion of the instruction. But aside from this, there is really no question of latent defect in the construction. The construction, such as it was, could have been easily detected and ascertained from an inspection of the coal-hole and its cover made from the surface of the sidewalk. It did not even require the removal of the cover to the coal-hole for an inspector to see that it was both an unusual and a dangerous construction. The fact that the top of the coal-hole extended over the rim of the iron framework instead of fitting firmly into the iron framework, was of itself sufficient to attract the attention of an inspector exercising ordinary care, and to cause him to examine it more closely and to condemn it.

Moreover, the liability of the city in this case did not depend upon an actual notice, for it was the duty of the city from the beginning to see that the coal-hole it permitted to be placed in one of its sidewalks was a reasonably safe construction.

There was, therefore, no error in modifying the instruction, but, on the contrary, the instruction as given was more favorable to the defendant than it was entitled to under the plaintiff's theory of the case. The defendant's theory of the case was that the coal-hole, as originally constructed, was a safe construction, but that it was rendered unsafe by the act of Mrs. Miller, who occupied the house abutting that portion of the street, in raising the coal-hole and propping it up early in the morning of the day of the accident, for the purpose of admitting air to the cellar, and that such condition had not existed long enough before the accident to impute notice to the city. This idea was expressed in defendant's instruction No. 8, which was modified and given by the court, and which instruction will be presently considered.

³⁸⁷ 3. The third error assigned is, the ruling of the court in modifying and giving defendant's instruction No. 8.

That instruction as asked was as follows: "The court instructs the jury that though you may believe from the evi-

dence that said coal-hole, rim and cover were defectively constructed so that the cover would slip out of place when stepped upon, yet, if you find that said coal-hole had been raised up or displaced by someone before plaintiff fell, and that because said cover was raised up or displaced, it slipped when plaintiff stepped upon it, and caused plaintiff to fall into the hole, then your verdict should be for the defendant city."

The court modified this by adding, "provided, you further believe and find from the evidence that such displacement was obvious; that is, that it was of such character that an ordinarily prudent person in passing over such walk could have observed and avoided the same."

The instruction, as asked, was manifestly predicated upon the theory that Mrs. Miller had raised and propped up the cover over the coal-hole on the morning of the accident, and that the city had not had time to be charged with notice thereof, and was not liable for the wrong of the witness in so doing. The criticism of the ruling of the court in this regard is, that it permitted the plaintiff to recover, though the cover was so propped up, provided the position was obvious to a passerby, and thereby broadened the issue and authorized a recovery upon an issue not raised by the pleadings, and that the liability of a city for defects in a sidewalk, caused by the acts of a third person, does not depend upon whether the defect was obvious to the person injured or not; and counsel illustrate their position by saying that the instruction as modified would authorize a recovery where the defect was latent, but would not ³⁸⁸ authorize a recovery where the defect was patent or obvious, and that the city is not liable for latent defects, but is only liable for defects which could be observed by the exercise of ordinary care.

The plaintiff did not seek to recover because of defects that were caused by the acts of a third person, and which had not existed long enough to impute notice to the defendant. In other words, the plaintiff did not ask to recover upon grounds or theories not raised by the petition. The instruction was based upon a theory of the case which was raised by the defendant, and not by the plaintiff.

This case, therefore, does not come within the rule laid down by this court in *Chitty v. St. Louis etc. Ry. Co.*, 148 Mo. 64, 49 S. W. 868, and cases of like character. The instruction, as asked by the defendant, declared the law to be that the defendant was not liable for defects caused by the act of a third

person. The instruction was too broad, for a city is liable for defects in a street caused by third persons, if it permits them to remain after it has constructive notice thereof. And the case made by the defendant in this regard was not simply an isolated instance of a defect in a sidewalk caused by the act of a third person, but that defect, according to the witnesses who testified to its existence, had continued every day for six weeks to two months before the date of the accident: *Carrington v. City of St. Louis*, 89 Mo. 208, 58 Am. Rep. 108, 1 S. W. 240; *Fehlhauer v. St. Louis*, 178 Mo. 635, 77 S. W. 843.

The city, therefore, was chargeable with notice of such continuing act of the third person in raising and propping up the cover over the coal-hole, and by the exercise of ordinary care could have remedied it. The theory of the modification by the court was, that the plaintiff was not entitled to recover if the defect caused by the third person consisted of an obvious defect. If the defect was obvious and the plaintiff failed to observe it and was injured, he could not recover from anyone, for his act would have been the proximate cause of the ³⁸⁹ injury. The act creating the defect, in such instance, would have been a remote cause.

The general rule of law is, that when a third person causes a dangerous condition to exist in a highway, the city is not liable for injuries resulting therefrom, unless the condition existed for such a length of time as to impute notice to the city, or unless the city had actual knowledge thereof. If the facts in this case had showed such to be the case, the court should have instructed the jury in the language of the instruction asked. But the same witness who afforded the basis of the instruction, by testifying that she had raised the cover on the morning of the accident, also testified that she had done the same thing every day for six weeks to two months before the date of the accident. Under such a state of facts the court would have been fully justified in refusing instruction No. 8 entirely, and this being true, the modification of that instruction made by the court did not injuriously affect the defendant at all.

4. The defendant next contends that the verdict was the result of passion and prejudice.

The gist of this contention is, that the evidence is so overwhelmingly in favor of the defendant that the court must necessarily find that the jury were guilty of passion or preju-

dice. The argument is, that the plaintiff is the only witness who testified that the cover was lying flat in its place over the coal-hole at the time he stepped on it, and that his testimony is contradicted by that of Mrs. Miller, who says she propped it up on the morning of the accident; by that of Mrs. Keebaugh, who says she saw it so propped up; by that of Mrs. Cohn and Mrs. Samuels, who said that the plaintiff was looking across the street at some houses in process of construction when he stepped on the cover; and by that of Albert Stedman, a witness for the plaintiff, who testified ³⁹⁰ that he saw the cover about five minutes before the accident, and that it was slightly out of position.

If it be conceded that the testimony was just as stated, nevertheless, it would not be sufficient to establish the charge that the verdict was the result of passion and prejudice. For it was the province of the jury to believe or disbelieve any of the witnesses who testified in the case, and it was the privilege of the jury to believe the testimony of the plaintiff if the jury were satisfied that his version of the case was the correct one.

Aside from all this, however, there is no necessary and irreconcilable conflict between the testimony of the plaintiff and other witnesses. It may be true that Mrs. Miller had propped up the cover over the coal-hole, and that Mrs. Keebaugh had seen it so propped up on the morning of the accident, but neither of them testified that it was so propped up at the time of the accident, and Mrs. Miller testified that she was not at home when the accident occurred. Likewise, it may be true, as stated by Mrs. Cohn and Mrs. Samuels, that the plaintiff was looking across the street at the moment he stepped on the cover, yet this would not establish that the cover was lying flat or was propped up or was slightly out of position. It may be true, as stated by Mr. Stedman, that five minutes before the accident the cover was slightly out of position, and yet it may likewise be true that the cover was lying flat and, so far as the plaintiff could see from the position he was in before he stepped on it, that it was apparently in place.

This analysis, however, is not intended as a comment upon the weight of the evidence, but simply to show that there is nothing in the testimony to induce a fair conclusion or belief that the verdict of the jury was the result of passion or prejudice.

A careful examination of the testimony, and of the instructions given and refused, compels the conviction that the case was fairly presented to the jury; that there is substantial evidence to support the verdict; that, in ³⁹¹ view of the serious and painful and permanent character of the injuries inflicted upon the plaintiff, the damages assessed cannot fairly be said to be excessive, and therefore there is no legal ground upon which this court can interfere with the finding of the jury and the judgment of the circuit court. The judgment is affirmed.

All concur.

The Liability of Municipal Corporations to persons injured by reason of defects in public streets is discussed in the monographic notes to *Dudley v. Flemingsburg*, 103 Am. St. Rep. 257; *Goddard v. Harpswell*, 30 Am. St. Rep. 384; *Browning v. Springfield*, 63 Am. Dec. 350.

The Duty and Liability of Property Owners in respect to coal-holes which they construct in the sidewalk are considered in *West Chicago Masonic Assn. v. Cohn*, 192 Ill. 210, 85 Am. St. Rep. 327; *Dickson v. Hollister*, 123 Pa. St. 421, 10 Am. St. Rep. 533; *Jennings v. Van Schaick*, 108 N. Y. 530, 2 Am. St. Rep. 459; *Barry v. Terkildsen*, 72 Cal. 254, 1 Am. St. Rep. 55. The duty and liability of a city in respect to coal-holes in sidewalks are considered in *Duncan v. Philadelphia*, 173 Pa. St. 550, 51 Am. St. Rep. 780. It is the duty of a city, when it allows a house owner to maintain a hatchway in a sidewalk, to see that it is so located and constructed as not to be unnecessarily insecure for persons passing when it is open: *McClure v. Sparta*, 84 Wis. 269, 36 Am. St. Rep. 924.

ST. LOUIS v. LIESSING.

[190 Mo. 464, 89 S. W. 611.]

CONSTITUTIONAL LAW—Regulation of Sale of Milk.—It is competent for the city of St. Louis to fix, by ordinance, the standard of quality of milk sold within the municipality, and to prohibit the sale of milk of a quality inferior to that standard. (pp. 783, 784.)

CONSTITUTIONAL LAW—Regulation of Sale of Milk.—An ordinance which fixes the standard of quality of milk sold in the city, prescribes the method by which the milk is to be tested, and charges the city chemist with the duty of analyzing milk submitted to him by inspectors, which analysis is not conclusive, is not unconstitutional as committing to a single officer absolute power in controlling a necessary article of food. (p. 784.)

CONSTITUTIONAL LAW—Regulation of Sale of Milk.—An ordinance exacting a registration fee of one dollar per annum from milk venders, and an occupation tax of two dollars and a half for each six months of the year, and twenty-five dollars from wholesalers, is not oppressive. (pp. 785, 786.)

CONSTITUTIONAL LAW—Ordinance Invalid in Part.—The provision of an ordinance making it a crime to sell milk below a specified standard, if severable from and not dependent upon other invalid provisions of the enactment, may be susceptible of enforcement. (p. 786.)

CONSTITUTIONAL LAW—Title of Ordinance.—The generality of the title to an ordinance is no objection, so long as it is not made to cover legislation incongruous in itself. (p. 788.)

CONSTITUTIONAL LAW—Title of Ordinance.—Sound policy and legislative convenience dictate a liberal construction of the title and subject matter of enactments to maintain their validity. (p. 788.)

EVIDENCE.—Judicial Notice of Municipal Ordinances will not be taken by the courts of Missouri. (p. 788.)

PUBLIC OFFICER—Manner of Appointment.—Where a municipal charter requires the city chemist to be appointed by the mayor and approved by the council, an ordinance is not invalid because it requires his appointment to be also approved by the board of health. (pp. 788, 789.)

INDICTMENT—Whether Indefinite.—An information for selling milk below the standard fixed by ordinance, which specifically advises the defendant of the time, place, and particular in which he has violated the ordinance, is sufficiently definite. (p. 789.)

E. F. Stone, for the appellant.

Charles W. Bates and William F. Woerner, for the respondent.

⁴⁷⁴ GANTT, J. This is a prosecution by the city of St. Louis against the defendant, for violation of section 18 of ordinance 20,808 of said city. The defendant was fined and appealed to the St. Louis court of criminal correction. The third count in the information is as follows: "It is further charged that T. Liessing, the defendant aforesaid, on the fourteenth day of January, 1903, and on divers other days and times prior thereto, did, opposite 3027 S. Broadway, in the city of St. Louis and state of Missouri, then and there control, carry and expose for sale milk, which said milk did show on analysis less than seven-tenths of one per cent ash, the said ash being estimated by weighing the residue after incineration of the total solids at a dull red heat until all the organic matter had been destroyed. Contrary to the ordinance in such cases made and provided." A motion was made by the defendant to quash this information on twelve different grounds as follows:

⁴⁷⁵ "1. Because the statement filed herein against the defendant charges the defendant with no violation of the city ordinance.

“2. Because the charge herein contained in said statement is so indefinite, vague and uncertain that no valid judgment can be rendered under the same against the defendant.

“3. Because the ordinance upon which the prosecution is based and predicated is unconstitutional and void in that it is repugnant to the provisions of section 28, article 4, of the constitution of the state, and also of section 13, article 3, of the charter of the city of St. Louis, in that said ordinance contains more than one subject and the subject matter of said ordinance is not clearly expressed in the title to the same.

“4. Because said ordinance is unconstitutional and void for the reason that the same is unreasonable in the provisions and it is practically impossible to comply with and enforce the same.

“5. Because said ordinance is unconstitutional and void for the reason that it is repugnant to section 4, article 2, and section 30, article 2, of the constitution of this state, in that it deprives the defendant of his natural rights to liberty and enjoyment of the gains of his own industry and of his property and liberty without due process of law.

“6. Because the ordinance is unconstitutional and void in that it is inconsistent with the statutes of this state.

“7. Because said ordinance is unconstitutional and void in that it is beyond the power of the municipal assembly of the city to enact the same.

“8. Because said ordinance is unconstitutional and void in that the charter of the city of St. Louis contains no express grant to the municipal assembly of the city to enact the same.

“9. Because said laws and ordinance on which ⁴⁷⁶ this prosecution is based are void and unconstitutional in that they were enacted under and contain an unlawful delegation of power.

“10. Because the laws and ordinance in question are void and unconstitutional in that they are class legislation and provide for taxation under the form and name of a license.

“11. Because said ordinance as a whole is void and in violation of section 28, article 3, of the charter of St. Louis, in that sections 27 and 29 of said ordinance are in conflict with the general ordinance of a prior date, to wit, article 9, chapter 11, of ordinance 19,991, which ordinance has not been repealed in express terms by the ordinance under which this prosecution is brought.

“12. Because said ordinance is void and unconstitutional for the reason that it is repugnant to section 1, article 14, of the amendments of the constitution of the United States in that it deprives the defendant of his liberty and property without due process of law and denies him the equal protection of the law.”

Section 18 of ordinance 20,808 of the city of St. Louis is as follows: “Sec. 18. No milk shall be sold, kept, offered or exposed for sale, stored, exchanged, transported, conveyed, carried or delivered, or with such intent as aforesaid be in the care, custody, control or possession of anyone, unless it show on analysis not less than three per cent by weight of butter fat, eight and five-tenths per cent solids not fat, and seven-tenths of one per cent ash, of which fifty per cent shall be insoluble in hot water. Provided, however, that in contested analysis of milk condensed under this ordinance, butter fat shall be estimated gravimetrically by the Adams Paper Coil process; total solids by evaporation, and nonfatty solids by difference between total solids and butter fat, ⁴⁷⁷ and ash by weighing the residue after incineration of total solids at a dull red heat until all the organic matter is destroyed. Anyone violating any one of the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars for each and every offense.”

The testimony of Milk Inspector Comer showed that the defendant was on the day charged in the information delivering milk in his regular milk wagon at 1227 South Broadway, St. Louis; the inspector “took a sample of milk from his wagon,” or rather in his presence from the customer to whom he had just sold the same, and gave as a reason why he did not take it from the can in the defendant’s wagon was because the defendant dumped some cream into the can before the inspector could get a chance to take a sample out of the can. This sample, with proper precaution to preserve same in proper condition, was turned over to the city chemist for analysis on the same day within an hour or two. City Chemist Walter Bernays testified as to the identity of the sample, and that it was received by him on the same day it was taken by the inspector. About 12 o’clock he made the analysis, and testified that this milk contained “sixty-five one-hundredths per cent of ash.” Doctor Bernays described the method used

to determine the ash as follows: "Weigh accurately a platinum dish, add approximately five cubic centimeters of milk, weigh the platinum dish plus the milk accurately; that gives the weight of the milk; evaporate in water both to apparent dryness brought to constant weight, thus determining the total solids. The dish containing the total solids is placed in a larger nickel dish and the whole heated at a low heat somewhat less than a dull red until all the organic matter is destroyed and the ash perfectly white. I tested the heat to see that there was no chloride of sodium and potassium. ⁴⁷⁸ I did this by heating a weighted quantity of pure sodium chloride and potassium in the same manner and ascertained there was no loss of weight. . . . In other words, the method used for determining the ash is accurate; there is no loss." He further testified that there was another method known, which, however, "is a modification of the same method, in which before incineration some nitric acid is added to facilitate incineration," and that with this exception, "it is the same identical method." On cross-examination he defined "ash" to be the mineral constituent of milk left after all the organic matter is destroyed by incineration. He stated that he followed the ordinance and incinerated the total solids in the analysis of the sample of defendant's milk to a dull red heat until all the organic matter was destroyed. He explained that there were other methods of ascertaining the amount of ash in milk, but there was no decided difference in the results, and that they must give practically the same results, though there might be a very slight difference. He also testified that compared with the average cow's milk, the amount of ash required by the ordinance was below the average.

The defendant on his part called three experts—Gottschalk, Richter and Keiser. There were some discrepancies between their testimony and that of Dr. Bernays on scientific points. Gottschalk testified that other methods might be used than that prescribed by the ordinance to determine the per cent of ash. The one he thought the most reliable was a long method not ordinarily carried out on that account. In his opinion, as well as the other two experts, the test imposed by the ordinance was not the best. None of them, however, testified as to any facts in this case, nor did the defendant call any witness to contradict any of the city's testimony as to the actual facts. At the conclusion of the testimony the defendant asked an instruction in the nature of a demurrer to the evidence which

was overruled ⁴⁷⁹ and defendant excepted. He then prayed the court to give the following instructions:

“The court sitting as a court instructs the court sitting as a jury that the ordinance upon which the statement in this case is based is unconstitutional and void, and for that reason this suit cannot be maintained, and the verdict of the court sitting as a jury must be for the defendant.

“The court sitting as a court instructs the court sitting as a jury that the ordinance upon which the statement in this case is based is invalid for the reason that it is unreasonable as a matter of law and as shown to be by the evidence in this case, and the court sitting as a jury must find and return a verdict for the defendant”—which were denied and the defendant duly excepted.

As already said, the court found the defendant guilty of violation of the ordinance and fined him twenty-five dollars and costs. In due time the defendant filed motions for new trial and in arrest of judgment, which were overruled, and exceptions saved, and an appeal allowed to this court. This appeal is in this court on two grounds: 1. Because the city of St. Louis, a political subdivision of the state, is a party to the action; and 2. Because the constitutionality of the St. Louis milk ordinance is directly challenged and involved in the determination of this appeal.

1. The ordinance upon which this prosecution is based is challenged as unconstitutional on various grounds, and we will endeavor to examine them seriatim. It is first said that the production, sale and distribution of milk is a legitimate and lawful occupation, conducted as a matter of right and not as a privilege, and that unusual and arbitrary restrictions cannot be lawfully imposed upon it by ordinance, nor can harsh, expensive and burdensome provisions be enacted against persons engaged in an innocent and useful business so as to deprive ⁴⁸⁰ them of the right to devote their property thereto and destroy their freedom and liberty.

The ordinance assailed has for its subject matter the inspection of milk and cream and the regulation of the sale thereof. It is obviously a police regulation to guard against the sale or dissemination of an unwholesome and injurious quality of milk and cream and to protect the public against imposition, fraud and deception as to an article of food almost universally used by the people. The city of St. Louis, as has been repeatedly declared by this court, derives its charter in pursuance of

constitutional provisions, and the police powers delegated therein are conferred by the state upon the municipality, and so long as they are not inconsistent with the constitution and laws of the state they are valid upon all who come within their scope and authority: *City of St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614, 67 S. W. 872, 64 L. R. A. 679; *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. Rep. 378, 48 L. ed. 1018; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458, 41 S. W. 953. By the express provision of section 26, article 3 of the charter of St. Louis, authority is given "for the inspection of butter, cheese, milk, lard and other provisions," and "to secure the general health of the inhabitants by any measure necessary," and "to pass all such ordinances as may be expedient in maintaining the peace, good government, health and welfare of the city, its trade, commerce and manufactures." None of the objects sought to be secured by the charter are of more importance than the health of its inhabitants, and ordinances having such in view have been often upheld as an exercise of the police power of the state delegated to the city: *City of St. Louis v. Galt*, 197 Mo. 8, 77 S. W. 876, 63 L. R. A. 778; *Ferrenbach v. Turner*, 86 Mo. 416, 56 Am. Rep. 437; *Smith's Mod. L. Mun. Corp.*, sec. 1322 et seq.; *Crossman v. Lurman*, 192 U. S. 189, 24 Sup. Ct. Rep. 234, 48 L. ed. 401. The provisions of the federal constitution, invoked by appellant, were not designed to interfere with the exercise of the police power by the states, and they have not shorn the states of their police power to ⁴⁸¹ regulate trades and occupations so as to guard against injury to the public, nor of regulating the use of property so as to prohibit that which is injurious and dangerous to the community: *St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614, 67 S. W. 872, 64 L. R. A. 679; *State v. Addington*, 77 Mo. 110; *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317; *Powell v. Commonwealth*, 114 Pa. St. 265, 60 Am. Rep. 350, 7 Atl. 913; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, 32 L. ed. 253. Perhaps on no one subject has this police power been affirmed as often as the right to inspect and regulate the sale of milk and cream. Numerous decisions of courts of last resort sustain the right of cities, in safeguarding the health of their citizens and in the prevention of deception upon them, by fixing a reasonable standard of purity, to be scientifically ascertained, of milk and cream sold within their limits and prohibiting the sale of milk of the quality inferior to that required by such

municipal standard. When the courts have come to deal with such municipal regulation they have announced the rule that if the article is universally conceded to be so wholesome and innocuous that the court may take judicial notice of it, the legislature under the constitution has no right to absolutely prohibit it, but if there is a dispute as to the fact of its unwholesomeness for food or drink, then the legislature can either regulate or prohibit it. The constitutionality of the law is not to be determined upon a question of fact in each case, but the courts determine for themselves upon the fundamental principles of our constitution that the act of the legislature or municipal assembly is not to be declared void unless the violation of the constitution is so manifest as to leave no room for reasonable doubt: *State v. Layton*, 160 Mo. 474, 83 Am. St. Rep. 487, 61 S. W. 171, 62 L. R. A. 163, and cases cited. Subject to the foregoing qualification the courts start out with a presumption in favor of an act of the General Assembly or the municipal authorities passed for the regulation and inspection of food products. It ⁴⁸² will scarcely be asserted that all milk is so wholesome and nutritious that there can be no doubt in the mind of the court of its wholesomeness. To do so would be to deny our common experience, and to condemn legislation on this subject in almost every state in the Union. In *People v. Cipperly*, 37 Hun, 319, Learned, P. J., announced that the court not take judicial notice whether milk below the standard is or is not unwholesome or dangerous to the public health. In that case the defendant took the ground that the legislature of New York could not under the constitution prohibit the sale of milk drawn from healthy cows which in its natural state fell below the standard fixed by the act, unless such milk, or articles made from it, was in fact unwholesome or dangerous to the public health. The learned justice asked the question, "Is that to be a question for the jury? If so, the court must charge the jury, in each case, that if they find milk below the standard to be unwholesome, then the statute is constitutional; if they find it to be wholesome, then the statute is unconstitutional. Evidently a constitutional question cannot be settled, or rather unsettled, in that way; the constitutionality would vary with the varying judgments of juries. Either, then, the legislature can forbid the sale of milk below a certain standard, or else cannot do this whether such milk be in fact wholesome or not. If they may fix a standard, they must judge whether or not milk below that

standard is wholesome. The court cannot review that judgment." His views were adopted by the court of appeals in the same case in 101 N. Y. 634, 4 N. E. 107. That it was within the legislative power he adds: "It may be known to the legislature that certain kinds of foods produce different degrees of richness in milk, and it may be known to the legislature that certain kinds of foods will cause a great flow of watery milk, and it may be known by the legislature that this watery milk supplied as food to children cheats them with an appearance ⁴⁸³ of nourishment and deprives them of that nutritious food which they need. It may be known to the legislature that milk below the standard which was fixed by this law is unsuitable for food and should not be sold. At any rate, all that is a matter for the legislature." And the learned judge applies the test that the courts may declare a law unconstitutional when it appears on its face that it is not intended to promote the public health and would have no such results, but that a law fixing the standard for the purity of milk on its face is evidently intended for the public health, and such being the case it was within the legislative power to enact it.

That case is in entire harmony with the decision of this court in *State v. Layton*, 160 Mo. 474, 83 Am. St. Rep. 487. 61 S. W. 171, 62 L. R. A. 163.

In *State v. Campbell*, 64 N. H. 402, 10 Am. St. Rep. 419. 13 Atl. 585, a statute prohibiting the sale of adulterated milk and providing that milk should be deemed adulterated whenever it showed on analysis over eighty-seven per cent water or under thirteen per cent milk solids, was sustained by the supreme court, and this though the defendant offered to show that pure milk from his cows showed less than the required solids. The court said: "The statute tends to discourage the breeding of a certain class of cattle for the supply of the milk market. The difficulty of guarding against the adulteration of milk may have influenced the legislature in fixing a standard of richness. Practically it makes no difference whether milk is diluted after it is drawn from the cow, or whether it is made watery by giving her such food as will produce milk of an inferior quality, or whether the dilution, regarded by the legislature as excessive, arises from the nature of a particular animal or a particular breed of cattle. The sale of such milk is a fraud which the statute was designed to suppress. It is a valid exercise of the police power for the prevention of fraud and the protection of the public health, and is constitu-

tional." And the court ⁴⁸⁴ quoted with approval from Learned, P. J., in *People v. Cipperly*, 37 Hun, 324.

In *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344, a statute fixing the standard of milk at not over eighty-eight per cent water, not less than twelve per cent solids, and not less than two and one-half per cent milk fats, and providing that milk not of that standard shall be deemed adulterated, was sustained by the supreme court of the state, the court saying: "It is equally a fraud on the buyer whether the milk was originally good and has been deteriorated by water, or whether in its natural state it is so poor that it contains the same proportion of water as that which had been adulterated. Again, since it may sometimes happen, though we presume infrequently, that milk as it comes from the cow is below the standard of quality, it would be difficult to prove that its poor quality was due to adulteration, although in a large majority of cases such would probably be the fact. By putting such milk in the same category with adulterated milk, the prosecution is relieved from the difficulty," etc. It was held further that the law was not unconstitutional on the ground that it was unequal and partial in its operation and discrimination in favor of owners of cows which gave rich pure milk and against owners of cows giving milk of inferior quality.

Without repeating the reasoning of the courts it must suffice to say that the same principle is announced in *Weigand v. District of Columbia*, 22 App. Cas. (D. C.) 559; *State v. Fourcade*, 45 La. Ann. 717, 40 Am. St. Rep. 249, 13 South. 187; *State v. Dupaquier*, 46 La. Ann. 577, 49 Am. St. Rep. 334, 15 South. 502, 26 L. R. A. 162; *State v. Stone*, 46 La. Ann. 147, 15 South. 11; *Deems v. City of Baltimore*, 80 Md. 164, 45 Am. St. Rep. 339, 30 Atl. 648, 26 L. R. A. 541; *Blazier v. Miller*, 10 Hun, 435; *City of Norfolk v. Flynn*, 101 Va. 473, 99 Am. St. Rep. 918, 44 S. E. 717, 62 L. R. A. 771; *State v. Smith*, 69 Ohio St. 196, 68 N. E. 1044; *Commonwealth v. Proctor*, 165 Mass. 38, 42 N. E. 335; *People v. Kibler*, 106 N. Y. 321, 12 N. E. 795; *State v. Schlenker*, 112 Iowa, 642, 84 Am. St. Rep. 360, 84 N. W. 698, 51 L. R. A. 347.

So that the validity and constitutionality of the ordinance as a police regulation in its general characteristics ⁴⁸⁵ and its general scope and purpose rest upon satisfactory reasons as well as upon the great weight of authority in this country. The specific provision, the validity of which is in question in this case, is that part of section 18, prohibiting the

sale of milk showing an analysis of less than seven-tenths of one per cent of ash. This in effect is the same as fixing the amount of milk fats, or solid matter, that the milk must contain, which is one of the nutritious ingredients in milk, and the diminution of which deteriorates the quality of milk in a corresponding degree. Authorities above cited are all in harmony on the proposition that it is perfectly competent in the interest of the health of a community to fix the standard of quality, and there is nothing unreasonable or oppressive in the ordinance in that respect.

2. The specific objection to the ordinance made by the defendant is that it commits to the will of a single officer practically absolute power in controlling this necessary article of food. It may be seriously doubted whether this objection is open for review in the condition of the pleadings and evidence, inasmuch as section 18 is the only portion of the ordinance involved in the pleadings or proof, or motion for a new trial, but as the case is thoroughly briefed on both sides on this proposition, we do not deem it amiss to consider this objection at this time.

Referring to this first section of the ordinance providing that the inspection shall be placed in charge of the city chemist, in connection with section 18, it is plain that the fixing of the legal standard to which all milk is subjected is not left to the city chemist, but was adopted by the municipal assembly itself, and not only so, but the method and the standard by which milk is to be tested is also fixed as a definite rule of action by which all persons dealing in milk are to be governed. Dealers in milk would unquestionably have a much more valid grievance if each case had to be submitted to ⁴⁸⁶ the police justice or a jury to determine the standard of milk according to their own ideas and making their individual judgment a standard of right and wrong. The ordinance as passed, instead of leaving the standard of milk to the caprice of the city chemist, contains a permanent legal provision which operates generally and impartially for its enforcement. The fact that the city chemist has charge, with the duty of analyzing all milk submitted to him by the various inspectors, in no sense deprives the seller of milk of any constitutional right. It was pointed out by the supreme court of the United States in *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. Rep. 378, 48 L. ed. 1018, that it was perfectly competent to delegate such a power as is conferred upon the city chemist by this ordinance

to a single individual. In *Wilson v. Eureka City*, 173 U. S. 32, 19 Sup. Ct. Rep. 317, 43 L. ed. 603, an ordinance providing that no person should move any building into or upon any of the public streets, etc., without a written permission of the mayor, or president of the city council, or in their absence a councilor, was challenged on the ground that it committed the rights of the plaintiff to the unrestricted discretion of a single individual and thereby removed them from the domain of the law, but the supreme court of the United States held that the ordinance was valid and was based on the necessity of the regulation of rights by uniform and general laws; and in *Gundling v. City of Chicago*, 177 U. S. 183, 20 Sup. Ct. Rep. 633, 44 L. ed. 725, an ordinance of the city of Chicago authorizing the issue of a license by the mayor of the said city to sell cigarettes, and forbidding their sale without license, was held no violation of the federal constitution, and the amount of the tax named for the license was in the power of the state to fix. In that case the contention was that the ordinance vested arbitrary power in the mayor to grant or refuse such license, and that such arbitrary power was a violation of the fourteenth amendment to the constitution of the United States, but the court held that it was not an unusual case that discretion ⁴⁸⁷ should be lodged by law in public officers or bodies to grant or withhold licenses to keep divers other places for the sale of spirituous liquors and the like, when one of the conditions is that the applicant should be a fit person for the exercise of the privilege and the fact of such offenses submitted to the judgment of an officer or board named. Nowhere in the ordinance before us is an analysis of the city chemist made conclusive of the quality of milk sold or offered for sale by a dealer in milk, but the particular section challenged in this case simply provides one uniform standard of quality of milk and for a uniform test in case of contested analysis of milk condemned under this ordinance. The owner of the milk is in no manner deprived of his right to contest the analysis of the city chemist, but it is his right and privilege when prosecuted for violation of this section to have his milk tested by other competent chemists and by the same standard, so that it cannot be said that such dealers are deprived of due process of law in the protection of their personal rights of property: *State v. Newton*, 45 N. J. L. 469.

The validity of the provision providing for the inspection of milk violates no law or constitutional right of the defendant; the registration fee exacted for the conducting of the milk business is only one dollar per annum, and the occupation tax is only two dollars and a half for each six months of the year, and twenty-five dollars for wholesalers. It is apparent that there is nothing oppressive in the amount of the registration fee or the occupation tax. In *State v. Dupaquier*, 46 La. Ann. 577, 49 Am. St. Rep. 334, 15 South. 502, 26 L. R. A. 162, an ordinance of the city of New Orleans requiring venders of milk to the public to furnish gratuitously on application of the sanitary inspector samples of milk not exceeding one-half pint for inspection and analysis, was held not unconstitutional as forcing dairymen to furnish evidence against themselves or as taking private ⁴⁸⁸ property for public use without compensation. In that case the decision in *Commonwealth v. Carter*, 132 Mass. 12, was freely quoted from. In the latter case it was held that a statute of Massachusetts authorizing inspectors of milk to enter all carriages used in the conveyance of milk, and whenever they have reason to believe any milk found therein is adulterated, to take specimens thereof for the purpose of analyzing or otherwise satisfactorily testing the same, was constitutional, the court saying: "Private property is held subject to the exercise of such public rights, for the common benefit; and in the case of licensed dealers in merchandise, the injury suffered by inspection is accomplished by advantages which must be regarded as a sufficient compensation: *Bancroft v. City of Cambridge*, 126 Mass. 438."

Such a seizure of milk for the purpose of examination is a reasonable method of inspection and does not require a warrant; it is a supervision under the laws by a public officer of a trade which concerns the public health, and is within the police power of the commonwealth: *Commonwealth v. Ducey*, 126 Mass. 269.

In *State v. Newton*, 45 N. J. L. 469, it was held that the ninth section of the act which conferred upon the city inspector of milk power to condemn, pour upon the ground or return to the consignor any milk which he finds upon inspection to be adulterated, was constitutional, and it was further held that the provision as to the analysis of milk was not intended to operate as a rule of evidence to be conclusive of the guilt of the defendant in selling adulterated milk, but it was simply

intended to prohibit the sale of milk under a certain standard of excellence, and this exercise of authority was within the police power of the city.

3. The learned counsel for the defendant has attacked various and sundry other provisions of this ordinance outside of section 18 under which this prosecution was begun and has been maintained. Section 18 is ⁴⁸⁹ clearly severable from any other provision of this ordinance concerning which there can be any doubt, and can be enforced independently of any of the other provisions attacked. The rule is well settled in this state that where certain provisions or ordinances or law are assailed which of themselves are valid and are severable from and not dependent upon invalid parts, the whole enactment will not be declared void because of such invalid portions, provided this will not defeat the general object of the enactment. We must decline to investigate and decide upon the validity of various provisions of this ordinance to which counsel have referred us because in our opinion section 18 is a valid provision and susceptible of enforcement without any reference to such other section of the ordinance: *State v. Bockstruck*, 136 Mo. 335, 38 S. W. 317.

4. It is insisted, however, that this ordinance is unconstitutional and invalid, for the reason that it contains more than one subject and the subject matter of said ordinance is not clearly expressed in the title of the same. In *City of Tarkio v. Cook*, 120 Mo. 1, 41 Am. St. Rep. 678, 25 S. W. 202, it was held that the constitutional provision of this state that no bill should contain more than one subject, which should be clearly expressed in the title, was intended to apply only to legislation and has no application to ordinances of cities: but section 13 of article 3 of the charter of St. Louis is also invoked. Conceding, as we do, that the charter must control, it is perfectly obvious, we think, that this ordinance is not violative of this charter provision. The title of the ordinance is an ordinance to license and regulate the sale of milk and cream, to provide for the inspection thereof and prescribe penalties to prevent the sale and distribution of any but pure, wholesome milk and cream, and to fix the minimum limit of its composition and defining its quality, being ordinance No. 20,808, approved August 27, 1902. All the provisions of the ordinance are germane ⁴⁹⁰ to the one subject of regulating the business of vending milk and cream, and the generality

of the title is not an objection so long as it is not made to cover legislation incongruous in itself. Sound policy and legislative convenience dictate a liberal construction of the title and subject matter of enactments to maintain their validity. There is but one subject to this ordinance and that is clearly expressed in the title: *City of St. Louis v. Weitzel*, 130 Mo. 600, 31 S. W. 1045; *State v. Whitaker*, 160 Mo. 59, 60 S. W. 1068.

5. Again, the defendant asserts that this ordinance 20,808 is void because it conflicts with the former general ordinance not expressly repealed, to wit, ordinance 17,157, or sections 478, 481, 483, 484, 519, 522 of the municipal code, such expressed repeal of inconsistent or conflicting ordinances being required by section 28 of article 3 of the city charter. Ordinance 17,157 was not offered in evidence or referred to in any way in the criminal court, nor is it referred to in the motion for new trial. Nothing is better settled in this state than that courts will not take judicial notice of the ordinances of municipalities: *City of St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915, and cases there cited. It is plain, therefore, that if ordinance 20,808 is in any manner in conflict with that ordinance, it was not made to appear in the trial of the case, and this court cannot consider it.

6. But learned counsel of the defendant, while urging that ordinance 20,808 is invalid because it does not expressly repeal ordinance 17,157, asserts that the latter ordinance is unconstitutional and void because the mode and manner of the appointment of the city chemist is not in compliance with the provisions of the charter, sections 2, 5, 7, 8, 9, 11, 14, of article 4, placing the appointing power in the mayor and city council and nowhere else. His contention is based upon the fact that section 478 of the municipal code creates the office of city chemist, and provides that he shall be appointed by the mayor with the approval of the board of health and ⁴⁹¹ subject to confirmation by the city council. The insistence is that because the ordinance requires the approval of the board of health in the appointment of the city chemist it violates the charter provision. Several answers suggest themselves to this proposition. Sections 478 to 485, inclusive, of the municipal code, creating the office of city chemist, were not introduced in evidence; therefore, strictly speaking, they are not before us for review, but if they are, and conceding all that counsel claims they are, we think there is no merit in the contention.

By that ordinance the city chemist is appointed by the mayor and confirmed by the council, just as the charter requires, and the charter does not anywhere prohibit other qualifications which may be deemed necessary by the municipal assembly. The mere fact that he should be approved by the board of health, in addition to the other qualifications provided by the charter, certainly in no manner disqualifies him. If that requirement was contrary to the charter it would simply be void, but would not affect the other legal steps which were followed in his appointment in pursuance of the charter, but certainly it does not lie in the mouth of the defendant in this case to object that greater qualifications were required and demanded of the city chemist than provided by charter, and the same may be said of the other point that under section 484 the removal of this officer differs from that pointed out in the charter, since the ordinance itself says that he should be subject to all the laws and regulations governing city officers; that the municipal assembly had the right to create the office of city chemist, and define his duties under sections 28 and 45 of article 4 of the charter, and to provide for his removal, section 26 of article 3 of the charter, there can be no sort of question.

7. The information was and is sufficient. It specifically advised defendant of the time and place and the particular in which he had violated the ordinance. ⁴⁹² Nothing more definite was necessary to apprise the defendant of the nature of the complaint against him. The testimony was sufficient to justify the court in finding for the plaintiff, and outside of the attack on the validity of the ordinance, there was practically no defense. That the defendant sold milk at the time and place charged which fell below the legal standard there can be no reasonable doubt. We hold the ordinance to be a valid exercise of the police power conferred upon the city, and not open to any of the objections urged against it, and the judgment is accordingly affirmed.

Brace, C. J., Marshall, Burgess, Valliant, Fox and Lamm, JJ., concur.

The Provision of an Ordinance Requiring Venders of Milk within the city to register with the health commissioner and pay a registration fee, is upheld as a valid police regulation in St. Louis v. Grafeman Dairy Co., 190 Mo. 492, 89 S. W. 617. An ordinance prohibiting the sale of cream which contains less than twelve per cent of butter fat is pronounced a valid exercise of the police power in St. Louis

v. Renter, 190 Mo. 514, 89 S. W. 628. And in *St. Louis v. Grafeman Dairy Co.*, 190 Mo. 507, 89 S. W. 627, it is held that an ordinance forbidding the sale of milk unless it shows on analysis not less than three per cent by weight of butter fat, "estimated gravimetrically by the Adams paper coil process," cannot be said, as a matter of law, to prescribe an unreasonable method for ascertaining the amount of butter fat. In *St. Louis v. Polinsky*, 190 Mo. 516, 89 S. W. 625, an ordinance prohibiting the sale of milk and cream containing coloring matter is declared constitutional: See, in this connection, the note to *State v. Rogers*, 85 Am. St. Rep. 400. So, in *St. Louis v. Schuler*, 190 Mo. 524, 89 S. W. 621, an ordinance forbidding the sale of milk containing a preservative is pronounced constitutional. It is within the police power of a state to prohibit the sale of adulterated milk: *State v. Schlenker*, 112 Iowa, 642, 84 Am. St. Rep. 360. But a statute which prohibits the preservation of dairy products except by the use of salt, sugar, and spirituous liquors, and prohibits their sale, no matter how harmless the ingredients used may be, or how efficiently they attain their purpose, is an improper exercise of the police power: *People v. Biesecker*, 169 N. Y. 53, 88 Am. St. Rep. 534. An ordinance declaring that no dairy or cow-stable shall be established or maintained within the limits of the city without permission from the municipal assembly by ordinance is not unconstitutional: *St. Louis v. Fischer*, 167 Mo. 654, 99 Am. St. Rep. 614. Neither is a provision of a city sanitary code providing that no milk shall be sold within the limits of the city without a permit from the board of health: *People v. Vandecarr*, 175 N. Y. 440, 108 Am. St. Rep. 781. As to the constitutionality of ordinances providing for the inspection of milk and requiring venders of milk to take out a license, see *Norfolk v. Flynn*, 101 Va. 473, 99 Am. St. Rep. 918.

STATE *v.* GORDON.

[191 Mo. 114, 89 S. W. 1025.]

HOMICIDE.—Words of Reproach, however grievous, do not constitute a provocation sufficient to free a person committing a homicide from the guilt of murder. (p. 797.)

SELF-DEFENSE.—A Person Who Applies Opprobrious Language or insulting epithets to another, thereby provoking an attack which he voluntarily resists, has a right of self-defense. (p. 798.)

ASSAULT.—Opprobrious Words or insulting epithets are not such a provocation as will justify a felonious assault. (p. 800.)

SELF-DEFENSE—Voluntarily Engaging in Difficulty.—One does not forfeit the right of self-defense merely because he voluntarily engages in a difficulty. (p. 801.)

SELF-DEFENSE.—Mere Words of Reproach or opprobrious epithets do not constitute such a provocation as will put the speaker in the wrong, if it becomes necessary for him in his own defense to kill the person to whom they are addressed when he makes an attack. (p. 802.)

SELF-DEFENSE—Apprehension of Danger.—It is not necessary, in order to acquit on the ground of self-defense, that the danger should have been real or actual, or that danger should have been impending and about to fall upon the defendant; it is necessary only that the jury believe that the accused had reasonable cause to apprehend that there was immediate danger of a design to commit a felony or to do great bodily harm to the defendant about to be accomplished. (p. 803.)

NEW TRIAL—Incompetency of Jurors.—It would be a flagrant abuse of discretion on the part of a circuit court in refusing a new trial on the ground of the incompetency of some of the jurors in a criminal trial, to justify an interference by the supreme court. (p. 804.)

O. Guitar, S. Turner, J. L. Stephens, J. C. Gillespy, E. W. Hinton and W. M. Williams, for the appellant.

Herbert S. Hadley, attorney general, and John Kennish, assistant attorney general, for the appellee.

¹¹⁷ GANTT, J. On the eighteenth day of October, 1902, the grand jury of Boone county, Missouri, at the October term of the circuit court, returned an indictment against the defendant, charging him with murder in the first degree of Hugo G. Doelling on the eighth day of July, 1902. The defendant was duly arraigned upon said indictment and entered his plea of not guilty thereto. At the February term, 1904, the defendant was put upon his trial before a jury, and was convicted of manslaughter in the fourth degree, and his punishment assessed at imprisonment in the state penitentiary for a term of two years. Motions for new trial and in arrest of judgment were filed in due time, heard and overruled and exceptions saved, and from the judgment and sentence the defendant appealed to this court.

The evidence on behalf of the state tended to prove the following facts: On the eighth day of July, 1902, Hugo G. Doelling was the proprietor of and conducted a restaurant in the city of Columbia, Boone county, Missouri. He was living with his wife and child in rooms immediately above the restaurant, and had lived in the city about one year. The defendant was an attorney at law, residing and ¹¹⁸ practicing at said city. An account against Doelling amounting to about forty dollars had been placed in the hands of the defendant for collection. It appears that the deceased had been slow in the payment of this bill, and the defendant in the discharge of his duty to his client had visited Doelling several times prior to the 8th of July, 1902, to collect the same. On the 8th of July, defendant's client who owned the account had called at defendant's office during his absence and requested defendant's father to ask the defendant to call at his hotel at the noon hour to see him in regard to this account. When the defendant received this information, he took the account and started to the hotel; he went first to the restaurant of Doelling and went in to see Doelling about it. Several people

were in the restaurant at the time eating dinner; Doelling was busy in the dining-room, and when the defendant entered the front room of the restaurant, Doelling came from the dining-room to meet the defendant in the front room. It appears that Mrs. Doelling was near where they met. According to the dying declaration of the deceased, when the deceased approached the defendant, the defendant presented him the account and said, "What are you going to do about this bill?" and the deceased said, "Wait; come in after dinner," and the defendant said, "You son of a bitch, I won't do it; I will not wait," to which Doelling replied, "How dare you come into my house and call me such names?" To which defendant replied, "You son of a bitch, I will kill you besides." At this point the deceased in his dying declaration says when he said this, "I struck him with my fist, and he then pulled his knife and cut me." Mrs. Doelling did not remember seeing her husband strike him, but says that immediately after the hot words passed between them they were in a scuffle before she realized anything. The conversation between the deceased and the defendant was in such low tones that none of the persons who were taking their dinner at the time observed¹¹⁹ that any difficulty existed between the parties at all until their attention was directed by the scuffle between the defendant and the deceased, and none of them testified as to who began the difficulty. After they had scuffled a few seconds, Doelling put his hand on his side and said, "He has stabbed me," and ran out of the door crying "Murder." Doelling then ran to the corner of the block, and then out diagonally into the middle of the street. As Doelling and the defendant separated in the restaurant, the defendant was seen holding a knife in his hand. Some of the witnesses called it a dagger, some called it a "spring button" knife, one witness said the blade was about five inches long. As Doelling went up the street the defendant followed, and when Doelling went out into the middle of the street the defendant continued straight ahead and went to his room. The evidence on behalf of the defendant tends to show that the deceased felt unkindly toward him because he had insisted on his paying the account. It was in evidence that the deceased upon one occasion, speaking of the defendant, said, "If that G——d —— red-headed Fleet. Gordon comes back here bothering me about that thing any more, I will break his neck and stamp him through the floor." The defendant testified that when he

went into deceased's place of business, the deceased approached him and in an angry voice asked him what he wanted there, and that defendant replied politely that he had come again to see about the payment of that account, and the deceased requested him to call later in the evening; that thereupon the defendant told him that he had held this account for quite a while and had frequently been disappointed in the promises of the deceased, and was tired fooling with him, and that thereupon, without more, the deceased struck him a heavy blow in the temple; that the blow dazed and staggered the defendant, and thereupon the deceased grabbed the defendant with his left arm around his head, pressed the defendant to his body and ¹²⁰ began choking him, and that while in this position, the defendant pulled his knife out of his pocket and cut the deceased in order to liberate himself and prevent the deceased from inflicting great bodily harm upon him. After going into the street Doelling was assisted upstairs to his rooms and the surgical examination revealed that he had received three stab wounds, one on the left shoulder, commencing at the spine and running toward the neck; a second one, about three inches from the spine between the ninth and tenth ribs, about an inch long; this second wound went straight in about two and a half inches, cutting the intercostal artery and penetrating the lung. The third wound was between the eighth and ninth ribs, about two and a half inches deep and cutting into the loop of the intestines. These wounds were fatal, and Doelling died that night about half-past ten o'clock. The evidence also discloses that the deceased, Doelling, was a large, athletic and powerful man, weighing, according to the different judgments of the witnesses, from one hundred and sixty-five to one hundred and seventy-five pounds, and that the defendant Gordon is physically small, much under the average of strength and power.

The court instructed the jury on murder in the first degree and second degree and manslaughter in the fourth degree. For the state the court gave instruction No. 10 in the following words: "If the jury believe and find from the evidence that the defendant had an altercation with Hugo G. Doelling, which resulted in the death of said Doelling, and that the defendant commenced such difficulty or voluntarily entered into the same with the felonious intent to take advantage of the quarrel thus begun and to kill said Doelling or to do him some great bodily harm, then there is no self-defense in this case,

and the jury will not acquit the defendant on that ground. And this is true, no matter how violent defendant's passion became or hard he was pressed, or how imminent his peril may have become during said difficulty. You are ¹²¹ further instructed, however, that although you may believe from the evidence and beyond a reasonable doubt that defendant had an altercation with Hugo G. Doelling, which resulted in the death of said Doelling, and that said defendant brought on or voluntarily entered into said difficulty, during the progress of which difficulty defendant intentionally stabbed and killed said Doelling, yet if you further find from the evidence that he did not bring on or enter into said difficulty with the view to take advantage of the quarrel thus begun and to slay said Doelling or to do him some great bodily harm, then the defendant cannot be justified on the ground of self-defense, and the killing was manslaughter in the fourth degree, and the jury will so find, no matter how hard pressed defendant was or imminent his peril may have become during said difficulty."

The court also modified instructions Nos. 1 and 2 asked by the defendant by insertion of the words "if necessary," so as to make said instructions read as follows:

"1. If the jury believe from the evidence that at the time of the killing of the deceased, Doelling, as charged in the indictment, the defendant Gordon went to the business house of said Doelling, in Columbia, to collect a claim theretofore placed in his hands as an attorney, for collection, and that then and there an angry controversy suddenly arose between said parties, followed by blows inflicted with his, Doelling's, fists on the head, face or body of said Gordon, and that said Doelling was a large, athletic and powerful man, and that Gordon was a physically small man, under the average of strength and power, and that he had then and there entertained a design to do him [Gordon] some great personal injury, with his fists, by reason of his [Doelling's] superior physical strength, and that there was then and there imminent danger of the accomplishment of such design, then the defendant Gordon was justified under the law in cutting or stabbing deceased and even ¹²² to kill him [deceased] if necessary to prevent the accomplishment of such design, even though the jury shall further believe from the evidence that said Doelling was unarmed at the time.

"2. If the defendant had any reasonable cause to believe from the words, acts and conduct of the deceased that he

had a design to do him some great personal injury, and that such design was about to be accomplished, then defendant had a right to act on appearances and to cut or stab deceased [if necessary] to prevent the accomplishment of such design, and in this connection the jury are further instructed that defendant was not required to nicely gauge the force used, but that he could use any means that appeared reasonably necessary under the circumstances. Neither is it necessary to this defense that his danger should have been real or actual, or that it should have been impending and about to fall, but if he had reasonable cause to believe, and did believe these facts, and cut the deceased to prevent such expected harm, then you must acquit on the ground of self-defense."

The other instructions will be noted as far as necessary in the discussion of the case, together with the objections of the defendant to them.

1. One of the principal contentions in this case, and one which requires consideration, is that the court erred in giving the tenth instruction on behalf of the state. This instruction is set forth in full in the statement which accompanies this opinion. No criticism is made on the first clause of this instruction, which told the jury that if the defendant brought on the difficulty with a felonious intent to kill the deceased, or to do him some great bodily harm, then the defendant could not be justified on the ground of self-defense, as a legal proposition, where the evidence warrants such an instruction, but it is earnestly insisted that the latter portion of the instruction in effect advised the jury that although the defendant voluntarily entered into the difficulty ¹²³ without any felonious intent and without any purpose to do great bodily harm and after the same had been brought on by the deceased, the jury were bound to ignore any evidence tending to show self-defense, and must at all events convict defendant of manslaughter. On the part of the state it is insisted that this is a misconstruction of the instruction that this portion of the instruction was not attempting to deal with the question of self-defense, but its purpose was to declare the law as announced in *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14, in which the distinction was drawn between the perfect and imperfect right of self-defense. In that case this court accepted the doctrine announced in *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795, as follows: "It may be divided into two general classes, to wit, perfect and imperfect right

of self-defense. A perfect right of self-defense can only obtain and avail where the party pleading it acted from necessity, and was wholly free from wrong or blame in occasioning or producing the necessity which required his action. If, however, he was in the wrong—if he was himself violating or in the act of violating the law—and on account of his own wrong was placed in a situation wherein it became necessary for him to defend himself against an attack made upon himself which was superinduced or created by his own wrong, then the law justly limits his right of self-defense, and regulates it according to the magnitude of his own wrong. Such a state of case may be said to illustrate and determine what in law would be denominated the imperfect right of self-defense. Whenever a party by his own wrongful act produces a condition of things wherein it becomes necessary for his own safety that he should take life or do serious bodily harm, then indeed the law wisely imputes to him his own wrong and its consequences to the extent that they may and should be considered in determining the grade of offense which but for such acts would never have been occasioned. . . . How far and to what extent ¹²⁴ he will be excused or excusable in law must depend on the nature and character of the act he was committing, and which produces the necessity that he should defend himself. When his own original act was in violation of law, then the law takes that fact into consideration in limiting his right of defense and resistance whilst in the perpetration of such unlawful act. If he was engaged in the commission of a felony, and, to prevent its commission, the party seeing it or about to be injured thereby makes a violent assault upon him, calculated to produce death or serious bodily harm, and in resisting such attack he slay his assailant, the law would impute the original wrong to the homicide and make it murder. But if the original wrong was or would have been a misdemeanor, then the homicide growing out of or occasioned by it, though in self-defense from an assault made upon him, would be manslaughter under the law.”

Bishop in the second volume of Criminal Law, eighth edition, section 701, states the rule in these words: “A common case is where two persons, upon a sudden quarrel, engage in mutual combat; then if either one, in the heat of it, kills the other, though with a deadly weapon, the offense is in most circumstances only manslaughter. When the combat has become mutual, it ordinarily ceases to be of importance by

which party the first blow was given. And, as we have seen, it makes no difference though the blow which proved fatal was, while prompted by the heat of the fight, inflicted with the intent to take life." Thus it will be observed that in Partlow's case this court held that the right of perfect or imperfect self-defense depended upon the intent with which the assailant brought on the quarrel.

If he provoked the combat, or produced the occasion in order to have a pretext for killing his adversary, or doing him great bodily harm, the killing will be murder in the first degree, no matter to what extremity he may have been reduced in the combat. If, on the other ¹²⁵ hand, he had no felonious intent, intending merely an ordinary battery, and during the progress of the fight is compelled to take the life of his adversary in order to save his own, he is guilty of manslaughter; or if, having entered into a fight without felonious intent, he seeks in good faith to abandon it and withdraws as far as he can, and his adversary still pursues him, then if necessary to save his own life he slay his opponent, he will be justified.

At common law words of reproach, how grievous soever, were not provocation sufficient to free the party killing from the guilt of murder, nor were contemptuous or insulting actions or gestures without an assault upon the person, nor was any trespassing against lands or goods to have the effect to reduce the guilt of killing to a grade of manslaughter; the provocation must consist of personal violence: 1 East's Pleas of the Crown, 233; 4 Blackstone's Commentaries, 201; State v. Wieners, 66 Mo. 13. And the common-law rule in this respect is firmly established in this state by a long line of decisions: State v. Starr, 38 Mo. 270; State v. Branstetter, 65 Mo. 149; State v. Hill, 69 Mo. 451; State v. Elliott, 98 Mo. 150, 11 S. W. 566; State v. Gartrell, 171 Mo. 489, 71 S. W. 1045.

Recurring now to the latter clause of instruction No. 10 given by the court, and measuring it by the foregoing established principles of criminal law in this state, and in the light of the testimony, was it a correct guide to the jury, or is it open to the objection urged by the defendant on this appeal? It is to be observed in the first place that it predicates the guilt of the defendant of manslaughter in the fourth degree upon one of two alternatives, either that the defendant brought on, or voluntarily entered into the said difficulty and stabbed and killed Doelling, and in either case deprived him

of the right of self-defense. It does not tell the jury that if the defendant brought on the difficulty by any wrongful or unlawful act of his with a design to commit a battery or an assault without any felonious ¹²⁶ intent to take advantage of the quarrel thus begun and to kill Doelling or do him some great bodily harm, then he was guilty of manslaughter only. But it, in effect, directs the jury that if he voluntarily entered into the difficulty, even though he had committed no assault or offered any personal violence to the deceased, but had only applied an insulting epithet or opprobrious language to the deceased, and the deceased, upon this provocation only, had assaulted him and the defendant had voluntarily resisted the assault thus made upon him by the deceased, still he had no right of self-defense.

It has been ruled in various cases by this court that self-defense is an affirmative, intentional act, and in that sense is voluntary, and while, perhaps, it was too strongly put in *State v. Rapp*, 142 Mo. 443, 44 S. W. 270, to say that, "Voluntarily entering into a difficulty is not an ingredient of any homicidal crime," as was said in that case, still we think it is clear that when one is assaulted by another and he neither brought on nor voluntarily entered into such a difficulty with a view to take advantage of a quarrel begun between him and his opponent, he does not forfeit his right of self-defense by voluntarily resisting the assault made upon him, and if the circumstances are such that when thus assaulted he has reasonable cause to believe and does believe that his opponent then and there entertains a design to kill him or do him some great bodily harm, and there is imminent danger of the accomplishment of such design, then he may resist the accomplishment of such a purpose by killing his adversary to prevent the accomplishment of such a purpose. In the instruction we are considering, the court told the jury that although they might "find from the evidence that the defendant did not bring on or enter into said difficulty with a view to take advantage of the quarrel thus begun and to slay Doelling or to do him some great bodily harm, the defendant could not be justified on the ground of self-defense, ¹²⁷ and the killing was manslaughter in the fourth degree, no matter how hard pressed defendant was or how imminent his peril may have become during said difficulty." In other words, although the jury might have found that the defendant did no more than apply words of abuse and opprobrious epithets to the deceased

Doelling, and did not assault him, and that Doelling first assaulted the defendant by striking him with his fist, and was the aggressor in the difficulty, yet if the defendant voluntarily entered into the difficulty to the extent of defending himself, then the defendant forfeited his right of self-defense. While it may have been the intention of the court to have instructed the jury that if the defendant provoked the combat or produced the occasion intending merely an ordinary battery, and during the progress of the fight was compelled to take the life of Doelling in order to save his own, he was guilty of manslaughter, we think the instruction failed to declare the law in such circumstances, but entirely deprived the defendant of the right of self-defense if he voluntarily entered into such difficulty, though his only purpose was to defend himself against the unlawful assault of Doelling upon him. It is insisted by the attorney general that this instruction in no manner attempts to deal with the question of self-defense save to eliminate it under the facts predicated, and that the doctrine of self-defense was fully presented in another instruction on that subject. We agree with the attorney general that the instruction eliminates the right of self-defense from the case if the jury should find that the defendant voluntarily entered into the combat even to defend himself against the assault first made upon him by the deceased, Doelling, an opponent greatly his superior in weight and strength, and even though in the combat thus commenced by Doelling there was reasonable cause to apprehend he was about to slay defendant or do him some great bodily harm. We concede that there has been much indefinite language used in defining ¹²⁸ the rights and duties of parties in these homicide cases, and that this court has in some cases approved instructions much like the one under consideration, but since the decision in the Partlow case, the circuit courts and this court have discarded the doctrine that the mere voluntarily entering into a difficulty in defense of one's life or limb deprives him of his right of self-defense.

That we may not be misunderstood, we hold there is a radical and well-defined distinction between the right of one who brings on or provokes a difficulty with another with the felonious purpose of wreaking his vengeance by killing him, to avail himself of the right of self-defense, even though in the attempt to perpetrate his crime he finds himself in imminent peril, and the right of one who neither seeks nor

brings on a difficulty, but who finding himself assaulted exercises his right of self-defense. Likewise, we think it is equally clear that if one wrongfully commences a difficulty by assaulting another and only intends to commit a misdemeanor or ordinary battery, and in the course of the combat finds it necessary, in order to save his own life, to slay his adversary, he still has the imperfect right of self-defense, and a homicide committed by one under such circumstances, even though he was at fault in the beginning, is only manslaughter, because he had no felonious purpose in bringing on or provoking the difficulty, and yet such a case is different from that which is disclosed in the record before us. Doelling, the deceased, in his dying declaration, and the defendant, the only two witnesses who speak of the commencement of the combat in which defendant stabbed Doelling, both agree in saying that the deceased assaulted the defendant by striking him a blow with his fist on the side of the temple. Deceased says he did this because defendant applied a foul epithet to him, and the defendant drew his knife after he was struck by deceased and stabbed deceased. On the other hand, defendant testified he did not use the foul language attributed to him, but said to deceased ¹²⁰ that he, defendant, "was d——n tired of fooling with him and the account too," and thereupon deceased struck him with all his might in the temple, and a fight then ensued in which deceased got the defendant around the neck with his left hand and pounded him with his right fist and while in this situation defendant drew his knife and stabbed deceased.

Now, upon the conceded facts, what was the right of the defendant? Conceding that deceased was right and defendant wrong as to the use of the insulting epithet, and that defendant did apply the opprobrious terms to deceased, clearly this was not a provocation which would justify deceased in making a felonious assault upon defendant, and if he had killed defendant upon such a provocation his offense would have been murder, not manslaughter.

In *Boatwright v. State*, 89 Ga. 140, 15 S. E. 21, it appeared that the deceased, under provocation of opprobrious words, attacked the defendant with a stick, and it was held that "where a battery with a weapon likely to produce death was being committed by the deceased upon the slayer when the mortal blow was given, the fact that he provoked the battery by the use of opprobrious words would not put the slayer

in the wrong for resisting it so far as was necessary to his defense; and a seeming necessity, if acted upon in good faith, would be equivalent to a real necessity."

In *Butler v. State*, 92 Ga. 601, 19 S. E. 51, it was ruled that if the assault upon the accused was made with a weapon likely to produce death and in a manner apparently dangerous to life, the fact that the accused provoked the assault by opprobrious words would not put him in the wrong for resisting it so far as necessary to his defense. And this must be true in this state. Either the law is that mere words of reproach or opprobrious epithets are not a sufficient provocation to justify an assault upon the person using them, or they are. If they are not, as this court has always declared, then the deceased ¹³⁰ was not justified in law in assaulting and striking defendant, even though we accept deceased's account of the beginning of the difficulty; and this being true, defendant was not in the wrong when resisting the assault thus made upon him, and it was not correct to apply to him the law as to one who was in the wrong in the first instance, either in provoking a difficulty with a design and intent to slay his adversary, or even the case of one who sought or provoked a difficulty by a wrongful act but intended to commit only a misdemeanor or battery. In this case, if the evidence of the deceased and defendant, who alone testify as to the commencement of the difficulty, is to be credited, defendant did not give the deceased any provocation which the law recognizes which would have justified the assault made by the deceased upon defendant, and hence, the defendant had a right to defend himself against that assault and to do so voluntarily, and considering the great disparity in weight and size and the character of the assault, it should have been submitted to the jury whether defendant had not reasonable cause to apprehend that deceased was about to kill him or do him some great bodily harm. Our conclusion is that in the light of the more recent decisions of this court since the *Partlow* case, notwithstanding there are cases which seemingly conflict with the view, it is error to instruct that a defendant in a personal altercation forfeits the right of self-defense merely because he voluntarily engages in a difficulty. The occasions on which this right is forfeited have been pointed out in the foregoing excerpts from the decision in *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14, and in cases cited. The tenth

instruction as applied to the facts in this record was, in our opinion, misleading and erroneous. It was not made applicable to the state of the testimony and should not have been given even when modified by omitting the clause as to "voluntarily entering into the difficulty," without fully advising the jury as to what constitutes ¹³¹ provocation that will justify an assault and as to what is meant by "provoking a difficulty" or "being free from fault." Mere words of reproach or opprobrious epithets do not constitute such provocation as would put the defendant in any degree in the wrong if it became necessary to kill Doelling in his own defense.

2. The criticism of instructions 3 and 6, on the ground that they assume that the knife with which defendant stabbed deceased was a deadly weapon, is without merit. Both instructions submit the question as one of fact to the jury: *State v. Weeden*, 133 Mo. 70, 34 S. W. 473.

3. As to the alleged failure to submit to the jury whether the dying declaration was in fact made, we think there was no just ground of complaint. Defendant asked and obtained an instrument (No. 12) which assumed a dying declaration had been made and was exceedingly favorable to defendant. Besides, such omission can readily be supplied on another trial.

4. The instruction on reasonable doubt was substantially correct, but we again approve the formula expressed on this subject in *State v. Nueslein*, 25 Mo. 111.

5. The defendant prayed the court to declare the law to be as follows: "1. If the jury believe from the evidence that at the time of the killing of the deceased, Doelling, as charged in the indictment, the defendant Gordon went to the business house of said Doelling, in Columbia, to collect a claim therefore placed in his hands as an attorney, for collection, and that then and there an angry controversy suddenly arose between said parties, followed by blows inflicted with his Doelling's, fists, on the head, face or body of said Gordon, and that said Doelling was a large, athletic and powerful man, and that Gordon was physically a small man, under the average of strength and power, and that he had reasonable cause to believe that deceased then and there entertained a design to do him [Gordon] some great personal ¹³² injury, with his fists, by reason of his [Doelling's] superior physical strength, and that there was then and there imminent danger of the accomplishment of such design, then the defendant Gordon was justified, under the law, in cutting or stabbing

the deceased and even to kill him [deceased] to prevent the accomplishment of such design, even though the jury shall further believe from the evidence that said Doelling was unarmed at that time.

“2. If the defendant had reasonable cause to believe from the words, acts and conduct of the deceased that he had a design to do him some great personal injury, and that such design was about to be accomplished, then defendant had a right to act on appearances, and to cut or stab deceased to prevent the accomplishment of such design, and in this connection the jury are further instructed that defendant was not required to nicely gauge the force used, but that he could use any means that appeared reasonably necessary under the circumstances. Neither is it necessary to this defense that his danger should have been real or actual or that it should have been impending and about to fall, but if he had reasonable cause to believe, and did believe these facts, and cut the defendant to prevent such expected harm, then you must acquit on the ground of self-defense.”

The circuit court modified these two instructions by adding the words “if necessary.” In the first, those words were inserted in the third line from its conclusion after the words, “And even to kill him, deceased, if necessary.”

In the second of said instructions, the words “if necessary” were inserted after the words in the fifth line, “then defendant had a right to act on appearances and to cut or stab deceased, if necessary.” The words “if necessary” add nothing to the clearness of the legal propositions asserted in these instructions. The instructions were correct without them, and while the ¹⁸³ legal mind might reconcile them with the remainder of the instructions, they were calculated to impress the jury with the idea that the danger to defendant must have been in fact real or actual, or that he must use exactly the amount of force necessary to defend himself and no more, whereas it is the settled law of this state that it is not necessary, in order to acquit on the ground of self-defense, that the danger should have been real or actual or that such danger should have been then impending and about to fall on defendant. It is only necessary that the jury shall believe that the accused had reasonable cause to apprehend that there was immediate danger of a design to commit a felony or to do great bodily harm to the defendant about to be accomplished.

6. As a reversal of the judgment results from the errors

already noted, it is unnecessary to consider whether the court erred in refusing a new trial on the ground of the incompetency of two jurors, further than to say it was a question of fact which the circuit court determined, and it would require an exceptionally flagrant abuse of discretion to justify our interference on such a ground. For the reasons assigned the judgment must be reversed and the cause remanded for a new trial in accordance with the views herein expressed, and it is accordingly so ordered.

Burgess, P. J., and Fox, J., concur.

RIGHT OF SELF-DEFENSE BY ONE WHO HAS MADE AN ATTACK, VOLUNTARILY ENTERED, UPON A RENCOUNTER.

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I. Scope of Note.

In this note we shall discuss only those cases in which the contest occurred at a sudden or unexpected meeting of the combatants. The

general subject of the right of self-defense has been treated in the monographic note on that subject, attached to *State v. Summer*, 74 Am. St. Rep. 717; while the right of policemen to arrest and of citizens to resist arrest has been considered in the monographic note to *State v. Evans*, 84 Am. St. Rep. 679.

II. General Nature of the Right of Self-defense.

The right of self-defense exists where one kills another of necessity. It exists when one finds himself in a position of imminent peril, either to himself or to another in peril of his life, or of serious bodily harm, and then strikes to save his life, or to save his body from serious harm, or to save the life of another, or to save the person of the latter from serious bodily harm: *State v. Bowers*, 65 S. C. 207, 95 Am. St. Rep. 795, 43 S. W. 656. In other words, the right of self-defense may be tersely stated as the law of necessity: *Jackson v. Commonwealth*, 98 Va. 845, 36 S. E. 487. In cases of self-defense, the question to be determined is, Did the accused, under the circumstances of the assault, as they appeared to him, honestly believe that he was in danger of his life, or of great bodily harm, and that it was necessary to do what he did, in order to protect himself? If so, he is excused, and it can make no difference whether he be a bold, strong man, used to affrays and personal encounters, or a weak, timid man unacquainted therewith, as to the sufficiency of his reason for his action, if the jury believe that he acted honestly in fear of his life or great bodily harm: *People v. Lennon*, 71 Mich. 298, 15 Am. St. Rep. 259, 38 S. W. 871.

The right of self-defense exists notwithstanding a mere preparation to commit a homicide where there is no accompanying demonstration which indicates that purpose: *Menly v. State*, 26 Tex. App. 274, 8 Am. St. Rep. 477, 9 S. W. 563. Self-defense may be resorted to in order to repel force, but not to inflict vengeance: *State v. Ballou*, 20 R. I. 607, 40 Atl. 861. But a person who kills another in self-defense is not guilty of murder merely because he bore malice toward the deceased: *State v. Matthews*, 148 Mo. 185, 71 Am. St. Rep. 594, 49 S. W. 1085.

III. Right of Self-defense where Defendant Provoked the Encounter or was the Aggressor.

"The plea of necessity is a shield for those only who are without fault in occasioning it, and acting under it": *People v. Hunt*, 59 Cal. 430. And, as was observed by the Georgia court, "before the law of necessity can exist, a case of necessity must exist": *Haynes v. State*, 17 Ga. 465. And acting, apparently, upon the principle that a man cannot take advantage of his own wrong, the courts have declared the general rule to be that a plea of self-defense cannot be sustained where the defendant was the aggressor and provoked the encounter in which the homicide was committed: Monographic note to *State v. Sumner*, 74 Am. St. Rep. 717. The defendant must have been free from fault in provoking or bringing on the difficulty:

Howard v. State, 110 Ala. 92, 20 South. 365; Haynes v. State, 17 Ga. 465; Story v. State, 99 Ind. 413; State v. Petsch, 43 S. C. 132, 20 S. E. 993; Vaiden v. Commonwealth, 12 Gratt. 717.

“Whenever an assault is brought upon a person by his own procurement or under an appearance of hostility which he himself creates with a view of having his adversary act upon it, and he so acts and is killed, the plea of self-defense under such circumstances is unavailing”: People v. Glover, 141 Cal. 233, 74 Pac. 745; Henry v. People, 198 Ill. 162, 65 N. E. 120; State v. Ballou, 20 R. I. 607, 40 Atl. 861. Where one assails another, intending only an assault and battery, and the assailed resists with violence, and the assailant kills him in self-defense, it is only manslaughter; and if, intending to abandon the combat, he retreats as far as he can, and is murderously pursued by the assailed, and kills him in self-defense, it is justifiable: State v. Partlow, 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14. A person may stand his ground and meet any attack made upon him in such a way as, under all the circumstances, he believes is necessary to save his own life or protect himself from great bodily harm: State v. Cushing, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145.

The court in State v. Gilmore, 95 Mo. 554, 8 S. W. 359, 912, in discussing this subject said: “If the jury believe from the evidence that the defendant provoked the difficulty, or began the quarrel with the purpose of taking the advantage of the deceased, and of taking his life, or of doing him some great bodily harm, then there is no self-defense in the case, however imminent the peril of the defendant may have become in consequence of an attack made upon him by the deceased; and if, in such circumstances, the jury believe that the defendant killed the deceased, then he is guilty of murder in the first degree: State v. Hays, 23 Mo. 287; State v. Packwood, 26 Mo. 340. But although the jury believe from the evidence that the defendant began the quarrel or provoked the difficulty with the deceased, yet if they also believe from the evidence that this was done by defendant without any felonious purpose, and that thereupon the deceased attacked him and compelled him, in order to save his own life, to take that of the deceased, still the law, while it will not entirely justify the homicide on the ground of self-defense, will hold the defendant guilty of no higher grade of crime than that of manslaughter in the fourth degree.”

A distinction exists between the right of one who brings on or provokes a difficulty with another with a felonious purpose of wreaking his vengeance by killing him, and the right of one who neither seeks or brings on the difficulty. But a defendant does not forfeit his right of self-defense merely because he voluntarily engages in a fatal encounter. And mere words of reproach or opprobrious epithets do not constitute such a provocation as put the defendant using them in the wrong if it becomes necessary to kill in self-defense the person toward whom the words are used: State v. Gordon, 191 Mo. 114, ante, p. 790, 89 S. W. 1025. The mere fact that defendant

sought the deceased for the purpose of provoking a difficulty does not deprive him of his right of self-defense unless he does some act—some overt act—or makes some statement indicating a purpose to arouse anger and provoke resentment on the part of the injured party, which act or conduct does provoke it: *Smith v. State* (Tex. Cr. App.), 87 S. W. 151.

And the mere fact that a defendant was at fault in commencing the affray does not foreclose him absolutely from setting up a plea of self-defense: *People v. Conkling*, 111 Cal. 616, 44 Pac. 314. "A party may have a perfect right of self-defense though he may not be wholly free from blame in the transaction; the question being, What is the nature of the blame? If the blame or wrong was not intended to produce the occasion, nor an act which was, under the circumstances, reasonably calculated to produce the occasion or provoke the difficulty, then the right of self-defense would be complete though the act may not be criminal. But if the act was a violation of the law, and was reasonably calculated to produce the occasion, then the right of self-defense would be abridged."

But it was decided in North Carolina that where a man provokes a fight by unlawfully assaulting another, and, in the progress of the fight, kills his adversary, he is guilty of manslaughter, at least, though at the precise time of the homicide it was necessary for the original assailant to kill in order to save his own life, though it was admitted that he could set up the plea of self-defense if he could show that he "quitted the combat before the mortal wound was given, and retreated or fled as far as he could with safety, and, then, urged by mere necessity, killed his adversary for the preservation of his own life": *State v. Garland*, 138 N. C. 675, 50 S. E. 853.

The court in *Foutch v. State*, 95 Tenn. 711, 34 S. W. 423, 45 L. R. A. 687, in discussing the right of the aggressor to plead self-defense, observed: "It is true that such statements are to be found in many books—that if one be the 'aggressor,' or be 'in fault,' or 'provoke a difficulty,' he cannot rely upon the plea of self-defense. But such general statements are only true when taken in the limited sense in which they must be understood, and with the qualifications with which judicial utterances that gave them existence have guarded their application. In order to make a man guilty of murder, who is the 'aggressor' or 'in fault,' or who 'provokes a difficulty' in which his adversary is killed, he must have provoked it with the intent to kill his adversary or do him great bodily harm, or to afford him a pretext for wreaking his malice upon his adversary: *Smith v. State*, 8 Lea, 402; *Daniel v. State*, 10 Lea, 261; *Brown v. State*, 58 Ga. 212; *Hash v. Commonwealth*, 88 Va. 172, 13 S. E. 398; *Cotton v. State*, 31 Miss. 504; *Radford v. Commonwealth* (Ky.), 5 S. W. 343; *Massie v. Commonwealth* (Ky.), 24 S. W. 611. In order to deny to such party the right to rely on the plea of self-defense, it must appear that he was the 'aggressor,' or 'in fault,' or 'provoked the difficulty' in such way and with such intent as the law contemplates in the use of

these terms. It is not every 'aggression' which produces a difficulty that is an unlawful one, within the meaning of this phrase, nor is it every 'fault' which a man might commit that precludes him from defending himself when violently assaulted or menaced, nor is it every 'provocation of a difficulty' which robs him of the right of self-defense. Cases already cited, and hereinafter cited, illustrate the true meaning, and show the sense in which these words must be understood. They are all really intended to imply the same thing, and what they do mean may be best indicated by suggestion of some things they do not mean, taking them up separately. First, as to the 'aggressor': It is not intended that everyone shall be held in law to be an aggressor who says something provoking to another, which does cause a difficulty, for oftentimes such an aggression is a just one, and sometimes a necessary one; but, even when it is neither just nor necessary, the use of opprobrious language to another is not, for this reason alone, an aggression, in the sense of law, for no mere words, however opprobrious, will justify an assault, or the overt menace of an assault; and hence if one only uses such words, and is assaulted or so menaced, he may defend himself. And the same thing is true of one in fault. He may be in such other and supposable fault, and yet not be deprived of a like right of self-defense; as, though one has threatened or abused him, he cannot go to him and assault him for it. So when he uses to another opprobrious words, that other cannot assault him, or menace him by overt act of violence, and deny him the right of defense, as to 'provoking a difficulty.' It is not every provocation, just or unjust, which he may offer, that will justify an assault upon him, or the menace of one, from which he cannot defend himself, and to this, also, the limitations as to mere words used apply. After all, the aggression, the fault, or the provocation depends upon its character and its intent. If it is an assault, or the menace of one by an overt act, or the provocation of a difficulty with intent to inflict death or great bodily harm in the event it is resisted, made of malice to bring about that result and enable the provoking party to wreak his malice on the assailant, that is an 'aggression' or 'fault' and a 'provoking of a difficulty' within the legal sense and meaning of the terms. If the 'combat is provoked,' or 'the occasion to kill produced' in the language of the charge, on this account, with this intent and for this purpose, defendant cannot rely upon the plea of self-defense; otherwise he can."

IV. Necessity for Provoking Party or Aggressor to Have Abandoned the Rencounter, in Order to Avail Himself of the Right of Self-defense.

In order for the person provoking the rencounter or acting as the aggressor therein, to avail himself of his right of self-defense, he must, prior to the commission of the homicide, have either withdrawn from the contest or declined to continue it any longer: *Johnson v. State*, 58 Ark. 57, 23 S. W. 7; *People v. Simons*, 60 Cal. 72; *Padgett v. State*, 40 Fla. 451, 24 South. 145; *State v. Thompson*, 45 La. Ann. 969, 13

South. 392; *Smith v. State*, 75 Miss. 542, 23 South. 260; *State v. Cable*, 117 Mo. 380, 22 S. W. 953; *State v. Vaughan*, 141 Mo. 514, 42 S. W. 1080; *People v. Filippelli*, 173 N. Y. 509, 66 N. E. 402; *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470; *People v. Hite*, 8 Utah, 461, 33 Pac. 254. Thus where one expecting to meet a person at a certain place goes there with the sole purpose of creating trouble, and the person defends, the assailant must abandon the contest before being allowed to use his right of self-defense: *People v. Phelan*, 123 Cal. 551, 56 Pac. 424. And where the defendant, while attempting to interview a witness against him in a civil case, was attacked by a brother of the witness, but retreated and withdrew from his attempt to interview the witness, he had the right of self-defense as against the brother who followed him up as he retreated: *Eby v. State* (Ind.), 74 N. E. 890.

Hence, even if the slayer provoked the difficulty originally, he does not lose his right of self-defense if he withdraws in good faith from the conflict and expresses a desire for peace: *Duncan v. People*, 134 Ill. 110, 24 N. E. 765; *Brazzil v. State*, 28 Tex. App. 584, 13 S. W. 1006. And where the defendant sought the combat for the purpose of taking advantage of the deceased, but afterward, in good faith, abandoned the combat, he may justify the killing on the same grounds as he might if he had not originally sought combat for such purpose. *People v. Wong Ah Teak*, 63 Cal. 544. So, also, where the defendant by his conduct challenges or provokes the fight and has gone to it armed with the purpose to use his weapons upon his adversary if the emergency occurs, he cannot, after having slain him, say that he acted in self-defense, but if he desists from the difficulty and so notifies his adversary, he thereafter becomes entitled to his right of self-defense: *Smith v. State*, 105 Tenn. 305, 60 S. W. 145. If, after the commencement of a combat over the land, the defendant's son appeared on the scene, and on a resumption of the shooting, the fatal shot was fired in his defense, the court should instruct the jury that if the defendant began the difficulty, or if he and the deceased went upon the premises determined on a conflict, and the conflict was by mutual consent, the defendant could not rely upon the right of self-defense, unless he withdrew from the conflict, and afterward re-engaged in it only in defense of his son: *Utterback v. Commonwealth*, 105 Ky. 723, 88 Am. St. Rep. 328, 49 S. W. 479.

The withdrawal from the encounter must, however, be real and actual and not for the purpose of gaining fresh strength or some new advantage: *Parker v. State*, 88 Ala. 4, 7 South. 98; *Luckenbill v. State*, 52 Ark. 45, 11 S. W. 963; *Johnson v. State*, 58 Ark. 57, 23 S. W. 7; *Aiken v. State*, 58 Ark. 544, 25 S. W. 840. A mere retreat is not such a withdrawal as justifies firing back and killing a pursuer: *Burris v. State*, 34 Tex. Cr. Rep. 387, 30 S. W. 785. In *State v. Hatch*, 57 Kan. 420, 57 Am. St. Rep. 337, 46 Pac. 708, the court said: "The doctrine that a party unlawfully attacked must 'retreat to the wall' before he can be justified in taking the life of his assailant in self-defense does not obtain in this state: *State v. Reed*, 53 Kan. 767,

42 Am. St. Rep. 322, 37 Pac. 174. Where the defendant is in the wrong, and commences the affray, even with no intent to kill or inflict great bodily harm, and the other party being thus provoked makes a deadly assault, then it is the duty of the defendant to retreat as far as the fierceness of the assault will permit him to do without danger of great personal injury to himself before slaying his antagonist: *State v. Rogers*, 18 Kan. 78, 26 Am. Rep. 754. In the present case it was for the jury to determine from the evidence whether Hatch or Mullen was in the wrong in commencing the affray at Second and Main streets, which resulted in the death of Mullen. The court should not assume that one party or the other was first or chiefly in fault where that fact is in issue, but should instruct the jury on the theory of the defendant as well as that of the state, provided each theory finds some support in the evidence as in this case."

V. Necessity for Intention of Withdrawal from the Contest to have been made Known to Opponent.

An assailant must notify his adversary by his conduct that he has abandoned the contest in order to avail himself of the right of self-defense, and if the circumstances are such that he cannot so notify him, he must take the consequences: *People v. Button*, 106 Cal. 628, 46 Am. St. Rep. 259, 39 Pac. 1073, 28 L. R. A. 591; *People v. Hecker*, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403; *State v. Smith*, 10 Nev. 106. But it was said in *People v. Hecker*, 109 Cal. 451, 42 Pac. 307, 30 L. R. A. 403, that "where one is the first wrongdoer, but his unlawful act is not felonious, as a simple assault upon the person of another, or a mere trespass upon his property, even though forcible, and this unlawful act is met by a counter assault of a deadly character, the right of self-defense to the first wrongdoer is not lost. For, as his acts did not justify upon the part of the other the use of deadly means for their prevention, his killing by the other would be criminal, and one may always defend himself against a criminal attempt to take his life. But in contemplation of the weakness and passions of men, and of the provocation, which, though inadequate, was wrongfully put upon the other, it is the duty of the first wrongdoer before he can avail himself of the plea to have retreated to the wall, to have declined the strife and withdrawn from the difficulty, and to have killed his adversary, under necessity, actual or apparent, only after so doing. If, however, the counter assault be so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, if he cannot retreat with safety, then as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying, forthwith, in self-defense."

But a mere momentary cessation of hostilities with no bona fide, clearly expressed intention to withdraw from the conflict is not sufficient to justify the original aggressor in killing under the plea of self-defense: *State v. Kellogg*, 104 La. 580, 29 South. 285.

VI. Right of Self-defense by Person Who Voluntarily Engages in a Encounter.

a. **In General.**—In *Wallace v. United States*, 162 U. S. 466, 16 Sup. Ct. Rep. 859, 40 L. ed. 1039, Mr. Chief Justice Fuller said: "Where a difficulty is intentionally brought on for the purpose of killing the deceased, the fact of imminent danger to the accused constitutes no defense; but where the accused embarks in a quarrel with no felonious intent or malice, or premeditated purpose of doing bodily harm or killing, and, under reasonable belief of imminent danger he inflicts a fatal wound, it is not murder: Wharton on Homicide, sec. 197; 2 Bishop's Criminal Law, secs. 702-715; 4 Am. & Eng. Ency. of Law, 675; *State v. Partlow*, 90 Mo. 608, 59 Am. Rep. 31, 4 S. W. 14; *Adams v. People*, 47 Ill. 376; *State v. Hays*, 23 Mo. 287; *State v. McDonnell*, 32 Vt. 491; *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795.

But if there is no intention to have a difficulty, defendant's right of self-defense remains complete. Some acts may, however, be committed of such a character as to carry the intent with them: *Carter v. State*, 37 Tex. Cr. Rep. 403, 35 S. W. 378. Where, however, defendant, pursuant to an expressed intention, goes to a place to kill the deceased, he loses his right of self-defense unless he abandoned the intention before the commission of the homicide: *State v. Johnson*, 2 Jones, 247, 64 Am. Dec. 582. Where defendant entered willingly into a combat, which is not for his protection, but to gratify his passions by inflicting injury on his adversary, he cannot invoke the plea of self-defense, even though he did not provoke the difficulty: *Sanders v. State*, 134 Ala. 74, 32 South. 654. In case of a mutual combat, retreat, if possible, to avoid danger is a duty: *Sullivan v. State*, 102 Ala. 135, 48 Am. St. Rep. 22, 15 South. 264. But a person suddenly assaulted need not retreat before using his weapon where an instant's delay may be at the expense of his own life: *People v. Macard*, 73 Mich. 15, 40 N. W. 784. The mere drawing of a pistol in a quarrel, though done by the person who commenced the quarrel, will not deprive him of his right of self-defense as against a deadly assault by his opponent. "Generally, the drawing of a deadly weapon by one of two parties between whom an altercation is going on might be sufficient to justify the other in believing there was an intent to immediately use it, and in acting accordingly; and in most cases a jury, under such circumstances, would probably be authorized to find that an immediate use of the weapon so drawn was intended. This, however, is not invariably true. It is easy to conceive of a case where two parties might be engaged in a quarrel, and one of them draws a deadly weapon without intending to use it at once, or without intending to use it at all, unless it should become necessary to do so for his own protection. Suppose, in a given case, this should appear affirmatively, and beyond all doubt, Then, certainly, the other party would not be justified in acting as he unquestionably would have a right to do were his adversary manifesting an intent or purpose to use the

weapon he had drawn": *Fussell v. State*, 94 Ga. 78, 19 S. E. 891. The right of self-defense is not impaired by mere preparation for the perpetration of a wrongful act: *Cartwright v. State*, 14 Tex. App. 486. Hence, in order to render one guilty of provoking the difficulty he must do some act at the time with intent to produce the occasion or bring about the difficulty: *Vance v. State*, 45 Tex. Cr. Rep. 434, 77 S. W. 813; *Pedro v. State* (Tex. Cr. Rep.), 88 S. W. 233. Thus, where defendant stopped deceased on the street and commenced using foul language against him, frequently running his hand in his pistol pocket, and shaking his fist under the nose of deceased, and finally drawing his pistol and shooting five times at deceased, who attempted to dodge his shot, he makes no showing of self-defense: *State v. Bryant*, 102 Mo. 24, 14 S. W. 822. But if defendant provoked the occasion of the homicide, not in order to have a pretext to kill his adversary or to do him great bodily harm, nor any other felonious intent, but merely to commit an ordinary battery, it will not completely deprive him of his right of self-defense: *White v. State*, 23 Tex. App. 154, 3 S. W. 710. And a patron, who, finding fault with the service in a restaurant, follows the waiter into the kitchen against the protest of the proprietor, and after provoking a difficulty, refuses to go out after the waiter has apologized, cannot avail himself of the plea of self-defense in killing the waiter, though the latter advanced upon him with a large carving knife. In such case, it is his duty to retreat, if necessary, to avoid killing the waiter, or to prevent himself from being killed: *State v. Trammell*, 40 S. C. 331, 42 Am. St. Rep. 874, 18 S. E. 940.

Where there was a wordy altercation between several persons, and the defendant was present and assenting to it, he will be charged with provoking the difficulty, where there were challenges to meet halfway and fight it out, to such an extent that he cannot avail himself of his right of self-defense: *Kirby v. State*, 89 Ala. 63, 8 South. 110.

b. Effect of Provocative Words Innocently Spoken.—In speaking of the effect of language or acts likely to provoke a difficulty, the court in *Allen v. Commonwealth*, 86 Ky. 642, 6 S. W. 645, said: "If, however, one by his wrongful act makes the harm or danger to himself necessary or excusable in the person who is inflicting or about to inflict it, then the former cannot, upon the plea of self-defense, excuse the taking of life or the infliction of great bodily harm. Nor can he do so if he seeks the other party, not innocently, but with the intention of provoking a difficulty, and does so. He must not, however, be deprived of the benefit of the plea of self-defense because words innocently spoken by him or in jest, or some act done by him not calculated or intended to do so, and not resorted to as a shelter for intended wrong, may have contributed to bring on the difficulty."

c. Effect where Both Combatants were Looking for Each Other or Rencontre is Mutual.—The plea of self-defense is not available where there were mutual threats and ill-feeling between the parties,

and they came together under conditions showing that they were looking for each other: *Gilleland v. State*, 44 Tex. 356. Thus where defendant went to the place of business of deceased and explained to him that he did not write certain anonymous letters, but deceased denounced him as a liar, and told him that he was going to get his gun and shoot him; afterward deceased got his gun, but was disarmed by relatives; he then sat alongside of the street; defendant coming along asked him whether he had got his gun; deceased cursed defendant and told him that he was not afraid of him, and then went into a store and got two scale weights, and, coming out, renewed the quarrel by threatening defendant; while deceased was about to throw a weight at defendant, the latter shot him. The court said: "Under such circumstances, we think the defendant, being without fault himself, had a right, if attacked in such a manner as to furnish reasonable ground for apprehending a design to take his life or do him great bodily harm, to act upon appearances, and to defend his life, and was not required to flee from the public highway in which he had been assailed."

In order for a mutual combat to deprive the defendant of his right of self-defense, he must have entered the combat willingly: *Christian v. State*, 46 Tex. Cr. Rep. 47, 79 S. W. 562. In cases of mutual combat the slayer is protected only when the killing is done as an absolute necessity to save his own life, and only in cases where it appears that the person killed is the assailant, or the slayer has in good faith endeavored to decline any further struggle before he inflicts the mortal wound: *Smith v. State*, 106 Ga. 673, 71 Am. St. Rep. 286, 32 S. E. 851.

d. Effect where Deceased Went About Armed.—The mere fact that the deceased had at hand the means for effecting a deadly encounter is not a sufficient excuse to slay him, but it must also appear, by some act or demonstration on the part of the deceased, that he intended, at the time of the killing, to carry out his purpose, or the circumstances must be such as to create a reasonable belief in the mind of the slayer that it was necessary to kill the other party in order to save his own life: *Springfield v. State*, 96 Ala. 81, 38 Am. St. Rep. 85, 11 South. 250.

e. Right of Self-defense where the Defendant Killed the Deceased, an Avowed Deadly Enemy, "on Sight."—A person who expects another to attack him is not bound to keep himself out of the way of being assaulted, and, if he kills his assailant to avoid great bodily harm, he may rely upon the plea of self-defense: *State v. Matthews*, 148 Mo. 185, 71 Am. St. Rep. 594, 49 S. W. 1085.

The doctrine that a person has the right to shoot an enemy on sight who has threatened and seeks one's life without waiting for some overt act or demonstration on the part of the enemy, is not generally approved, though the doctrine has been strongly approved in an early Kentucky case, and approved with some modifications by later de-

cisions in that state: *State v. Kellogg*, 104 La. Ann. 580, 29 South. 285.

In *Carico v. Commonwealth*, 7 Bush, 124, the defendant, in the early hours of the morning, shot the deceased in the back while he was not making any apparent demonstration of an immediate assault, though the deceased had made previous assaults on defendant, and had, the day before, threatened to kill the defendant before evening of the next day. The deceased was a man of violent passions and inflexible will, while the defendant was a quiet and peaceable man. The court in laying down the law of self-defense in such cases, referred to *Phillips v. Commonwealth*, 2 Duvall, 328, 87 Am. Dec. 499, and recognized the difficulty of the application of the doctrine, but observed that "its liability to perversion or abuse by juries cannot curtail the principle itself as a law for the court." In this connection the court observed: "Speaking of assured and continual danger to life, this court, in the case in 2 Duvall defined the principle of self-defense as follows: 'Like the sword of Damocles, the threatened danger is continually impending every moment and everywhere. The threatened man may be waylaid or otherwise attacked unawares without the possibility of defense or of escape, and may never, day or night, feel safe, or actually be so, while his enemy lives, who, whenever he may see him, or wherever he may find him, may be anxious and able to kill him. And does either human or divine law require such prolonged agony and peril; or can the best and most prudent men suicidably forbear to strike for riddance, if they have the courage to defend themselves, in the only way of secure and lasting escape?'

"Now, if a man feels sure that his life is in continual danger, and that to take the life of his menacing enemy is his only safe security, does not the rationale of the principle as thus defined allow him to kill that enemy whenever and wherever he gives him a chance and there is no sign of relenting? But before a jury should acquit they should be well satisfied that the killing was not the offspring of bad passion, but solely of a thorough and well-founded belief that it was necessary for security. And here lies the danger of misapplication. It is difficult to be assured that the act was thus necessary and done in good faith. Of that, however, the jury and not the court must judge; and in that judgment they cannot be too self-poised and careful before they conclude that the peril of the accused was imminent and incessant, and that he, well assured of it, honestly believed that his only safe remedy was to destroy the power to execute the threats. And if he was authorized to believe, and did considerably apprehend, that his own exile or the death of his persevering enemy, watching to kill him, was, like the tabula in naufragio, the only safe mode of rescue, might he not lawfully choose his remedy and throw his enemy overboard? Why should he be required still to wait an assault and to endure longer haunting and hazard, when he might at any moment become the victim of his own forbearance, and when self-defense might be impossible or unavailing? Why let the sword still hang over him? Why not remove

it out of sight when he may, and not passively linger until it unexpectedly falls and strikes his heart unresisted. The recognition of the perfect right to do so in such a crisis appears to us consistent with both principle and policy. It seems to us conservative. It might afford more security and prevent more assassinations than the lame law of punishment ever could, and the manly and opportune assertion of this universal birthright may teach the reckless who thus maliciously beset the pathway of the peaceable that they will be likely to bring destruction on their own heads. This preventive principle will go hand in hand with civilization and philosophical jurisprudence as a palladium of personal security and social order and peace. Properly guarded, it may do more good than harm."

In *Bohannon v. Commonwealth*, 8 Bush, 481, 8 Am. Rep. 474, the court, though approving the principle of self-defense announced in the above case, did not fully concur in the arguments advanced therefor. The court said: "The threats of even a desperate and lawless man do not, and ought not to, authorize the person threatened to take his life; nor does any demonstration of hostility short of a manifest attempt to commit a felony justify a measure so extreme.

"But when one's life has been repeatedly threatened by such an enemy, when an actual attempt has been made to assassinate him, and when, after all this, members of his family have been informed by his assailant that he is to be killed on sight, we hold that he may lawfully arm himself to resist the threatened attack. He may leave his home for the transaction of his legitimate business, or for any lawful and proper purpose; and if on such an occasion he casually meets his enemy, having reason to believe him to be armed and ready to execute his murderous intentions, and he does believe, and from the threats, the previous assault, the character of the man, and the circumstances attending the meeting, he has the right to believe, that the presence of his adversary puts his life in imminent peril, and that he can secure his personal safety in no other way than to kill him, he is not obliged to wait until he is actually assailed."

The views expressed in the above case were approved by the Kentucky court in *Oder v. Commonwealth*, 80 Ky. 32, but it was said that it is always a question for the jury to judge of the reasonableness of the apprehended danger and the bona fide belief of the defendant in its existence.

f. **Right of Self-defense on Hip-pocket Movement by Opponent.**—A hostile movement on the part of the deceased toward his hip pocket in such a manner as to indicate to a reasonable mind that his purpose was to draw and fire upon the defendant, creates such an apparent peril to his life and limb that he is justified in the exercise of his right of self-defense in anticipating him and firing first; but the defendant should not have been instrumental in having provoked or brought on the difficulty: *De Arman v. State*, 71 Ala. 351; *Gonzales v. State*, 30 Tex. App. 203, 16 S. W. 978. And the

same rule applies where the hostile movement is toward the bosom to draw a pistol carried in a pocket in the vest: *Lawrence v. State*, 36 Tex. Cr. Rep. 173, 36 S. W. 90. But whether a movement of the hand toward the hip furnishes reasonable ground of apprehension to act upon appearances is a question for the jury: *Guice v. State*, 60 Miss. 714. But where the defendant knew of a marked peculiarity of the deceased in that he had a habit of resting his hand on his hip, or in his hip pocket while walking or standing, that fact is properly considered in determining whether the defendant was entitled to act upon the appearance that deceased was about to draw a weapon: *People v. Grimes*, 132 Cal. 30, 64 Pac. 101. Undoubtedly in some localities where the habitual carrying and use of firearms is well known, the appearance of imminent peril by the movement of the hand of an opponent in a rencounter toward his hip pocket would be more real than apparent, and would justify the defendant in exercising his right of self-defense against the threatened peril. And the same would probably be true in a case where threats of bodily harm or of shooting on sight were made and communicated to the parties participating in the rencounter.

g. Rencounters Resulting from Attempts to Adjust Business Matters or Claims.—The principal case is a typical example of a rencounter arising from an attempt to collect an account from an obstreperous debtor.

The mere fact that defendant went to the place of business where the deceased was is not of itself sufficient to deprive him of his right of self-defense: *Allen v. Commonwealth*, 86 Ky. 642, 6 S. W. 645. Hence, where defendant sought an interview with deceased with no hostile intentions, but simply to demand a settlement and pay for some riding spurs, and deceased became angry and an altercation ensued, during which deceased drew his pistol and assaulted defendant, the defendant may avail himself of his right of self-defense: *Bonnard v. State*, 25 Tex. App. 173, 8 Am. St. Rep. 431, 7 S. W. 862. And where a defendant, who went armed to see his tenant with respect to his portion of the cotton crop, upon entering into an altercation with the tenant, was ordered off from the plantation with the admonition that the tenant would "hurt" him if he didn't go, but the defendant immediately dismounting exclaimed: "Hurt!" upon which the tenant drew his gun and retreated, followed by the defendant, who, advancing with drawn gun, ordered him to drop the gun, but the tenant saying that he would not, fired with deadly effect, the court decided that the defendant did not provoke the difficulty: *Jackson v. State*, 32 Tex. Cr. Rep. 192, 22 S. W. 831. But where the defendant, armed with a gun, told his brother, who had taken his clothes, that he would kill him if he did not return the clothes, and the brother thereupon advancing upon him with a drawn knife, shot him, he was held to have shot him because of failure to deliver the clothes, and not in self-defense: *Combs v. Commonwealth (Ky.)*, 9 S. W. 655.

Where defendant went to the meat market of the deceased in an angry mood armed with a revolver, so carried as to be available for instant use, for the purpose of getting satisfaction for a supposed insult in refusing to extend him further credit until his past indebtedness was adjusted, and used language calculated to provoke an assault, and took no means of avoiding the collision which his conduct invited, but rather sought it and did not fire until after the deceased dropped a whip which he had taken up to protect himself, the defendant is not entitled to urge a plea of self-defense: *State v. Murdy*, 81 Iowa, 603, 47 N. W. 867.

h. Rencontres Resulting from Demands for Apologies or Explanations of Charges or Things Said Concerning the Defendant.—A person has a right to request an apology for prior insulting conduct, and unless his manner and acts in doing so were intended to bring on an affray or a deadly conflict, his right of self-defense is not forfeited: *Winters v. State* (Tex. Cr. Rep.), 51 S. W. 1110. Thus where a patron of a restaurant, finding fault with the service performed by a negro waiter, follows the waiter into the kitchen against the protest of the proprietor of the restaurant, and after provoking a difficulty, refuses to go out after the waiter has apologized, he cannot avail himself of a plea of self-defense in killing the waiter, even though the waiter advanced upon him with a carving knife. It was his duty to retreat if necessary to avoid killing the waiter or to prevent himself from being killed: *State v. Trammell*, 40 S. C. 331, 42 Am. St. Rep. 874, 18 S. E. 940. So, also, where the defendant, who had been looking for the deceased, on entering a saloon met him unexpectedly and presenting his cocked gun demanded an apology for applying to him an opprobrious epithet, and the deceased, who was in habit of going about armed, immediately drew his gun and fired, wounding the defendant slightly, the defendant on shooting the deceased is not entitled to urge self-defense, since he provoked the difficulty which he knew, or ought to have known, would end in either the death of himself or of the deceased: *Coyle v. State*, 31 Tex. Cr. Rep. 604, 21 S. W. 765. And where the defendant with a shotgun in a position to be instantly used advanced toward deceased and asked the deceased about certain threats made by him against the life of defendant, but the deceased, without saying a word, fired at the defendant, the defendant cannot claim to have acted in self-defense when he returned the fire with fatal effect: *Baker v. State*, 81 Ala. 38, 1 South. 127. Likewise, where defendant, who went to the store of the deceased to obtain an apology and explanation of a letter which he claimed that the deceased had written to his wife, and deceased disclaimed having written any letter to her, and explained how the letter, which was neither signed nor addressed to anyone, came to be written, but defendant refused to leave the store upon being requested to do so, and then drew his pistol upon the deceased, who then crouched behind a counter, whereupon the defendant reached over and shot him, he cannot claim to have

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shot in self-defense, even though the deceased returned the fire as defendant was leaving the store: *Gaines v. Commonwealth*, 88 Va. 682, 14 S. E. 375.

But the mere fact that the defendant arms himself when seeking an explanation of deceased for having been characterized as a coward in the presence of ladies, and that at the interview he profanely denied the accusation, does not deprive him of his right of self-defense: *Shannon v. State* (Tex. Cr. Rep.), 28 S. W. 687. So, also, where the deceased has been circulating accusations charging the defendant with theft, the defendant may arm himself to protect himself while interviewing the deceased in a quiet and peaceable manner concerning the accusations: *Beard v. State* (Tex. Cr. Rep.), 81 S. W. 33. But, on the other hand, if the defendant sought an interview with the deceased with the deliberate purpose of killing him if he questioned him concerning the taking of a yearling, he is not entitled to urge self-defense, even though the deceased made a hip-pocket movement: *Adams v. State*, 35 Tex. Cr. Rep. 285, 33 S. W. 354. And where the defendant with pistol in hand enters a saloon where the deceased is, and menacingly says to him, "I understand you intend to kill me," and upon the deceased making a movement as if he was about to draw his pistol, shoots him, he cannot plead self-defense, where he admits that he killed deceased because of the threats of deceased to kill him: *Hoover v. State*, 35 Tex. Cr. Rep. 342, 33 S. W. 337.

1. **Encounters Arising from Passing the Lie.**—The facts and argument used by the court in *Polk v. State*, 30 Tex. App. 657, 18 S. W. 466, show the rule of law in a sudden quarrel where the lie is passed. The court said: "Did the defendant fire the fatal shot in order to prevent the taking of his own life? If he did, then did the necessity of taking the life of his adversary arise in the progress of a difficulty brought about, provoked or occasioned by defendant's own conduct? If these are answered in the affirmative by the jury, then the defendant will be guilty of the offense of manslaughter; for, having provoked the occasion, his right of self-defense would be imperfect. But did the homicide occur in the progress of a difficulty provoked and brought on by the acts, conduct and words of the deceased toward the defendant and were such acts, conduct and words of the deceased reasonably calculated to provoke and bring on the difficulty? If this question is answered affirmatively, would the defendant, if he killed his adversary to save his own life, be justified, and his right of self-defense be perfect? Here we have presented a very nice question. A says to B, 'You are a G——d d——n liar.' B, on the impulse of the moment, resents the insult by slapping or striking A with his hand, A draws a pistol with intent to shoot and kill B. B, to save his own life, kills A. Could B be guilty of an offense less than manslaughter? In the supposed case B does not intend to provoke the difficulty or produce the occasion; but, prompted by a sudden im-

pulse, acts on the spur of the moment, and resents the insult by striking A with his hand. This question must be solved by well-settled principles of law. Insulting words will not justify an assault and therefore B was the aggressor in the eye of the law. He was as much guilty of an assault and battery upon A as he would have been had A not given the insult, and though he may not have intended to produce the occasion or provoke the difficulty, yet this would be the reasonable and natural consequence of his act, for which, by the law, he is held responsible, and responsible to the same extent as if he had intended to provoke the difficulty. In this case the facts show that the slap or blow was given before A attempted to draw his pistol. But it is contended that the deceased provoked the difficulty by calling defendant a 'G——d d——n liar.' Concede this to be so, it would not alter the rights of appellant. To use such language to a person is not recognized in law as a provocation, when the one so insulted proposes to act under it, or justify himself for the assault and its consequences. While the charge upon mutual combat may not have been called for, still, if we are correct in the above, there was no possible chance for such charge to have injured appellant. Why? Because, concede to the fullest extent that the witnesses for the defense gave the correct version of the facts in the case, nothing less than manslaughter could have been the result from an honest jury; for all the witnesses who swear to the fact agree that, when insulted by being called a 'G——d d——n liar,' and before deceased attempted to draw his pistol, appellant struck him; and we hold that the party giving the blow, being the aggressor, would be guilty of manslaughter, and nothing less, though he kills to save his own life."

j. **Encounter Resulting from an Attempt to Eject a Misbehaving Person from One's Premises.**—Where the defendant, with two companions, armed with firearms and a supply of whisky, went uninvited to the house of deceased where a dancing party was in progress, and annoyed some of the guests, and upon being requested to leave replied, "By God! I will when I get ready"; and upon the deceased advancing toward him and saying, "You will go now," said, "If you don't stop, I will shoot you," and did shoot upon the deceased continuing to advance, the court said: "If appellant went to the house of deceased without invitation, or if, having invitation, he, after getting there, behaved in a manner to disturb and prevent others enjoying the dance, or broke the peace, Alvey [the deceased] had the right to order him off his premises, and it was his duty to go, and upon his refusal to go, Alvey had right to use reasonable force to compel him to leave. This was not fully explained to the jury and that omission was prejudicial to the Commonwealth, not to appellant. Therefore in one, and we think a proper, view, appellant did seek and commence the difficulty, by unlawfully refusing to leave premises of deceased when requested to do so, and in resisting, when deceased, as he had a right to

do, attempted to forcibly remove him. And if he thus refused and resisted with intention to take the life of Alvey, or inflict great bodily harm upon him, rather than to leave the premises, he could not be excusable upon the ground of self-defense": *Scott v. Commonwealth* (Ky.), 29 S. W. 977. So, also, where an assault with intent to kill was committed by a railroad station agent in a rencounter with a person who had been waiting at the depot, and who purposely slammed the door of the waiting-room with great violence, thereby breaking window panes and the like, the court said: "While it may be said that the defendant had the undisputed right to preserve proper order in the office or depot, where he had been placed as agent, and would be justified in using all reasonable, necessary force to prevent any disorderly conduct on the part of persons who might come into his office, yet such right does not warrant him in following a person outside of the depot, who has gone outside in obedience to his request. The facts in this case show that the prosecuting witness left the depot office and we are unwilling to say in this case that the prosecuting witness was compelled to abandon the platform and entire premises under the control of the agent under the circumstances as detailed in the trial of this cause": *State v. Tooker*, 188 Mo. 438, 87 S. W. 487.

k. Rencounter Resulting from a Quarrel Over Card Game.—Where, as the result of a quarrel over a card game, defendant, who had charged deceased with having cheated in the game, demanded the return of his money, pistol in hand, the mere fact that the deceased had his hand on his hip or near his hip-pocket does not make it proper for his assailant to shoot deceased, who dared him to shoot, and especially where defendant knew that it was a habit of the deceased to stand with his hand in or about his hip pocket: *People v. Grimes*, 132 Cal. 30, 64 Pac. 101.

l. Rencounter in Which Defendant Intervened to Protect Others.—"The right of self-defense rests upon necessity, and apparent reasonable necessity is the whole law and reason of it. It was not derived from society. It is a natural right, instinctive in the person. Man, when he came into society, brought it with him in all its freedom and broadest sense. It has been restricted by law in its exercise to cases of necessity, but cannot be altogether denied. If it were possible, it should not be, because as now restricted, it serves to protect right against wrong in emergencies where the law would not avail.

"It is the duty of a man who sees a felony attempted by violence to prevent it if possible. This is an active duty, and hence he has a legal right to use the means necessary to make the resistance effectual. If A be unlawfully assaulted by B and his life thereby endangered, he may, by reason of not being in fault, defend it even to the extent of taking the life of the person who is in fault: and as the right is a natural one, rules of law restricting it must, in order that it may still be effective, be adapted to his character

and nature. He may, therefore, act upon appearances, if he acts reasonably; and if assailed by another, and he believes, and has reasonable ground to believe, that his life is thereby endangered, he may even take life in its apparent necessary defense. So great, however, is the law's regard for human life, that he must be careful and not violate the restriction that law and society have placed upon this right of self-defense, to wit, he must act from necessity, or reasonable apparent necessity, and not be in fault.

"Not only, however, may he do this, but another may do it for him. This other person in such a case steps into the place of the assailed; and there attaches to him not only the rights, but also the responsibilities, of the one whose cause he espouses. If the life of such person be in immediate danger, and its protection requires life for life, or if such danger and necessity be reasonably apparent, then the volunteer may defend against it, even to the extent of taking life, provided the party in whose defense he acts was not in fault. He interferes at his peril if the person slain was not in fault. In the language of Mr. Wharton, 'a person interposing, particularly if he be a stranger, should act with much caution.' This necessarily follows, because he takes the place of one of the combatants, and can only do for him what he had the right to do under the circumstances in defense of himself. Thus if A unlawfully assaults B, endangering the latter's life, C has no right, because he may come upon the scene of conflict at a time, when during its progress A is in danger, to kill B. This would be murder in C, just as it would in A. Any other rule could not be tolerated. The innocent cannot be sacrificed to save the guilty. This would be paradoxical. A volunteer must not kill in behalf of one in fault. This would be what some writers have termed a negligent killing. He may, however, do so for one not in fault, if the impending danger thus brought about be either actual or apparent. In other words, as the person not in fault may, if he believes, and has reasonable grounds to believe that his life is in immediate danger, defend it to the extent of taking life, so another may act upon the like appearances as to such danger, and defend it for him to the same extent. Here a felony is attempted; and in killing the attempter, through the necessity to save an innocent person, the one so doing is in the condition of *se defendendo* in defending the one not in default. In such a case, the doctrine of self-defense in all its principles extends to the accused, just as it would if the felony had been attempted upon him, or as it would apply to the one in danger if he had done the killing": *Stanley v. Commonwealth*, 86 Ky. 440, 9 Am. St. Rep. 305, 6 S. W. 155.

The above rule prevails, notwithstanding the person intervening is doing so on behalf of his brother: *Wood v. State*, 128 Ala. 27, 86 Am. St. Rep. 71, 29 South. 557; *Snurr v. State*, 105 Ind. 125, 4 N. E. 445. In *People v. Curtis*, 52 Mich. 616, 18 N. W. 385, the court, proceeding upon the theory that a dangerous felony may be prevented

by one who is not himself in the wrong, stated that a person not in the wrong may interpose to prevent a felonious injury to his brother, even though the latter is not blameless.

In *Morrison v. Commonwealth* (Ky.), 74 S. W. 277, the deceased was beating his sister when defendant intervened, drawing a pistol and telling him to desist; deceased replied that he would kill both the defendant and the sister; ill-feeling existed between the defendant and the deceased because of alleged illicit relations between the defendant and the sister. The court held that inasmuch as the deceased was not committing a felony, the defendant was the aggressor and in urging a plea of self-defense was burdened with the duties resting upon an aggressor.

m. Right of Defendant Engaged in a Robbery to Urge Plea of Self-defense.—The defendant in *State v. Shockley*, 29 Utah, 25, 80 Pac. 865, sought to plead self-defense in killing the conductor of a street-car, whom he was robbing at the time of the homicide. The deceased, upon being ordered to "put up" his hands, quietly informed the defendant that he "had better put up his hands," whereupon the defendant slowly backed out of the car, but while backing out of the car the defendant stumbled, whereupon the deceased and the motorman rushed toward him, the deceased being armed with a gun. The defendant shot the deceased while he was rushing toward him. The court, in discussing the principles of law applicable to the case, said: "In the case of *State v. Smith*, 10 Neb. 106, the court, in discussing the question, said: 'A man who assails another with a deadly weapon cannot kill his adversary in self-defense until he has fairly notified him by his conduct that he has abandoned the contest, and, if the circumstances are such that he cannot so notify him, it is his fault, and he must take the consequence.' In the case of *People v. Button*, 106 Cal. 628, 46 Am. St. Rep. 259, 39 Pac. 1073, 28 L. R. A. 591, it is also said: 'In order for an assailant to justify the killing of his adversary, he must not only endeavor to really and in good faith, withdraw from the combat, but he must make known his intentions to his adversary. His secret intentions to withdraw amount to nothing. They furnish no guide for his antagonist's future conduct. They indicate in no way that the assault may not be repeated, and afford no assurance to the party assailed that the need of defense is gone.' And again, in the same opinion: 'It is therefore made plain that knowledge of the withdrawal of the assailant in good faith from the combat must be brought home to the assailed. He must be notified in some way that danger no longer threatens him, and that all fear of further harm is groundless.' In 25 American and English Encyclopedia of Law, 270, the rule is stated as follows: 'While he remains in the conflict, to whatever extremity he may be reduced, he cannot be excused for taking the life of his antagonist to save his own. In such a case it may be rightfully and truthfully said that he brought the necessity upon

himself by his own criminal conduct.' And again it is said, on page 271: 'If the circumstances are such, arising either from the condition of his adversary, caused by the aggressor's acts during the affray, or from the suddenness of the counter-attack, that the original assailant cannot so notify his adversary, it is such assailant's fault, and he must take the consequences': 1 McClain's Criminal Law, secs. 309, 310; *Stoffer v. State*, 15 Ohio St. 47, 86 Am. Dec. 470; *Parker v. State*, 88 Ala. 4, 7 South. 98; *Carpenter v. State*, 62 Ark. 286, 36 S. W. 900; *People v. Robertson*, 67 Cal. 646, 8 Pac. 600; *Smith v. State*, 73 Ga. 79.

"Section 4638 of the Revised Statutes of 1898 provides that a private person may arrest another 'for a public offense committed or attempted in his presence.' Therefore, when Gleason [the deceased] stated to defendant that 'he had better put up his hands,' it was his duty to throw down his gun and surrender himself as a prisoner. And Gleason and Brighton, under the foregoing provision of the statute, had a right to use whatever force was necessary to disarm him and prevent his escape. The same rule does not govern in this case that applies to parties engaged in a mutual combat, or one that arises from a sudden quarrel or heat of passion, wherein both parties may be at fault. In such a case the aggressor, if he can do so, may in good faith withdraw from the combat and place of encounter, and if he does, the party assailed is not justified in pursuing him for the purpose of continuing the affray. In this case the defendant was acting in the role of an outlaw and hold-up. He was endeavoring to, and in fact was in the act of robbing a couple of blameless and inoffensive men, and when he was told to put up his hands, he was in effect placed under arrest; and the killing of these men, under the circumstances as related by himself in order to make his escape, was just as culpable and indefensible as though he had, without warning, shot them down when he first entered the car. At no time from the moment he entered until he fired the fatal shot that killed Gleason did he do anything that would even suggest that he intended in good faith to withdraw from the contest, much less abandon his felonious attempt of robbery or surrender himself as a prisoner. True, according to his testimony, which, for the purpose of this case, we must accept as true, after he had shot Gleason he said to Brighton, 'For God's sake, man! Don't kill me; I will give up.' When he made this statement he had already committed the crime for which he stands convicted. And even if this declaration had been made in good faith, under the circumstances it would avail him nothing. Brighton had made no statement or move, so far as shown by the record, that would even justify an inference he had in his possession a deadly weapon or intended to use one upon defendant, notwithstanding, under the circumstances, he had a perfect right to use whatever force was necessary to overcome defendant's resistance, even to the taking of his life." And continuing the court said: "In concluding the

discussion of this branch of the case, we have no hesitancy in saying that, according to defendant's own testimony, which, as hereinbefore stated, we must assume to be true, from the time he entered the car and told the occupants to throw up their hands, and until he killed Brighton, there was not a moment that either Gleason or Brighton would not have been justified in shooting him down—first, for the protection of their own persons and lives; and, second, to prevent his escape. And there is an entire absence of testimony that would even tend to suggest that he, at any time after the affray began, ceased to be the aggressor. This is conclusively shown by his testimony, wherein he stated, referring to the time he slipped and fell: 'There was nothing said or done by the men up until this time, except as I have stated; there was nothing done or stated to cause me to abandon the thought of taking the money from these men.' In reading the record, one looks in vain to find any evidence that prior to the shooting of Gleason the defendant gave notice of any kind of intention of abandoning his attempted robbery or of ceasing from his felonious assault.''

But the statutory right of a person to seize personal property which has been stolen and bringing it with the supposed offender, does not deprive a horse thief from defending himself from the attempt of the owners of the horse to kill him while pursuing him: *Luera v. State*, 12 Tex. App. 257.

But, on the other hand, a person upon whom an attempt to rob is being made is justified in killing his assailant without attempting to use other or less radical means or to retreat, even though such means may be resorted to with entire safety to himself and would manifestly be successful: *State v. Bonofiglio*, 67 N. J. L. 239, 91 Am. St. Rep. 423, 52 Atl. 712, 54 Atl. 99. In connection with this general subject, see, also, the note on unintentional homicide in the commission of an unlawful act, attached to *Johnson v. State*, 90 Am. St. Rep. 571, and the note on the right of policemen to arrest and of citizens to resist, attached to *State v. Evans*, 84 Am. St. Rep. 679.

n. **Right of Husband or Paramour to Urge Self-defense on Attack by One or the Other on Discovery of the Adultery.**—The cases in which the husband urged the plea of self-defense on a charge of killing the paramour caught in the act of adultery with his wife do not appear to be numerous. They probably do not reach the appellate courts. In Louisiana, in a case where the husband caught his wife and her paramour in the act of adultery and began shooting at them indiscriminately, whereupon the wife who was a large woman, caught the husband's arm and called upon the paramour to shoot him, the court decided that the doctrine of "aggressorship" which prevails with respect to ordinary cases in which the plea of self-defense is urged, did not apply and that the sinning parties were the real aggressors, and hence that the husband was justified in killing the wife who was holding his arm: *State v. Cancieune*, 50 La. Ann. 847, 24 South. 134. But in a North Carolina case where

the husband, looking through a crack in the house, saw the deceased with his arms around his wife's neck and other facts sufficient to satisfy him of their illicit relations, and then ran around to the door into his house, and in the rencounter killed the paramour, the court said: "If, upon the prisoner entering his house and being assailed by the deceased with a knife, he entered into a fight with the deceased and stood not entirely on the defensive, and in the fight slew the deceased, it would be manslaughter at the most. But if the prisoner stood entirely on the defensive and would not have fought but for the attack and the attack threatened death or great bodily harm and he killed to save himself, then it was excusable homicide, although the prisoner did not turn and flee out of his house. For, being in his own house, he was not obliged to flee, but had the right to repel force with force, and to increase his force, so as not only to resist, but to overcome the assault": *State v. Harman*, 78 N. C. 515.

With respect to the right of a paramour to kill the husband in self-defense, the fact of the illicit intercourse with the wife is considered such a wrong as to take away the right of the paramour to self-defense in a rencounter between him and the husband immediately after detecting them in the illicit act. The only defense of the paramour lays in flight or "means short of deadly": *Dabney v. State*, 113 Ala. 38, 59 Am. St. Rep. 92, 21 South. 311; *Drysale v. State*, 83 Ga. 744, 20 Am. St. Rep. 340, 10 S. E. 358, 6 L. R. A. 424. But in Texas, under a statute making adultery merely a misdemeanor, it was held that one who being caught by a husband in adultery with his wife, resists an attack made upon him by the husband, and kills the husband to save his own life, is guilty only of manslaughter: *Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795. But where a person merely goes to a house for the purpose of securing a place to sleep and with the permission of the wife lies on a bed awaiting the return of the husband to obtain permission from him to obtain lodging, but the husband returning home in the early morning hours makes a violent assault upon him, the person may kill the husband in self-defense, even though his conduct in staying in the house under the circumstances was imprudent: *Franklin v. State*, 30 Tex. App. 628, 18 S. W. 468. And the killing of a husband by the paramour of his wife is justifiable when the husband deliberately lays a trap for the paramour by pretending that he is going on a journey and concealing himself near his home for the purpose of killing the paramour if he is caught in the guilty act, providing the killing is done by the paramour in defending himself against a deadly assault by the husband: *Wilkerson v. State*, 91 Ga. 729, 44 Am. St. Rep. 63, 17 S. E. 990.

o. Right of Self-defense of Owner or Trespasser as Against Each Other.—The mere fact that the owner of land warned the deceased in a quiet and peaceable manner not to commit a trespass does not constitute the land owner the aggressor in a rencounter

resulting therefrom: *Gibson v. State*, 91 Ala. 64, 9 South. 171. And where the deceased was discovered by the defendant, who was a woman living alone, squatting behind some bushes in her yard, and she, not knowing who or what the object was, fired to frighten the object away, the act of the defendant does not deprive her of her right of self-defense in an attack by the deceased: *White v. State* (Tex. Cr. Rep.), 68 S. W. 689. But where the land owner attempts to forcibly remove a trespasser, who is not attempting to commit a felony, he is guilty of provoking the rencounter, and hence cannot ordinarily avail himself of the right of self-defense: *People v. Henshell*, 10 Cal. 83; *State v. Talley*, 9 Houst. 417, 33 Atl. 181; *Tiffany v. Commonwealth*, 121 Pa. St. 165, 6 Am. St. Rep. 775, 15 Atl. 462. But, on the other hand, a trespasser who provokes a rencounter without intending to kill the deceased or do him serious bodily harm does not wholly lose his right of self-defense, but is merely guilty of manslaughter: *Arto v. State*, 19 Tex. App. 126.

STATE v. GOGGIN.

[191 Mo. 482, 90 S. W. 379.]

JUDGMENT—Whether Binds Estate of Deceased Surety.—If a surety on the bond of an administrator dies three years before a judgment is rendered against his principal, and no administrator is appointed for the estate of the surety, his estate is not bound by such judgment. (p. 828.)

FRAUDULENT CONVEYANCE.—A Creditor cannot maintain a suit in equity to set aside a conveyance of his debtor until he has exhausted his legal remedies. (p. 829.)

James P. Maginn, for the appellant.

William P. Sheridan, for the respondent.

⁴⁸⁴ **VALLIANT, J.** Suit in equity to set aside a deed by John Goggin, since deceased, to the defendant, his wife, on the ground that it was made to defraud creditors.

The case may be stated as follows: Peter Taafe and Thomas E. Gay were partners in trade; the copartnership was dissolved in 1891 by the death of Peter Taafe; Gay qualified as administrator ⁴⁸⁵ of the partnership estate and gave bond in the penalty of five thousand dollars, with William P. Hourigan and John Goggin as sureties; the plaintiff qualified as administrator of the estate of Peter Taafe. Pending the administration of the partnership estate, John Goggin, being then the owner of three lots of city real estate, made a deed conveying them without consideration to a friend, who at once reconveyed them to Goggin and his wife as an estate of

entirety. Goggin died in 1895, leaving but little personal property and no real estate, if the deeds in question are valid. In 1898 a final settlement of the partnership estate was decreed in the probate court, in which it was adjudged that Gay, the surviving partner as administrator, pay to the plaintiff as administrator of the estate of the deceased partner the sum of ten thousand three hundred and ninety dollars and sixty-two cents; execution issued on the judgment against Gay and was returned nulla bona and the judgment remains in full force and entirely unsatisfied.

The evidence of the defendant tended to prove that part of the real estate in question was the homestead, within the limits of the law, of John Goggin at the time of conveyances mentioned were executed, and that the reason for his executing the deeds was that he was about to undergo a surgical operation of a dangerous character and was advised that he might not survive it, and his motive was to put the title to the property in his wife to avoid the trouble and expense of administration. The probate court, finding that there was no personal property more than the law gave the widow, ordered that there be no administration on the estate of John Goggin.

On that state of facts the circuit court rendered a decree in favor of the defendant and the plaintiff appealed.

On the part of respondent it is contended that since the judgment against Gay in the probate court was not rendered until six years after the conveyances complained of and more than three years after the death of ⁴⁸⁶ Goggin he was not a debtor when he made the conveyances (citing *State v. Gambs*, 68 Mo. 289), and was free to make deeds of gift, in the absence of proof of a fraudulent intent; citing *Boatmen's Sav. Bank v. Overall*, 90 Mo. 410, 3 S. W. 64. And it is also contended that a suit in equity of this kind cannot be maintained until the plaintiff has obtained a judgment against the alleged debtor and exhausted his legal remedy.

On the other hand, it is contended by appellant that the judgment in the probate court is conclusive against the surety; citing *McCartney v. Garneau*, 4 Mo. App. 567; *State v. Donegan*, 12 Mo. App. 190; *State v. Bilby*, 50 Mo. App. 162; *State v. Holt*, 27 Mo. 340, 72 Am. Dec. 273; *State v. Cruesbauer*, 68 Mo. 254; *State v. Rucker*, 59 Mo. 17; *Dix v. Morris*, 66 Mo. 514. And appellant contends also that his case falls within the exception to the rule that equity in such

case requires a party to first exhaust his legal remedy, that is, that equity never requires a vain act to be done, and therefore when it appears that to sue at law would be impossible or unavailing, it will not be required; citing *Kent v. Curtis*, 4 Mo. App. 121; *Nieters v. Brockman*, 11 Mo. App. 600; *Lackland v. Smith*, 5 Mo. App. 153; *Dodd v. Levy*, 10 Mo. App. 121; *Pendleton v. Perkins*, 49 Mo. 565.

The several propositions of law contended for by the learned counsel on each side are well established, and it is only required to make the proper application of them to the facts of this case.

If the judgment in the probate court on the final settlement of the partnership estate was conclusive as to Goggin's personal representatives, then the other facts in the case show that a suit at law to establish or collect the judgment against his estate would be a vain act. In such case, the administrator of the Goggin estate, if there should be one, could not dispute the judgment, and there being nothing of his estate except that covered by these deeds, there would be nothing ⁴⁸⁷ to apply to the satisfaction of a judgment at law against the estate, nothing at least that a court of law could effectually reach. In that condition of affairs a suit at law would be but an idle ceremony out of which nothing could be expected. Therefore, if the judgment of the probate court was conclusive as to the Goggin estate the plaintiff would not be denied the relief he seeks in a court of equity on the ground that he had not exhausted his legal remedy against that estate. But if that judgment was not binding on the Goggin estate, then it was not sufficient to establish the plaintiff as a creditor of the estate of such a character as to justify a court of equity in granting relief of the kind prayed.

We hold that under the facts in this case the judgment in the probate court on the final settlement of the administrator of the partnership estate was not binding on the estate of John Goggin, deceased.

Proceedings in the probate court are somewhat in the nature of proceedings in rem, and when the notices required by law have been given, all persons interested are chargeable with notice and have the right to be heard. The sureties on the administrator's bond are interested in his final settlement and are entitled to be heard before a judgment, which is to be binding on them, is rendered, and have the right to appeal if they feel aggrieved. If they do not, after due notice of

the purpose of the administrator to make final settlement has been given, appear in court, but let the judgment of final settlement go against their principal and take no part in the proceedings until the period for appeal has elapsed, they have no cause to complain, because they have neglected their opportunity and the judgment is conclusive on them. That is the theory of the cases above cited on this point. But in all those cases the sureties were living when the judgments against their principals were rendered and they were chargeable with constructive notice; here we have a case in which the surety was dead three ⁴⁸⁸ years before the notice, if any, was given, or the judgment was rendered, and there was no administrator of his estate. If the plaintiff had so desired he could have moved in the probate court, before the final settlement, and before he published notice of his purpose to make final settlement, to have an administrator appointed who could represent the surety's estate and guard its interest. We cannot hold that a judgment rendered after the death of the surety, when there was no one to be affected by the notice, no one to represent his estate at the hearing in the probate court or to take an appeal if desired, is conclusive on his estate.

Therefore, in this case it was not sufficient for the plaintiff, in order to show himself a creditor of the Goggin estate, to merely show the judgment of final settlement against the administrator; if he had otherwise an excuse for not suing at law he had no excuse for not attempting to establish his claim when he came into a court of equity by having an account taken.

We think the learned chancellor took the correct view of this case.

The judgment is affirmed.

All concur.

How Far a Judgment Against a Principal is binding upon his sureties is discussed in the monographic note to *Charles v. Haskins*, 83 Am. Dec. 380-390. It has been held that except in those cases where, upon a fair construction of the contract, a surety may be held to have undertaken to be responsible for the result of an action, a judgment against a principal is not binding upon his surety: *Park v. Ensign*, 66 Kan. 50, 97 Am. St. Rep. 352, and see the cases cited in the cross-reference note thereto.

CHERRY v. CHICAGO AND ALTON RAILROAD COMPANY.

[191 Mo. 489, 90 S. W. 381.]

CONNECTING CARRIERS—Sale of Ticket—Authority of Agent.—If an agent of an initial carrier, in accordance with a custom previously observed by connecting lines, sells a special-rate through ticket, good for return within a time therein limited, he is deemed to have authority to represent each of such lines in so limiting the ticket, whether he is a special or general agent. (p. 839.)

CONNECTING CARRIERS—Through Ticket—Acceptance of Terms.—If a connecting carrier has agreed to a proposition for the issuance of sixty-day return limit tickets, it cannot decline to honor such tickets merely because it has not filed its acceptance with the interstate commerce commission, as the law requires. (p. 840.)

CARRIERS—Continuous Journey, Necessity of Pursuing.—Where a passenger purchases a ticket from Fresno, California, to Philadelphia and return, which requires him to pursue a continuous journey in going, and also in returning as far as St. Louis, but does not expressly require a continuous passage throughout the return trip, as appears from the dates limited for leaving Philadelphia and reaching Fresno, nor contemplate such a passage, he does not forfeit his right to carriage from St. Louis to Fresno by stopping off in Kentucky and thereby forfeiting his rights under his ticket from there to St. Louis and necessitating the purchase of other transportation for that portion of his journey. (p. 842.)

CARRIERS—Unreasonable Conditions in Tickets.—No provision contained in a railway ticket, whether expressly or impliedly accepted by a passenger, is binding upon him, unless it is a just and reasonable one in the eye of the law. (p. 849.)

CARRIERS—Unreasonable Condition in Ticket—Expulsion of Passenger.—A provision in a railway ticket requiring passengers, in case of doubt between them and a conductor as to the right of transportation, to pay him what he demands, take his receipt therefor, and report the matter to the general passenger agent, is unreasonable and unenforceable; and if a passenger holding such a ticket, which entitles him to transportation, refuses to pay a cash fare demanded by a conductor, and the conductor thereupon forcibly expels him from the train, the carrier is answerable in damages. (pp. 851, 852.)

Johnson, Allen & Richards and Henry W. Allen, for the appellant.

Jamison & Thomas, for the respondent.

495 MARSHALL, J. This is an action for five thousand dollars actual damages and five thousand dollars punitive damages, alleged to have been sustained by plaintiff on the 28th of July, 1900, by being assaulted, maltreated, maimed and ejected from the defendant's train by the conductor thereof, at Alton, Illinois.

The answer is a general denial, coupled with two special defenses, to wit: 1. That if plaintiff was ejected from defendant's train it was because he presented for passage a limited special excursion ticket issued by the agent of the Atchison, Topeka & Santa Fe Railway, at Fresno, California, for a continuous passage from Fresno, California, to Philadelphia, Pennsylvania, and for a like continuous passage from Philadelphia to Fresno, and that the agent of the Atchison, Topeka and Santa Fe had no right or authority from the defendant to issue such a ticket to be good returning later than the 27th of June, 1900, no stop-overs to be allowed, and that the plaintiff had not, in returning, continuously pursued his journey, but, on the contrary, stopped over for a period of five weeks at Louisville, Kentucky; that when the ticket was presented to the conductor of the defendant's train on July 28th, it had become void by reason of the expiration of the time limit, and by reason of the plaintiff not having continuously pursued his return journey; and 2. That the ticket contained the following express contract between the road and the plaintiff, signed by the plaintiff, to wit: "In case of an error on the part of the agent, or a question of doubt between the holder and the conductor, pay the conductor's claim, take his receipt, and report to the general passenger agent. The case will then be fairly considered and promptly adjusted. I have read and I fully understand and agree to the above terms in consideration of reduced rates. Signed, George W. Cherry"; that when plaintiff presented the ticket to the conductor, the latter informed him that it had expired, and ⁴⁹⁶ that the plaintiff had not pursued continuously his return passage. Thereupon the conductor endeavored to persuade the plaintiff to pay his fare, take his receipt, and report to the general passenger agent as provided by the contract, all of which the plaintiff refused to do, and that thereupon the conductor politely requested the plaintiff to leave the train, and that the plaintiff refused to do so, and continued to refuse to pay his fare, although given ample time so to do, in consequence of which the plaintiff was ejected from the train.

The reply is a general denial. At the close of the plaintiff's case the court sustained a demurrer to the evidence, the plaintiff took a nonsuit with leave, and thereafter the court sustained the motion to set aside the nonsuit, and the defendant appealed to this court.

Chronologically stated, the facts in judgment are these:

On the 19th of June, 1900, the Republican National Convention was held at Philadelphia, Pennsylvania. Preparatory to providing transportation for persons desiring to attend the same, the general ticket agent of the defendant, on the 18th of May, 1900, issued a circular letter to all ticket agents prescribing the terms on which tickets might be sold. That circular provided that tickets might be sold for passage to Philadelphia and return for one fare for the round trip; that from stations in Illinois and St. Louis, the sale of such tickets should begin on the 14th of June and end on the 18th, and from all other stations should begin on the 14th of June and end on the 16th; that the ticket should be limited to a continuous passage in each direction, going passage on date of sale, returning passage on date of execution, and the final limit to be June 27, 1900; that the coupons on the going ticket should be stamped, "Good only on date stamped on back thereof"; that no stop-over would be allowed on the Chicago and Alton Railway; that "tickets may be sold via all ¹⁹⁷ authorized direct routes via which one way rates ordinarily apply"; that the agents of the company were instructed to publish notices in the newspapers in their locality, advertising such contracts and in every way making the excursion widely known so as to secure a large travel; the instructions then contained the following: "To connecting lines. The rates and arrangements quoted herein are respectfully tendered to connecting lines for basing purposes with the request that we be favored with an issue of through tickets for this occasion embodying the restrictive conditions outlined herein. Should it be impracticable to provide through tickets, exchange orders drawn on authorized gateways of this company will be accepted. Through tickets or exchange orders will be honored for going passage from recognized gateways and for returning passage only dates prescribed herein, and connecting lines will please be governed accordingly."

The plaintiff had no notice or knowledge of the terms of this circular. On the 19th of May, 1900, Eben E. MacLeod, chairman of the Western Passenger Association, of which the Chicago and Alton and the Atchison, Topeka and Santa Fe were members, issued what is termed "W. P. A. Consultation Letter No. 358," which contained a letter from W. G. Neimeyer, general western passenger agent of the

Southern Pacific Company, stating that the tickets of the Southern Pacific Railway Company to the Republican National Convention would be issued by that road good for sixty days, and asking MacLeod to take up the matter with the association lines, and arrange for a like limit of sixty days with all the members of the association, and the letter of MacLeod was sent to all the members of the association requesting the members thereof to vote on the proposition to make the tickets good for sixty days. The general passenger agent of the defendant company answered MacLeod's letter, under date of May 22, ⁴⁹⁸ 1900, and directed him to "record our vote with the majority on this proposition." It appears that at first some of the members objected to the sixty day limit, but thereafter withdrew their objections, and upon such withdrawal, without again submitting the proposition to another vote, MacLeod, under date of June 7, 1900, issued a circular letter No. 3429, in which he stated that upon reconsideration the proposition had been adopted, and that accordingly his circular No. 3405, announcing the refusal to adopt the proposition, was negatived, and the circular letter also contained the statement that subsequent to the announcement contained in letter No. 3405, several lines requested the reconsideration of the proposition, but that the lines that raised objection had withdrawn their objections and cast their votes in the affirmative and therefore a formal reconsideration became unnecessary and his circular No. 3429 and action was equivalent to a revote on the subject. The circular concluded as follows: "The proposition is therefore announced adopted, and lines interested will please be governed accordingly." This circular was mailed to all the members of the association, including the defendant, on the 7th of June, 1900.

The association is a voluntary association, each road being represented therein by its general passenger agent. Some of the roads are divided into divisions, and the general passenger agent of each division is a member of the association. W. J. Black is the division general passenger agent of the Santa Fe for that road east of Colorado Springs, Pueblo and Denver, and is located at Topeka. MacLeod's circular No. 3429 was sent to Black. J. J. Byrne, of Fresno, California, is the general passenger agent of the Santa Fe for the San Francisco and San Joaquin valley division in California, and is not a member of the association, and MacLeod did not send him a copy of the circular, but Black did send a copy thereof

to Byrne, who is located at Fresno, ⁴⁹⁹ California, and Byrne received the same on or prior to June 12, 1900.

The plaintiff resides at Fresno, California, and desired to attend the Republican National Convention at Philadelphia on the 19th of June, 1900. Byrne advertised excursion tickets to the said convention and solicited travel over the Santa Fe and connecting roads. On the 12th of June, 1900, the plaintiff applied to A. S. Darrow, the local ticket agent under Byrne at Fresno, for an excursion ticket to Philadelphia and return, and paid to Darrow the sum of eighty-eight dollars and fifty cents therefor. Byrne says that he had no specific authority to issue tickets over the defendant road to the Republican National Convention; that his authority for so doing was based on MacLeod's circular letter No. 3429, dated June 7, 1900, and that he considered that letter as changing the defendant's circular No. 7730, dated May 18, 1900, under which latter the final limit was June 27, 1900, whereas under MacLeod's letter No. 3429, the final limit was sixty days from the date of issue, and accordingly he had instructed Darrow to sell excursion tickets good for sixty days. Byrne further says, however, that the Santa Fe system extends direct to Chicago, but in order to get their share of the business, the Chicago and Alton and other companies, either by themselves or through the association, had always extended the time limit in accordance with the limits specified in the tickets of the Santa Fe. And it further appears that on prior occasions the defendant had uniformly recognized tickets sold by the Santa Fe system, including the divisions represented by Byrne, for passage over the defendant road. Accordingly, Darrow, on the 12th of June, 1900, issued an excursion ticket to plaintiff to Philadelphia and return. That is, a ticket over the Santa Fe from Fresno to Kansas City, over the Chicago and Alton from Kansas City to St. Louis, and an exchange order, which, when presented to the joint agent at St. Louis, entitled the plaintiff to a round-trip ⁵⁰⁰ ticket from St. Louis to Philadelphia and return to St. Louis, after which the ticket issued at Fresno would entitle the plaintiff to return from St. Louis to Kansas City over the Chicago and Alton, and thence to Fresno over the Santa Fe.

The ticket issued to the plaintiff recited that it was subject to a contract, the third clause of which is, "This ticket must be used for continuous passage going, commencing date

of sale, as stamped on back hereof." It also contained this clause: "5. Before this ticket will be accepted for the return passage it must be presented by the holder to the joint agent of the Philadelphia Terminal Lines at Philadelphia, Pa., and there signed, stamped and witnessed as provided on the back hereof. It will then be valid for passage to arrive at original starting point not later than the extreme limit of this ticket, as indicated by punch mark in margin of this contract." It also contained this provision: "Ticket issued on exchange order from eastern gateway to Philadelphia and return will be continuous passage and good to leave Philadelphia not later than June 26, 1900." In the margin of the ticket the date punched by the agent at Fresno specified that the ticket would be good until August 11, 1900.

Upon this ticket the plaintiff proceeded over the Santa Fe from Fresno to Kansas City and over the defendant's road from Kansas City to St. Louis. At St. Louis he presented the exchange order provided for in the ticket, and received a ticket from St. Louis to Philadelphia and return, and upon that ticket proceeded to Philadelphia, where he remained until June 20, 1900. He then presented the ticket, and the exchange ticket to the agent at Philadelphia, who "validated" them on June 20th. The plaintiff then started to return. He stopped over one day at Washington by permission of the conductor. The next day he resumed his journey westwardly, and proceeded until he reached Louisville, Kentucky, about the 22d of June, where he left ⁵⁰¹ the train and went to Russellville, Kentucky, to visit relatives, buying other transportation therefor. He remained with his relatives about a month and then went from Louisville to St. Louis over a different road, procuring other transportation therefor. He arrived at St. Louis on the morning of July 28th. He presented the ticket from St. Louis to Fresno to the gatekeeper at the Union Station, who punched it and permitted him to enter the train of the Chicago and Alton Railway. After the train left St. Louis the conductor came around, examined the plaintiff's ticket and said he would have to look up the matter. He took the ticket and in a short time returned to the plaintiff, saying that he could not ride on that ticket, but would have to get off of the train. When asked why, the conductor replied that plaintiff "was only entitled to a continuous journey from Philadelphia to Fresno," and added that the ticket was "dead." The plain-

tiff then called his attention to the provision of the ticket that it was valid for passage not later than the extreme limit indicated by the punch marks on the margin thereof, and said that under that he was entitled to ride on the ticket, and that he was anxious to pursue his journey and did not wish to have any trouble with the conductor or the defendant road. Thereupon the conductor took the ticket and went off with it. But in a short time came back and told plaintiff he would have to pay his fare, telling him the amount of it. The conductor did not call the plaintiff's attention to the provision of the ticket set out in the answer that in case of error in issuing the ticket or of doubt between the holder and the conductor, the passenger should pay the conductor's claim, take his receipt and report to the general passenger agent. Upon the train reaching Alton, the conductor and a brakeman took hold of the plaintiff, one by each arm, and violently ejected him from the train. The plaintiff made some resistance and says he may have struck the conductor, but has no ⁵⁰² recollection of doing so; that he was excited and believed he had a right to ride on the ticket. In putting the plaintiff off of the train his left wrist was bruised, the skin was knocked off of his right wrist, and the cuticle of the muscle between the shoulder and the elbow of the right arm was torn off in a number of places, and the arm became very sore.

After being ejected at Alton, the plaintiff bought a ticket back to St. Louis and there procured a ticket from St. Louis to Fresno, paying forty-seven dollars and fifty cents, and left for Fresno the same evening. The plaintiff says his railroad fare from Alton to St. Louis and incidental expenses in St. Louis amounted to five dollars.

It was upon this showing that the circuit court nonsuited the plaintiff, and afterward set aside the nonsuit, from which latter order the defendant appealed.

1. The first contention of the defendant is, that the agent of the Santa Fe at Fresno was not the general agent of the defendant but at best was only its special agent, and as such special agent had no authority to issue a ticket over the defendant road which would be good later than June 27th; and as the return ticket was presented to the conductor on July 28th, he had a legal right to demand fare from the plaintiff, and upon the plaintiff refusing to pay the same, after being

allowed a reasonable time so to do, he was justified in ejecting plaintiff from the train, upon his refusal to leave it.

This contention is based upon the proposition that the Western Passenger Association is a mere voluntary association and that according to its rules and regulations, its purpose is to advise all of its members of the character of tickets proposed to be issued by any of the roads belonging to the association, so that all other roads may, but are not obliged to, conform their ⁵⁰³ tickets thereto, and that the members are not obliged to sell similar tickets unless they individually elect so to do, and that they are not bound thereby unless they notify MacLeod, the chairman of the Western Passenger Association, and also file a copy of the election with the Interstate Commerce Commission, and that the defendant did neither in this case. Hence, the agent of the Santa Fe at Fresno, who had before him a copy of defendant's circular No. 7730, dated May 18, 1900, stating that the final limit of return tickets over the defendant road was June 27th, had no right to issue a ticket which would be good beyond that date, and that his action in issuing the ticket to the plaintiff good until August 11, 1900, was void for want of authority; and subsidiary to this the defendant further contends that as Byrne, the general passenger agent of the Santa Fe in California, and west of Albuquerque, was not a member of the association, and as MacLeod never sent him his circular letter No. 3429, dated June 7, 1900, the defendant is not bound by Byrne's action, however much it might have been bound by MacLeod's action otherwise, and finally that the action of the defendant in accepting the ticket as transportation for the plaintiff from Kansas City to St. Louis over its road was not a ratification of the act of Byrne in issuing a return ticket over defendant's road, good until August 11, 1900. In view of the facts in judgment here, it is not material to determine whether Byrne was the general agent of the company or only its special agent. It satisfactorily appears that even prior to this occurrence, Byrne had issued tickets over the defendant road and that his action in reference to the limitation of time therein contained, had always been acceded to by the defendant in order to obtain a share of the business. In addition to this, the charge made by Byrne for this ticket of eighty-eight dollars and fifty cents necessarily included the pro-

portionate part of the cost of transportation over defendant's road from Kansas City to St. Louis and return, ⁵⁰⁴ and although there is no direct evidence to that effect in this record, still it is a fair presumption that as this amount was collected on the 12th of June, by the Santa Fe, the defendant had received its part thereof before the 28th of July, when the return ticket was presented to it. Based upon this assumption, therefore, the defendant had received compensation from the plaintiff not only for the going part of the transportation over the defendant road but also for the return part, and this, too, according to the terms of the ticket itself. The passenger, of course, knew nothing of the defendant's circular letter of May 18th, nor the MacLeod circular of June 7th. The plaintiff was in the same position, when purchasing this ticket, as the traveling public generally who apply for a ticket to a designated point and return, and pay their money therefor and receive a ticket, which specifies a right to return within the time punched on the ticket. In this day when railroads so conduct their business as to authorize the issuance of transportation over their roads by agents of other roads, it is manifestly impossible for the purchaser of the ticket to ascertain, and likewise unreasonable to expect him to ascertain, whether the agent selling the ticket has authority to limit it in the manner he actually does or not. Such an obligation upon a passenger would make it practically impossible for the traveling public to purchase tickets extending over other roads than the road of the seller. It follows that the custom of the roads in this regard, which had been previously observed by the defendant, is strong, if not conclusive, evidence to the traveler of authority in the selling agent to issue a ticket in the terms specified, and whatever conflict of opinion there may have been in olden times when this method of doing business did not obtain, the better view now must be held to be that where such custom is shown to have obtained previously, it is sufficient evidence to sustain the claim that the agent of the selling company, who ⁵⁰⁵ issues the ticket, has authority from all the roads over which the ticket entitled him to transportation to represent each one of those roads, and to make the contract expressed on the face of the ticket. If railroads under this ruling will suffer hardship, it is easily within their power to prevent it, by refusing to enter into such agreements with other roads or to customarily transact business in that way.

Any other rule would work infinitely more injury to the traveler and to the railroad business generally than the rule here announced.

The defendant seeks to differentiate between the powers of the division passenger agents of the Santa Fe, who were members of the Western Association, and of Byrne who was not a member, and impliedly concedes that if Black, who was a member of the association, and who was the division passenger agent of the Santa Fe east of Colorado Springs, Pueblo, and Denver, had issued this ticket on the faith of MacLeod's circular of the 7th of June, and in contravention of the terms of the defendant's circular of the 18th of May, a different case might have been presented. The testimony is, however, that both the Santa Fe and the Chicago and Alton were members of the Western Passenger Association. True, they were represented in that association, as in the nature of things they had to be represented, by natural persons, by their general passenger agents. But in the eye of the law it is the company and not the company's agent alone who is such member. Therefore, it is not material to the determination of this case whether Byrne was or was not a member of the association. Byrne had before him, when he issued this ticket, defendant's letter or circular of May 18th, which limited the return ticket to June 27th, but he had also received from Black a copy of MacLeod's circular of June 7th, which limited the return ticket to sixty days. He considered MacLeod's circular to supersede defendant's circular, and he was right and justified ⁵⁰⁶ in so construing it, because when the general passenger agent of the defendant was notified on May 19th that other roads, especially the Southern Pacific, expected to sell tickets good in returning for sixty days, and was told that the matter was being submitted to the members of the association, and the defendant's general passenger agent, under date of May 22d, instructed MacLeod to cast the vote of the defendant with the majority on that proposition, but upon a request being made by some of the members to reconsider the proposition, those who had previously voted against it changed their votes and voted in favor of it, and under the authority of the general passenger agent's letter of May 22d, MacLeod was justified in casting the defendant's vote in favor thereof. There is no merit in the proposition that the vote was not again resubmitted, for when the vote was cast

in favor of rescinding the former action and in favor of the proposition, it would have been a work of supererogation, which there was scarcely time to accomplish, for MacLeod to go over the formality of again submitting the proposition to the members who had already expressed their wishes in favor thereof. The case presented, therefore, is that the defendant voted, through MacLeod, on the 7th of June, to authorize the ticket agents of all connecting lines to issue tickets to the Republican National Convention, good in returning for sixty days from the date of the issuance thereof. This had the effect of changing the defendant's original instructions as contained in its letter of May 18th, and Byrne was authorized to issue the ticket in question, whether he be regarded as the general or special agent of the defendant.

But it is said that in order to make the action of the defendant in agreeing to the sixty day return limit, binding upon it, it was necessary for it to file its acceptance of those terms with MacLeod, and also a copy of such acceptance with the Interstate Commerce Commission. ⁵⁰⁷ True there is testimony that such is the procedure, under ordinary circumstances. But in this case the defendant's letter to MacLeod of May 22d, authorizing him to record defendant's vote with the majority on the proposition, was a precedent continuing acceptance of the proposition if it was adopted by a majority of the members of the association, and did not require a subsequent action by the defendant, but became effective the instant the majority of the association so voted. The question of whether the defendant, after receiving notice from MacLeod, that all of the roads interested had agreed to the proposition, failed to file its acceptance with the Interstate Commerce Commission, cannot affect its contract in this case, for the plaintiff neither had notice of any such requisite nor did he have power to compel the defendant so to do. So far as the plaintiff was concerned, he accepted the invitation held out by Byrne to the public generally to buy tickets of this character, and he was not required to look further to ascertain whether the defendant had filed its acceptance with the Interstate Commerce Commission.

2. It is next contended by the defendant that the plaintiff was not entitled to ride on the return ticket from St. Louis to Kansas City over its road, because he had not pursued his return passage continuously from Philadelphia, but on the contrary had stopped over, by permission of the

conductor, one day at Washington, and of his own motion had stopped over about a month in Kentucky. In answer to this contention the plaintiff claims that according to the strict letter of the contract, as expressed in the ticket, he was only obliged to pursue a continuous journey going, and that there was no provision in the contract or ticket which required him to do so when returning.

The third clause of the contract set out in the ticket is, "This ticket must be used for continuous passage, ⁵⁰⁸ going, commencing date of sale, as stamped on back hereof." There is no question but that plaintiff complied with this. The only further provision of the ticket, with reference to the continuous passage or to the return passage, is contained in the fifth clause, which is to the effect that before returning the passenger must have his return ticket validated at Philadelphia, and that "it will then be valid for passage to arrive at original starting point not later than the extreme limit of this ticket as indicated by punch mark in margin of this contract," which was August 11, 1900.

So far the matter is clear, as the return ticket was presented to the conductor on July 28th, which was within the extreme limit of the time specified by the punched margin. The fifth clause then contains this further provision: "Ticket issued on exchange order from eastern gateway to Philadelphia and return will be continuous passage and good to leave Philadelphia not later than June 26, 1900."

As above stated, the exchange order from eastern gateway to Philadelphia consisted of an order originally attached to the ticket when it was sold at Fresno, which entitled the holder on reaching St. Louis to present the order and receive a ticket from St. Louis to Philadelphia and return. That ticket the plaintiff obtained. He likewise had that exchange order validated in Philadelphia on the 20th of June, 1900, and left Philadelphia that day. That exchange order ticket, under the terms of the contract of this ticket, required one traveling upon it, in order to be entitled to its benefits, to make a continuous passage from Philadelphia to St. Louis, returning. The plaintiff did not make a continuous passage, but stopped over on the way for a considerable time. He therefore lost the right to use the exchange order ticket from the place at which he stopped to St. Louis, and he recognized that he had so done by procuring other transportation from Louisville to St. Louis.

⁵⁰⁹ The defendant now insists that it should be judged by the strict letter of its contract, and it has a right in this respect to be so judged, for there was nothing unreasonable in the requirement of the contract in this respect. The defendant, moreover, insists that having violated the provisions of the exchange order ticket, the plaintiff lost the benefit of the whole ticket. The strict letter of the contract does not so read. When read in connection with what immediately precedes it in the same paragraph, to wit, that the returning passage shall be good not later than the extreme limit of the ticket, it is apparent that there is no provision in the whole contract which required the plaintiff to make a continuous passage from Philadelphia to Fresno. This is the strict letter of the contract, and by it the defendant insists it must be judged. So judged, the contention that there was any obligation on the part of the plaintiff to make a continuous passage from Philadelphia to Fresno is untenable. That a continuous return trip all the way from Philadelphia to Fresno was not intended or contemplated by the contract expressed in the ticket is further conclusively demonstrated by the fact that the ticket provides that the passenger shall leave Philadelphia not later than June 26th, and at the same time it provides that the ticket shall be good within the extreme limit specified in the punch marks on the ticket, which was August 11th. Of course a continuous trip from Philadelphia to Fresno would not take from June 26th to August 11th.

3. The defendant next contends that the contract, as evidenced by the ticket, contained a provision that, "In case of an error on the part of the agent or a question of doubt between the holder and the conductor, pay the conductor's claim, take his receipt, and report to the general passenger agent. The case will be fairly considered and promptly adjusted." And that the contract ⁵¹⁰ was signed by the plaintiff, who recited that he had read and fully understood and agreed to the terms thereof, in consideration of reduced rates. The defendant upon this predicate contends that even if the plaintiff had a ticket which entitled him to ride over the defendant's road from St. Louis to Kansas City on his return journey, nevertheless, when he presented it to the conductor who pronounced it invalid because the plaintiff did not pursue a continuous journey and because the ticket had expired on the 27th of June, and demanded that the plain-

tiff pay his fare or leave the train, it became the duty of the plaintiff, under this provision of the contract, to accede to the conductor's claim, pay the amount demanded by him, and take his receipt therefor, and thereafter seek reimbursement from the company; or else to leave the train and thereafter sue the company for damages for breach of contract, and that as he failed to do either and was ejected from the train, he is not entitled to maintain an action sounding in tort for the eviction.

In the determination of this question certain fundamental rules of law materially aid therein. The contract which is evidenced by the ticket is the contract between the passenger and the company. The conductor of the train, whom some cases liken to the master of a ship at sea, who has large police and discretionary powers, is, nevertheless, the alter ego of the company. He speaks for the company, but he has no more power than his principal. Some cases hold that it is the duty of the passenger to peacefully submit to the requirements of the conductor, and that such course of conduct is necessary to the orderly running and management of the train, and to the peace and quiet of the passengers, and that the remedy of the passenger is by a suit against the company thereafter as for a breach of contract, and that if the passenger does not do so, or refuses to leave the train when requested so to do by the conductor, and the conductor ejects him therefrom, he is not entitled ⁵¹¹ to maintain an action for damages for the tort. Cases holding to this rule will be found cited in the briefs of counsel; other cases may be found collated in 5 American and English Encyclopedia of Law, second edition, 602; but the author last cited, at page 603, says: "The decided weight of authority, however, now is to the effect that where a passenger exercised ordinary prudence in the purchase of his ticket, or in accepting a token showing that his fare had been paid to another conductor on the carrier's line, the latter cannot excuse itself from the consequences of its own act by showing that they were produced by the concurrent acts of two agents rather than by the sole act of the ejecting conductor. If the latter should fail to heed the explanation and protests of the passenger at that time, he does so at the financial peril of his employer." This proceeds upon the legal theory that the conductor is the alter ego of the principal, and therefore the act of the conductor is the same as if the principal had done it himself.

The same author, at page 639, says: "Tickets are rather in the nature of receipts, the office of which is to serve as tokens to enable persons having charge of the conveyance of the carrier to recognize the bearers as persons who are entitled to be received for passage, than in the nature of written contracts, and therefore passengers are not precluded from contradicting, varying, or explaining them by parol testimony."

The same author, at pages 612 and 613, discusses the authorities bearing upon the difference or distinction that is made in some of the adjudications between the ticket if signed by the passenger and if not signed but his acceptance thereof is implied from his use of the ticket, and concludes that there is no difference in the legal effect of the two. Counsel in this case have learnedly discussed the question of whether or not the provision under consideration under this head constitutes a part of the contract, or whether it is a mere notice. But it is not necessary to the determination of this case to ⁵¹² decide that question, for other controlling considerations are present.

The author above quoted, at page 614, in speaking of the validity of limitation of liability contained in a ticket, whether expressly or impliedly assented to by the passenger, cites many cases which sustain the doctrine that, in order to be legal, such limitations expressed in the ticket must be just and reasonable in law.

The supreme court of Indiana had before it a case in many respects similar to the case at bar (*Chicago etc. R. Co. v. Graham*, 3 Ind. App. 28, 50 Am. St. Rep. 256, 29 N. E. 170), and in disposing of a contention similar to that here made, that court said: "It is further contended that it was the appellee's duty to pay the return fare demanded by the conductor, out of consideration for the rights of other travelers, and that his only right of action would be to recover from the company the excess charged. If he had paid the extra demand, and been carried to his destination, perhaps he could only recover the excess, unless some element of special damages entered into the occurrence; but he was not bound to do this. This identical question was before the court in *Jeffersonville R. R. Co. v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276. In deciding it the court said: 'The plaintiff was under no obligation to purchase, even for a trifle, the right which was already his own.' "

Speaking to this subject the supreme court of Wisconsin, in *Yorton v. Milwaukee etc. R. R.*, 62 Wis. 367, 21 N. W. 516, 23 N. W. 401, said: "The same counsel further says the plaintiff might have protected himself from all loss or inconvenience arising from the fault or mistake of the first conductor at a trifling expense, and that he failed in a social duty by omitting to do so. The jury found that he had sufficient money with him when on the second train to have paid his fare from Clintonville to Oshkosh. But was he under legal obligation to pay the additional fare exacted? He had once paid for a ticket to Oshkosh, and ⁵¹⁸ claimed the right to ride to his destination. Probably most persons having the ability would, under like circumstances, pay the additional fare rather than submit to the inconvenience and delay of leaving the train at that hour and place. But, as we have said before, we think the plaintiff had the option either to pay or leave the train and resort to his legal remedy. There are men who, in social life and business matters, act upon the maxim, 'Millions for defense, but not a cent for tribute'; in other words, men who stand upon their strict legal rights.

"There is certainly a class of cases where the law imposes upon a party injured by another's breach of contract or tort the duty of making reasonable exertions to render the injury as light as possible. Counsel have referred to authorities which affirm that rule of law. They have also cited cases which hold that a passenger cannot insist upon remaining on the train without paying fare, in order that force may be used for his expulsion and then claim damages for the force thus used. But we have not been referred to a case analogous to this, which decides that it was the duty of the plaintiff to have paid the fare exacted and remained on the train, in order to protect the company against the consequences of the mistake or fault of the first conductor. According to our view, the law imposed upon him no such duty. On the contrary, when he was ordered to leave the train or pay the additional fare, he had an election to leave, or remain on the condition of paying. Having concluded to leave, he has his remedy against the company for his damages, which are not necessarily limited to the additional fare paid subsequently to go to Oshkosh, and interest thereon. The law allows him to recover full compensation for the damages he sustained by reason of the fault of the first conductor."

⁵¹⁴ In *St. Louis etc. Ry. Co. v. Mackie*, 71 Tex. 491, 10 Am. St. Rep. 766, 9 S. W. 451, 1 L. R. A. 667, it appeared that the plaintiff purchased and paid for a first-class ticket for himself and family, but that the agent of the company gave him a second-class ticket. When the ticket was presented to the train conductor he demanded extra pay for the privilege of riding in the first-class cars. The plaintiff did not have money enough to pay the extra charge, and therefore was compelled to ride in the second-class coach; in consequence of which the plaintiff's wife was made sick. The suit was to recover damages. The court said: "The appellant made a contract to transport or to cause to be transported, in a first-class car, the appellee and his family from one named place to another, and for this service received in advance the compensation demanded. This contract was made by an agent, who failed through mistake or otherwise to give the written evidence of it, but it was nevertheless the contract of the appellant, who is charged with knowledge of all the terms of it. Knowing the terms of the contract, through another agent, it violated it, and, we may say, did so under circumstances aggravating in their character. Under the regulations made by the appellant and other lines over which the appellee had to pass, it may have been made the duty of conductors to their companies to regard the tickets as the only evidence of the contract to which they could look for the regulation of their conduct, but the law affects the appellant with knowledge of the real contracts made by its agents, and it cannot be permitted to shield itself from liability for the nonperformance of a contract on the ground that it had made a regulation which precluded its conductor from making any inquiry as to the real contract made, or from carrying it out. The making and enforcement of such a regulation rather aggravates than excuses the violation of a contract, for this withdraws from agents operating trains the power to correct a mistake and comply with the contract actually made, ⁵¹⁵ although this might be easily done. But for such a regulation the conductor would probably, when informed of the mistake in the tickets, have, as he might have done, ascertained soon after the passage began what the real contract and consequent right of the appellee was. It cannot be heard to say that it was ignorant of the terms of the contract, of its violation or of the unauthorized demand made by its agent as a condition on which he would execute the

contract. The duty of appellant was fixed by contract based on full consideration paid, and the law recognizes no means whereby it can be more firmly imposed or compliance with made more imperative."

Fetter on Carriers of Passengers, section 317, page 792 et seq., thus states the rule: "There is an irreconcilable conflict of authority as to whether a passenger must submit to an ejection from the train, where he has paid his fare, but where, through some mistake of the carrier's servants, he has not received the proper evidence of payment. The correct rule, and the one supported by the great weight of recent authority, is that the ticket is not conclusive in dealings between passenger and conductor, and that the conductor has no higher right to expel a passenger than the company itself has. In expelling a person from a vehicle, the carrier resorts to the right of self-help, and not to any legal remedy. It would therefore seem that the carrier acts at its peril whenever it takes the law into its own hands, and if it turns out that the person ejected was not a trespasser, but was lawfully on the train, that the carrier ought to respond in damages for the wrongful ejection. The general principle is that a person who has the right to go to any place without being regarded as a trespasser, and who does go there properly and lawfully, cannot be interrupted so long as he does not interfere with the right of anybody else, but simply pursues his own legal right; and any person who does interrupt him, treat him as a trespasser, and forcibly ⁵¹⁶ ejects him as a trespasser, is liable in law for an action of assault and battery.

"This principle, that in such circumstances the ticket is not conclusive as between passenger and conductor, though denied by courts of high standing, is supported by numerous recent cases. The supreme court of the United States has recently held that the conversation between a passenger purchasing a ticket and the ticket agent is admissible as to what the contract of carriage is. So a passenger who is wholly without fault, and who has done all that can be reasonably required of him to do, and in whose ticket there is an error through the mistake, carelessness or negligence of the agent or conductor of the railroad company, and who is ejected from the train on the ground that his ticket is defective, may recover for his ejection, and is not bound to pay another fare, and then sue the company to recover that."

In *Cherry v. Kansas City etc. Ry. Co.*, 52 Mo. App. 499, the Kansas City court of appeals discussed the question as to whether it was the duty of the passenger to pay the additional fare and sue for the return of the money, or to submit to expulsion from the train and sue for damages, and disposed of the question as follows: "The suggestion is made in defendant's brief that, even to admit plaintiff's right to ride on defendant's road at the time, yet he ought to have paid the additional fare demanded and sued for the return thereof as money paid under duress unless the same was refunded. Notwithstanding the rulings of some of the courts which look that way, we think no such course was incumbent on the plaintiff, since he would thereby be purchasing a right he had already. 'The plaintiff was under no obligation to purchase, even for a trifle, the right which was already his own': *Jeffersonville R. R. Co., v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276; *Chicago etc. R. R. Co. v. Graham*, 3 Ind. App. 28, 50 Am. St. Rep. 256, 29 N. E. 170. By the purpose of this ticket, entering the car and displaying to the conductor the evidence entitling him to a passage, ⁵¹⁷ a duty arose on the part of the railroad company to carry the plaintiff over the route he sought to travel. By the company's refusal to perform this duty, and forcibly expelling the plaintiff from the train, a case was made, to wit, an action for damages for the wrong thus inflicted on the plaintiff."

Carroll v. Missouri Pac. Ry. Co., 88 Mo. 239, 57 Am. Rep. 382, was an action for damages for the death of plaintiff's husband caused by the negligence of the company. The deceased was riding on a drover's ticket, and had signed a contract or agreement, set forth in the ticket, that in consideration of free passage, he released the company from liability for any injury he might receive. The deceased was killed by the negligence of the defendant company in permitting the train he was riding on to come in collision with another train. The company pleaded as a special defense the written agreement of the deceased aforesaid. In passing on the validity of that agreement this court said: "The action of the wife, we may observe, was for the death of the husband, occasioned by the defendant's negligence, and the question is as to the validity of the agreement made by the husband exempting the defendant from injuries caused by its negligence, the collision of the trains, as we must assume after verdict, being due thereto. The right of common carriers of goods and

passengers to thus contract against their own negligence has repeatedly been before this court in a variety of ways, and has heretofore been denied upon grounds of public policy: *Dawson v. Chicago etc. R. R. Co.*, 79 Mo. 296; *Harvey v. Terre Haute etc. R. R. Co.*, 74 Mo. 538. Like stipulations and exemptions in stock contracts substantially similar were involved and passed upon in the case of *New York Cent. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, where, upon an extended review of the cases, the supreme court of the United States held, also, that a common carrier cannot stipulate for exemption from liability from its own negligence, that the rule applied ⁵¹⁸ to the common carrier of goods and passengers for hire."

The court also pointed out that a different doctrine obtained in some of the other states, but adhered to the rule that had always obtained in this state, and held that the stipulation and agreement in the contract expressed in the ticket was void, as being contrary to public policy. And a recovery in favor of the plaintiff was sustained.

A multitude of cases could be cited bearing upon the question under consideration, but as there is an irreconcilable conflict between the adjudications, the foregoing is sufficient to show that whilst in England it is held that a railroad company may by special contract, either expressly or impliedly agreed to by the passenger, limit its liability, and prescribe rules of procedure in cases like the case at bar, still the American rule has long been settled that a railroad company cannot, even by an express contract, signed by the passenger, limit its common-law liability for negligence, and the rule is equally as well settled that no provision contained in the ticket will be binding upon the passenger whether expressly or impliedly accepted, unless such provision is a just and reasonable one in the eye of the law. The reason underlying the rule is, that while, ordinarily, the courts will enforce contracts made by persons who are *sui juris*, still the public has an interest in contracts for carriage of passengers, and the law will require them to be just and reasonable, even if the passenger had not so required or had otherwise expressly agreed.

It only remains, then, to determine whether or not the provision relied on here is a reasonable provision.

Given the first premise that the contract entered into by the plaintiff was a contract in law with the principal; and

given the minor premise that the conductor was the mere alter ego of the principal, it follows that if the company itself could not have repudiated ⁵¹⁹ or raised a doubt as to the validity of the contract as expressed in the ticket, and the passenger refusing to agree to the view thereof taken by the company, the company could not legally eject him from the train, so, likewise, the conductor could not legally do so. The contract was plain. It gave the plaintiff the right to return over the defendant's road at any time before August 11th. The plaintiff was returning on the 28th of July. There was therefore no room for doubt that the plaintiff was complying with the contract.

The provision relied on requiring the passenger to comply with the demand of the conductor to pay whatever the conductor demanded, take his receipt therefor, and afterward seek consideration and remuneration from the company, made the conductor the supreme arbiter of the proper interpretation to be placed on the ticket. And if it is a valid provision, would permit the conductor to require the passenger to pay a second time for that which he had already paid. Yet it is said such a contract must be upheld by the court in order to sustain the proper and peaceful operation of the train by the conductor. The practical working of such a regulation would be that when a passenger made a contract with the company as principal, and paid all the company demanded therefor, and started on his journey, he would have to provide himself with funds sufficient to meet the requirements and whims of every conductor he came in contact with and would have to pay each conductor whatever amount he demanded in order to be entitled to transportation under his contract. It is not a violent assumption to believe that few travelers take such precautions, and it is no reflection upon the average citizen to say that few would be able to thus guard against such exactions of conductors. This is especially true as to persons who travel thousands of miles to attend political conventions, and who meet with such difficulties on their return journeys, and who under such circumstances are not generally overwell supplied ⁵²⁰ with a plethoric purse. Men sending their families on journeys of necessity or pleasure do not generally anticipate that the women and children will meet with such demands from capricious or arbitrary conductors, but rely upon the contract contained in the ticket purchased which gives the

family the right to transportation without extra or additional charge to the point of destination. The spirit of Americanism would rebel at once against reposing such plenary and arbitrary power in mere agents of the principal. Yet it is said that the passenger must submit to such demand and that his only remedy, if he has not money enough to meet the requirements, is to peaceably leave the train, and find himself stranded in a strange country, and among strangers, and get to his destination the best way he can, and then sue the company for breach of contract. And that if he refuses to allow the conductor to have his own way about the matter, and the conductor ejects him from the train, an action for the tort will not lie. This court will not give its assent to such a doctrine. The provision relied on in this regard is not only unreasonable, but is absolutely absurd on its face, and would entail hard and onerous burdens on passengers, who had done nothing to justify such treatment. The provision is unreasonable and was not binding upon the plaintiff. In fact it is essentially unilateral in character.

The plaintiff in this case was without fault, was conducting himself in a peaceable and quiet manner, was not disturbing his fellow-passengers, and only insisted upon his rights as an American citizen to have a voice in the determination of the question of the validity of the contract he had made with the defendant, and for which he had paid a valuable consideration. The conductor may have obeyed instructions. He may have had only the circular letter of the defendant No. 7,730, dated May 18, 1900, limiting the return ticket to June 27, 1900, as his guide; he may have known ⁵²¹ nothing whatever of MacLeod's circular of June 7th, or of the defendant's obligation to be bound thereby. But the ignorance or mistake of the conductor could not impair or take away the rights of the passenger, nor change the contract the company had entered into with the passenger. If the conductor did not know of MacLeod's letter, and of the defendant's acceptance of the proposition to extend the return tickets for sixty days, it was solely because the defendant failed to give proper notice to its conductors of the change of the condition that occurred after it issued its letter of instructions of May 18th. But whatever was the cause of the action of the conductor, his acts were the acts of the principal, and as the principal in this case had no right to make such a demand upon the plaintiff as the conductor made, and no right to eject the

plaintiff for refusing to comply with that demand, the defendant cannot be excused from the consequences of its conductor's wrong. In these days of telegraphic communication, it would have been an easy matter for the conductor to have ascertained promptly the true character of plaintiff's rights, and he should have done so instead of doing as he did. The conductor was charged with all the notice that the defendant had of plaintiff's rights, and the act of the conductor was the act of the defendant, for which the defendant is as liable as if it had acted itself.

As above pointed out, the defendant itself would have had no right to make such demands of the plaintiff or to eject him from the train. If it did so it would be liable to the plaintiff for the consequences thereof.

The foregoing considerations impel the conclusion that the trial court correctly ruled in setting aside the nonsuit, and therefore its judgment is affirmed.

All concur.

Where a Passenger is Aboard the Cars of a carrier without the proper evidence of his right to passage, due to the fault or mistake of the carrier's agent, not to the passenger's fault, the agent of the carrier in charge of the car or train must heed or accept the reasonable explanation of the passenger in respect to the ticket in dispute; and if he refuse to do so, and expels the passenger from the car or train, he does so at the peril of making the carrier answerable in damages: *Indianapolis St. Ry. Co. v. Wilson*, 161 Ind. 153, 100 Am. St. Rep. 261; *Citizens' St. R. R. Co. v. Clark*, 33 Ind. App. 190, 104 Am. St. Rep. 249; *Illinois Cent. R. R. Co. v. Harper*, 83 Miss. 560, 102 Am. St. Rep. 469; *Memphis St. Ry. Co. v. Graves*, 110 Tenn. 232, 100 Am. St. Rep. 803. Some courts, perhaps, have taken a different view of this question: See *Garrison v. United Railways etc. Co.*, 97 Md. 347, 99 Am. St. Rep. 452; *Harp v. Southern Ry. Co.*, 119 Ga. 927, 100 Am. St. Rep. 212; *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384, 82 Am. St. Rep. 460.

A Condition in a Transfer Ticket issued by a street railway company that, in case of controversy with the conductor about the ticket and its refusal, the passenger shall pay another fare and apply to the office of the company for a refunding of the excessive charge, is unreasonable and void: *O'Rourke v. Citizens' St. Ry. Co.*, 103 Tenn. 124, 76 Am. St. Rep. 639.

The Effect of Time Limitations in round-trip passenger tickets will be found discussed in *Cleveland etc. Ry. Co. v. Kinsley*, 27 Ind. App. 135, 87 Am. St. Rep. 245; *Walker v. Price*, 62 Kan. 327, 84 Am. St. Rep. 392; *Coburn v. Morgan etc. R. R. Co.*, 105 La. 398, 83 Am. St. Rep. 242.

CASES
IN THE
SUPREME COURT
OF
WASHINGTON.

FILLEY v. CHRISTOPHER.

[39 Wash. 22, 80 Pac. 834.]

THE CRITERION of a Fixture is the united application of these requisites: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is appurtenant; and 3. The intention of the party making the annexation to make a permanent accession to the freehold. (pp. 855, 856.)

FIXTURES.—A Furnace and Boiler, Together with the Radiators and Pipes Connected Therewith, located in the basement of a theater, resting on a foundation built up from the floor, encased in brickwork and not capable of being taken away without removing masonry, and the pipes extending to various parts of the building for the purpose of heating it, are fixtures and constitute part of the realty. (p. 856.)

FIXTURES.—Opera Chairs in a Theater, screwed to the floor and being such as are in common use in such places, are fixtures. (p. 856.)

FIXTURES.—Drop Curtains in a Theater, Scenery and Appliances Used for Raising and Lowering the Same, and an Electric Switch-board, are fixtures. (p. 856.)

FIXTURES.—The Bill-board and Money Drawer of a Theater, the former being nailed to the sidewalk, and the latter running in a groove next to and beneath the window, are fixtures. (p. 856.)

FIXTURES.—Evidence to Show Views of Persons Erecting.—The fact that the person who places articles in a theater building, on the sale of the realty, surrenders them to the purchaser, is admissible in evidence in a controversy between third persons as indicative of his view of their annexation to and connection with the building. (pp. 856, 857.)

JURY TRIAL.—The Reading of Judicial Decisions to the Jury on the question of what constitutes a fixture has a tendency to confuse and bewilder, rather than enlighten, and the practice is not to be commended. (p. 857.)

FIXTURES.—The Injury to the Freehold that Will Result from the Removal of an Article and the Value of the Article After Removal are circumstances to be taken into consideration in determining whether it is a fixture, but they are not controlling. (p. 857.)

Troy & Falknor, for the appellant.

Israel & Mackay, for the respondent.

²³ Per CURIAM. On the sixteenth day of November, 1894, John Miller Murphy and Eliza J. Murphy, his wife, mortgaged to A. A. Phillips, trustee, certain real property in the city of Olympia, upon a portion of which was situate the Olympia theater, for the purpose of securing the payment of certain indebtedness due the First National Bank of Olympia and others. On the fifth day of January, 1902, this mortgage was duly foreclosed, and the mortgaged premises ordered sold by a judgment and decree of the superior court of Thurston county. On the eighth day of March, 1902, the defendant in this action became the purchaser of the lots and lands upon which the Olympia theater is situate, at sheriff's sale, and is still the owner thereof. On the third day of November, 1895, Eliza J. Murphy died, intestate, and the plaintiff is the administrator of her estate. As such administrator, he brings this action in claim and delivery, to recover the possession of certain goods and chattels, situate in said Olympia theater, claiming the same as personal property belonging to the estate of said deceased. The defendant, on the other hand, claims that the property in controversy is not personal property, but is a part of the realty, and passed to him under the foreclosure sale above mentioned. The character of this property is the principal question involved ²⁴ in the case. The plaintiff had judgment below, and the defendant appeals.

The motion to strike from the transcript, and the motion to dismiss the appeal, are denied.

So many different articles of property are involved that a separate discussion of each would subserve no useful purpose. At the close of the testimony, the appellant requested the court to instruct the jury to return a verdict in favor of appellant, as to certain articles of property particularly described, and we think a discussion of the questions involved in this request will be a sufficient guidance for the lower court upon a retrial of the case. The following articles were included in this request: "One furnace, Denning No. 2, automatic with boiler; piping and plumbing material with radiators; triangle display board on sidewalk; 1 money drawer; 1 ticket box; 146 chairs (opera), No. 10 (automatic); 134 chairs (opera), No. 6 (Torser back); 220 chairs (opera), balcony veneer; 1 drop curtain, damask; 1 drop curtain; 12 sets

scenery; 1 lot stage rigging consisting of 50 sets of lines, chives, and blocks; set of gaslight switches and by passes; gas piping throughout the house and fixtures; water plumbing, electric switchboard, and 140 lights, fixtures and one dimmer, grooves, chains, belaying pins, chives."

The furnace and boiler in question were located in the basement of the theater building, and rested on a foundation built up through the floor. They were encased in brickwork, and could not be taken out or removed without tearing away the masonry. The pipes extended from the boiler to the radiators, in different parts of the building, for the purpose of heating the same. Some of the radiators were not attached to the building otherwise than to the pipes connected therewith. Others were made of piping and hung on brackets. The pipes could be detached from the boiler by unscrewing them, and could be removed without material injury to the building, except to leave the holes through which they passed. The triangle display board was built of ship lap, and nailed ²⁵ to the sidewalk in front of the theater building. It was so constructed as to display a bill on either side of it. One of the respondent's witnesses testified that it was nailed down to keep people from turning it over. The money drawer ran in a groove underneath, and next to, the ticket window. It could be removed by simply loosening a screw. The ticket box consisted of a box four inches deep, made in two parts, which closed together. It contained a diagram of the theater, and slits were cut in it to represent each seat and its number. It was not attached to the building in any way. The five hundred chairs were situate in the body of the theater and in the balcony. The chairs were screwed to the floor, and were such as are in common use in such places. The drop curtains and scenery were attached to the staging, and could be removed without material injury to the building. The stage rigging was used for the purpose of handling the curtains and scenery. The electric switch was used for the purpose of lighting the different parts of the house, as necessity or convenience might require.

Little could be gained by a review of the authorities as to what constitutes a fixture. As said by this court in Philadelphia Mtg. etc. Co. v. Miller, 20 Wash. 607, 72 Am. St. Rep. 138, 56 Pac. 382, 44 L. R. A. 559: "There is a wilderness of authority on this question of fixtures, and a hopeless conflict of decision." The true criterion of a fixture is

the united application of these requisites: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is appropriated; and 3. The intention of the party making the annexation to make a permanent accession to the freehold. Within this rule, we are of opinion that all, or nearly all, of the articles above referred to are fixtures, and a part of the realty.

Nearly all the authorities concur in holding that a furnace and boiler, together with the radiators and piping connected therewith, such as are above described, constitute a part of ²⁶ the realty: *Thielman v. Carr*, 75 Ill. 385; *Folsom v. Moore*, 19 Me. 252; *Main v. Schwarzwaelder*, 4 E. D. Smith (N. Y.), 273; *Raddin v. Arnold*, 116 Mass. 270; *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235, 23 N. E. 327, 6 L. R. A. 249; *Goodin v. Elleardsville Hall Assn.*, 5 Mo. App. 289; *Capehart v. Foster*, 61 Minn. 132, 52 Am. St. Rep. 582, 63 N. W. 257; *Woodham v. First Nat. Bank*, 48 Minn. 67, 31 Am. St. Rep. 622, 50 N. W. 1015. These views are not inconsistent with the decision in *Philadelphia Mtg. etc. Co. v. Miller*, 20 Wash. 607, 72 Am. St. Rep. 138, 56 Pac. 382, 44 L. R. A. 559. In that case the boiler was in no manner attached to the building except by its plumbing connections.

We think the same rule applies to the opera chairs attached to the floor, the drop curtains, scenery, and appliances for raising and lowering the same, and the electric switchboard. All these articles were attached or annexed to the building. They were a permanent accession to the freehold, and were no doubt intended as such. In *Grosz v. Jackson*, 6 Daly (N. Y.), 463, opera chairs such as are here involved were held to be a part of the realty. In *Capehart v. Foster*, 61 Minn. 132, 52 Am. St. Rep. 582, 63 N. W. 257, it was held that the title to steam radiators, an electric enunciator, and an office desk used in a hotel passed by a foreclosure sale of the hotel. In *Woodham v. First Nat. Bank*, 48 Minn. 67, 31 Am. St. Rep. 622, 50 N. W. 1015, it was held that the bar and back bar in a saloon passed by a foreclosure of the mortgage on the saloon building.

The other items included in the request are not of sufficient value to warrant an extended discussion. We deem it sufficient to say that, in our opinion, the billboard and the money drawer were sufficiently annexed to the building to

become fixtures; and the ticket box, having passed into the hands of the purchaser by consent of the former administrator, should remain there. It has no value except in connection with the theater. While the present administrator is not estopped by the act of his predecessor in surrendering the possession of these articles to the purchaser at the ²⁷ foreclosure sale, nevertheless, the former administrator was the person who placed these articles in the theater building, and his act in surrendering possession to the purchaser was indicative of his view of their annexation to and connection with the building, and is entitled to consideration for that reason. On the same ground, the documentary evidence offered should have been received. The elimination of the above articles from the case disposes of practically all the errors assigned.

The witnesses, whose competency on the question of values was challenged had, in our opinion, sufficient knowledge on the subject to be of some aid to the jury. The reading of judicial decisions to a jury on the complex question of what constitutes a fixture has a tendency to confuse and bewilder, rather than to enlighten, and the practice is not to be commended. It is unnecessary to comment further upon the question, as the judgment must be reversed for the reasons above stated. The injury that will result to the freehold by the removal of an article, and the value of the article after removal, are, no doubt, circumstances to be taken into consideration in determining whether a given article is a fixture or a chattel; but they are not controlling, and too much prominence was given these two features in the charge of the court.

This disposes of all the errors assigned. The judgment is reversed, with instructions to dismiss the action as to the articles enumerated in the request incorporated in this opinion, and for a new trial as to the remainder of the case, in accordance herewith.

Tests for Determining What are Fixtures are given in *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305, 105 Am. St. Rep. 640, and cases cited in the cross-reference note thereto. The fact that chattels affixed to the freehold may be removed without injury to them is not conclusive of their character: *McCrillis v. Cole*, 25 R. I. 156, 105 Am. St. Rep. 875; *Knickerbocker Trust Co. v. Penn Cordage Co.*, 66 N. J. Eq. 305, 105 Am. St. Rep. 640. As to whether kitchen ranges or boilers are fixtures, see *Jennings v. Vahey*, 183 Mass. 47, 97 Am. St. Rep. 409; *Schellenberg v. Detroit Heating etc. Co.*, 130 Mich. 439, 97 Am. St. Rep. 489; as to whether steam radiators or hot-air furnaces are fixtures, see *Towne v. Fiske*, 127 Mass. 125, 34 Am. Rep. 353; *Capehart v. Foster*, 61

Minn. 132, 52 Am. St. Rep. 582; as to whether bakers' ovens are fixtures, see *Baker v. McClurg*, 198 Ill. 28, 92 Am. St. Rep. 261; *Calamore v. Gillis*, 149 Mass. 578, 14 Am. St. Rep. 460; and as to whether gas and electric-light fixtures form part of the realty, see *Canning v. Owen*, 22 R. I. 624, 84 Am. St. Rep. 858; *Hall v. Law etc. Co.*, 22 Wash. 305, 79 Am. St. Rep. 935.

STATE v. BREWER.

[39 Wash. 65, 80 Pac. 1001.]

MANDAMUS—Practice.—A demurrer to the writ or affidavit in mandamus is, in effect, a motion to quash the writ, and may be entertained and in a proper case granted by sustaining the demurrer and dismissing the proceeding. (p. 859.)

MANDAMUS Issues only to Compel the Performance of a Ministerial Duty, and cannot be used to compel the performance of a duty requiring the exercise of discretion. (p. 859.)

MANDAMUS will not Lie to Compel a General Course of Official Conduct, because it is impossible for the court to oversee the performance of such duties. Hence, this writ will not issue to compel the sheriff of a county or the marshal of a city to make complaint and prosecute the persons who violate the laws of the state against keeping saloons, cigar-stands, and other places of business open for trade on Sunday. (pp. 860. 861.)

E. C. Dailey and Frank D. Lewis, for the appellant.

R. A. Hulbert, Hathaway & Alston and Bell & Austin, for the respondents.

66 DUNBAR, J. This is an action in mandamus, brought in the superior court of Snohomish county, wherein the state of Washington, on the relation of F. B. Hawes, is plaintiff, and Frank Brewer, sheriff of Snohomish county, and Edward J. Dwyer, marshal of the city of Everett, Washington, are defendants. The affidavit of relator alleges that it is the duty of said officers, under and by virtue of their oath of office, and of the laws of the state of Washington, to enforce the laws of said state, and make complaint against and prosecute all persons who violate the laws of said state against keeping saloons, cigar-stands, and other places of business open for the purpose of trade or sale of goods on the first day of the week commonly called Sunday, or who sell or dispose of any intoxicating liquor on Sunday, as aforesaid, or who rent houses for the purpose of prostitution or who gamble or run gambling-houses; and, in fact, to complain of and prosecute persons who commit offenses against the criminal laws of the said state

of Washington. It alleged that said laws have been, for a long time past, openly and notoriously violated in said city, in that saloons, cigar-stands, etc., have been kept open on Sunday for the purpose of trade, and that houses are being, and have been, rented in said city for the purpose of prostitution, and that gambling with slot-machines has been carried on, and at length reciting the perpetration of the crimes and misdemeanors committed in the city; that demand had been made upon defendants to enforce the laws of said state against the violators thereof; that said defendants, and each of them, have utterly failed, neglected and refused to enforce said laws, or any of them. This is the substance of the affidavit. And the demand was made that an alternative writ of mandamus issue to said defendants, requiring them to enforce said laws, and prosecute all persons guilty of the violation thereof, or to show cause to the court why they neglected and failed so to do.

⁶⁷ A peremptory writ was issued, and upon the hearing a demurrer was interposed to the complaint: 1. That the court had no jurisdiction of the subject matter of said action; 2. That the plaintiff had no legal capacity to sue; 3. That there was a defect of parties plaintiff and defendant; 4. That the complaint did not state facts sufficient to constitute a cause of action. The demurrer being sustained, judgment was entered, and from such judgment this appeal was taken.

It is insisted by the appellant, first, that the court erred in sustaining the demurrer and in dismissing the action, because there is no provision for a demurrer to the writ or affidavit in mandamus. We think there is no merit in this contention. The common-law forms of pleading have been abolished by the code, and the demurrer in this instance was in effect a motion to quash the writ, and the sustaining of the demurrer was in effect the quashing of the writ. The view we take of the merits of the case renders it unnecessary to pass upon the proposition that the defendants could not be joined in the same action, as we think there is no cause of action stated in the affidavit.

The office of mandamus is to compel an officer to perform a ministerial duty, and the writ cannot be used for the purpose of compelling the performance of a duty which requires the exercise of discretion. It is insisted by the respondent that this question cannot be considered in this case, for the reason that the demurrer admits all the facts stated in the com-

plaint, and that it was stated that the commission of crime was open and notorious. The allegations of the complaint are admitted for the purpose of raising the questions of law which are to be determined on the demurrer in this case; namely, that the respondents held certain official positions and that the suit was brought to compel them to commence actions, and that it seeks to compel a general course of official conduct, which the courts are not authorized to do. Mandamus will not lie to compel a general ⁶⁸ course of official conduct, as it is impossible for a court to oversee the performance of such duties: 13 Ency. of Pl. & Pr. 497.

It will be seen, in this case, that the remedy sought was entirely too general to be at all practical. It is true that we decided in *State v. Spokane St. R. Co.*, 19 Wash. 518, 67 Am. St. Rep. 739, 53 Pac. 719, 41 L. R. A. 515, that mandamus would lie to compel a street railway company to resume the operation of a line which it had discontinued. But there was one specific thing which the street railway company was required to do which involved the entire controversy. But here there is a general course of official conduct sought to be compelled. There is no specific allegation of violation of duty in the petition. There is no statement of any commission of crime by any particular person, and we are unable to conceive to what effect an action for contempt could be prosecuted in case there was a refusal on the part of defendants to obey the injunction of the court. The alternative writ in this case is an instance of the inefficiency of such proceedings. The writ, after reciting the violation of the law, proceeded as follows: "Now, therefore, being willing that justice be done in the premises, you and each of you are hereby commanded immediately to complain of and prosecute any and all persons violating any of the laws of the state of Washington, in said city of Everett, in manner and form hereinbefore described, and that thenceforth you and each of you perform each and every duty enjoined upon you by the laws of said state of Washington, in said city, or that you appear before the above-entitled court at the courthouse in said city of Everett, Washington, on the twenty-first day of May, 1904, at 10 o'clock in the forenoon of said day, and show cause, if any you can, why you refuse so to do."

The demand is for a continuing course of action. The writ cannot be any more specific than the petition, and the writ which must necessarily issue under a petition of this kind,

and which was peremptorily issued, is no more effective than the statute. Each equally commands the officer to perform his duty. One is the announcement of the law by the law-making power, the other is the announcement of the law by the court. The remedy by mandamus contemplates the necessity of indicating the precise thing to be done. It is not adapted to cases calling for continuous action, varying according to circumstances. It is the office of mandamus to direct the will, and obedience is to be enforced by process for contempt. It is therefore necessary to point out the very thing to be done; and a command to act according to circumstances would be futile: 13 Ency. of Pl. & Pr., p. 497, and cases cited.

Ballinger's Code, section 7252, provides that: "Any public officer who shall refuse or willfully neglect to inform against and prosecute offenders against the last preceding section [which is the section under which this action is brought] shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, and the court before which such officer shall be tried shall declare the office or appointment held by such officer vacant for the remainder of his term."

Here is a specific remedy pointed out by the statute, and the remedy which must be resorted to by the citizen, in case of violation of duty by the officer.

The judgment is affirmed.

Mount, C. J., Fullerton and Hadley, JJ., concur.

Rudkin, Root and Crow, JJ., took no part.

Mandamus against public officers is the subject of an extended note to *State v. Gardner*, 98 Am. St. Rep. 863-908.

STATE v. SUPERIOR COURT.

[39 Wash. 115, 80 Pac. 1108.]

APPEAL AND ERROR—Supersedeas, When does not Extend to Injunctions.—If an order is entered restraining as a nuisance the continuance of the use and operation of a shooting-gallery, tonophone and orchestrion until the final determination of an action, an appeal from such order does not suspend its effect, because the injunction is not mandatory, but preventive. (p. 867.)

Williamson & Williamson and J. W. A. Nichols, for the relators.

H. H. Johnston, for the respondents.

¹¹⁵ FULLERTON, J. On April 14, 1905, one John Grantham brought an action in the superior court of Pierce county to enjoin the relators from operating, in connection with their business, a shooting-gallery, and two certain instruments known respectively as a "tonophone" and an "orchestrion," alleging that their operation constituted a public nuisance specially injurious to himself. At the time of commencing his action, Grantham applied for a temporary injunction pending the final determination of the action. Notice of this application was given the relators, and a hearing had thereon, at which hearing the court granted the injunction applied for, in which it restrained the relators from operating the shooting-gallery, the tonophone, and orchestrion, until the final determination of the action. The ¹¹⁶ relators gave notice of appeal from the order, and applied to the court to fix the amount of the bond it would require to supersede the order pending the appeal. The court declined to fix the amount of the bond, on the ground that the order was not one that could be superseded. The relators thereupon applied to this court for a writ of mandate to compel the trial court to fix the amount of such bond.

From the petition for the writ and the return thereto, it is gathered that Grantham, for some years last past, has held a lease upon a part of a certain building, in the city of Tacoma, in which he has conducted a hotel and lodging-house, under the name of "Hotel Gordon"; that, about a year preceding the commencement of this action, the predecessors in interest of the relators leased the remaining part of the building, being a room on the ground floor, and fitted it up for the exhibition of pictorial views, enlarged and made at-

tractive by means of electrical contrivances. The "tonophone" was put in at or near the time the business was first opened, the shooting-gallery was put in about December 4, 1904, and the "orchestrion" about one week prior to the commencement of the action. It will be observed, therefore, that the order of the court had the effect of changing the status quo of the parties, as it prohibited the relators from conducting a part of their business and from operating the so-called musical instruments, all of which they were doing at the time the injunction issued.

The relators contend that, when considered with reference to the right of supersedeas, there is a distinction between an injunction that merely restrains the commission of an act the defendant is about to commit or attempting to commit, and one that restrains the continuance of an act which he is performing at the time of the issuance of the order; that the one cannot be superseded on an appeal, for the reason that the status quo of the parties is not changed by the injunction, the effect of the same being in fact to maintain¹¹⁷ the status quo of the parties; while the other can be superseded, for the very reason that the injunction does not maintain, but actually changes, the status quo.

The distinction here sought to be drawn between injunctions that can be superseded and those that cannot is not the distinction ordinarily drawn by the cases. According to the usual classification, injunctions are either mandatory or prohibitory; a mandatory injunction being one that compels the performance of some affirmative act, while a prohibitory injunction is one that operates to restrain the commission or continuance of an act; and it is only the former that is superseded by taking an appeal and giving the supersedeas bond provided by statute. The reason usually given for this distinction is that an appeal and supersedeas does not destroy the intrinsic effect of a judgment; that, notwithstanding the appeal, the judgment is still the measure of such of the rights of the parties as it adjudicates; and until reversed it operates as an estoppel, and as *res judicata*, as effectively as it would had no appeal therefrom been taken, and no supersedeas bond given. In other words, the appeal and supersedeas operates as a stay of affirmative action upon the judgment, as a supersedeas of execution, but does not destroy the judgment in so far as it can operate without the aid of an execution.

While there are cases to the contrary, this distinction is supported by the great weight of authority. In the Slaughter-House Cases, 10 Wall. 273, 19 L. ed. 915, Mr. Justice Clifford, speaking for the court, said: "It is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court"; and it was held that the same rule applied to writs of error from state courts in equity proceedings. To the same effect is *Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. Rep. 136, 27 L. ed. 888. In *Leonard v. Ozark Land Co.*, 115 U. S. 465, 6 Sup. Ct. Rep. 127, 29 L. ed. 445, it was said: "The injunction ordered by the final decree was not vacated by the appeal: Slaughter-House Cases, 10 Wall. 273, 297, 19 L. ed. 915; *Hovey v. McDonald*, 109 U. S. 150, 161, 3 Sup. Ct. Rep. 136, 27 L. ed. 888. It is true that in some of the Slaughter-House Cases the appeal was from a decree making perpetual a preliminary injunction which had been granted at an earlier stage of the case, but the fact of the preliminary injunction had nothing to do with the decision, which was 'that neither an injunction nor a decree dissolving an injunction is reversed or nullified by an appeal or writ of error before the cause is heard in this court.' This doctrine, in the general language here stated, was distinctly reaffirmed in *Hovey v. McDonald*, and it clearly refers to the injunction contained in the decree appealed from, without reference to whether that injunction was in perpetuation of a former order to the same effect, or was then for the first time granted. The injunction, therefore, which was granted by the final decree in this case, is in full force, notwithstanding the appeal."

And in *Knox County v. Harshman*, 132 U. S. 14, 10 Sup. Ct. Rep. 8, 33 L. ed. 249, it was said: "The general rule is well settled that an appeal from a decree granting, refusing or dissolving an injunction does not disturb its operative effect." In *Central Union Tel. Co. v. State*, 110 Ind. 203, 10 N. E. 922, 12 N. E. 136, the rule is stated in the following language: "The effect of a supersedeas is to restrain the appellee from taking affirmative action to enforce his decree, but it does not authorize the appellant to do what the decree prohibits him from doing. The doctrine which our decisions have long maintained is thus stated in *Nill v. Comporet*, 16 Ind. 107, 79 Am. Dec. 411: 'Indeed, the only effect of an

appeal to a court of error, when perfected, is to stay execution upon the judgment from which it is taken. In all other respects, the judgment, until annulled or reversed, stands binding upon the parties, as to every question directly decided.' "

¹¹⁹ In *National Docks etc. R. Co. v. Pennsylvania R. Co.*, 54 N. J. Eq. 167, 33 Atl. 936, it was said: "Moreover, I find no warrant for the insistment that the mere existence of an appeal suspends or in any manner affects the present inherent validity and force of the decree appealed from. The person in whose favor it is rendered is denied process to enforce it, and that is all. Consequently, where the decree is itself an injunction, that injunction is in force and must be obeyed, unless, to continue the status quo of the parties pending the determination of the appeal, this court or the court of errors and appeals shall order a suspension of its effect. And it is not necessary to issue a writ to bind the parties to the suit to obedience to such a decree. Being before the court, they are bound, at their peril, to take notice of the provisions of any decree rendered in due course upon the issues tendered."

In *State v. Dillon*, 96 Mo. 56, 8 S. W. 781, where the effect of the statutory provision is that a perfected appeal shall stay execution, and all further proceedings upon a judgment appealed from, it is said: "Our law regulating practice in injunction and appeals is essentially the same as that prevailing in the federal courts and those of the other states, and the overwhelming weight of authority is that injunctions ordered on final hearing on the merits are not vacated by an appeal from that decree. A stay of proceedings from its nature operates only on orders and judgments commanding some act to be done, and does not reach injunctions." To the same effect are the cases of *Gardner v. Gardner*, 87 N. Y. 14; *Genet v. Delaware etc. Canal Co.*, 113 N. Y. 472, 21 N. E. 390; *Hawkins v. State*, 126 Ind. 294, 26 N. E. 43; *Sixth Avenue R. Co. v. Gilbert Elev. R. Co.*, 71 N. Y. 430; *James v. Markham*, 125 N. C. 145, 34 S. E. 241; *Bullion etc. Min. Co. v. Eureka Hill Min. Co.*, 5 Utah, 151, 13 Pac. 174.

The only cases we find supporting the relators' contention are from California. In that state all the decisions lay down the general rule that a mandatory injunction can be ¹²⁰ superseded by an appeal and supersedeas bond, while a prohibitory injunction cannot, but they do not agree on the

question whether it is the status quo at the time of the commencement of the action, or at the time of taking the appeal, that is maintained by the stay of execution when a stay is effected. In *Merced Min. Co. v. Fremont*, 7 Cal. 130, it is said that: "A stay of proceedings, from its nature, only operates upon orders or judgments commanding some act to be done, and does not reach a case of injunction"; and, further, that: "The stay of proceedings pending an appeal has the legitimate effect of keeping them in the condition in which they were when the stay of proceedings was granted; it operates so as to prevent any future change in the condition of the parties." This case was approved on both propositions in the cases of *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333, and in *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580. On the other hand, in the cases of *Dulin v. Pacific Wood etc. Co.*, 98 Cal. 304, 33 Pac. 123, *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58, and *Mark v. Superior Court*, 129 Cal. 1, 61 Pac. 436, the court, while adhering to its holding that a prohibitory injunction could not be superseded, says that the effect of a stay of proceedings is to leave the parties in the same situation with reference to the rights involved in the action as they were prior to the granting of the injunction. These cases make no mention of the contrary rulings, and it may be that the statement was made through inadvertence, as the question does not seem to have been involved in either of them. But be this as it may, it seems to us that the cases first cited state the rule in accordance, not only with the great weight of authority, but with the better reason.

In this state, while no case presenting the precise facts of this case has been determined, it seems to us that the ¹²¹ question presented has been determined in principle. In *State v. Stallcup*, 15 Wash. 263, 46 Pac. 251, we held that a temporary injunction, restraining and enjoining the defendant from stringing electric wires on the streets of the plaintiff city, could not be superseded on an appeal therefrom. In *State v. Superior Court*, 35 Wash. 200, 77 Pac. 33, we held the same way with reference to a final order of injunction enjoining the appellant from fencing up and otherwise obstructing a roadway. In these cases the question presented differed from the question in the case before us, in that the injunctive orders restrained the commission of an act, while the one before us restrains the continuance of an

act. But, according to all of the definitions, an injunction which restrains the continuance of an act or a series of acts is just as much a preventive or prohibitory injunction as is one which restrains the commission of an act, and, this being so, neither can be superseded on an appeal.

It is thought, however, that the case of *State v. Superior Court*, 28 Wash. 403, 68 Pac. 865, lays down a different rule. But it will be seen, on an examination of that case, that the injunctive order there in consideration was a mandatory injunction, as it commanded the defendant to deliver to the appellant certain books of account, moneys, and other property, of which he was in possession, belonging to a corporation. While the court said that the effect of a stay of proceedings was to preserve the status quo of the parties, it is clear that it meant nothing more than that a mandatory injunction could be superseded.

It may be that the court itself has inherent power to suspend the effect of a prohibitory injunction, when the purposes of justice require it, pending a decision of the merits on an appeal (*Hovey v. McDonald*, 109 U. S. 150, 3 Sup. Ct. Rep. 136, 27 L. ed. 888), but this question we do not decide. The relators insist that they are entitled to supersede the order appealed from as a matter of ¹²² right, and this we hold they cannot do, as the order is a preventive, and not a mandatory, injunction.

The application is denied.

Mount, C. J., Rudkin, Crow, Hadley and Dunbar, JJ., concur.

The Only Effect of an Appeal from a judgment, supplemented with the filing of a supersedeas bond, is to stay execution on the judgment: *Willard v. Ostrander*, 51 Kan. 481, 37 Am. St. Rep. 294. That an appeal does not operate as a supersedeas and stay execution of a mandamus, see *Pinckney v. Henegan*, 2 Strob. 250, 49 Am. Dec. 592. As to the implied authority of courts to issue writs of supersedeas, see the monographic note to *State v. Board of Education*, 67 Am. St. Rep. 714-722.

IN RE BROWN.

[39 Wash. 160, 80 Pac. 1001.]

INSANITY—Burden of Proof.—General Insanity Being Once Shown to Exist, it is presumed to continue, and the burden of showing a lucid interval rests upon him who asserts it. (p. 871.)

INSANITY, Presumption of Continuance of.—If one is acquitted of murder on the ground of his insanity when he committed the act, his condition is presumed to continue after his acquittal, and the burden is on him to show the contrary. (p. 871.)

INSANE PERSON, to What Prison may be Committed on Acquittal of Crime.—If a statute declares that on the acquittal of a person charged with crime by reason of his insanity, the court may commit him to prison, it may select any prison coming within its committing jurisdiction, such as the county jail of the proper county. (pp. 871, 872.)

INSANE PERSONS, Constitutionality of Statute Requiring Imprisonment of.—The state may classify insane persons and require those whose dangerous tendencies have been manifested by the perpetration of acts impairing the safety of the community after a full hearing has established the fact of insanity, to be confined in prison while the condition continues. (p. 872.)

CONSTITUTIONAL LAW—Insane Person Acquitted of Crime, Statute Authorizing Imprisonment of.—A statute declaring that when any person indicted or informed against for an offense shall be acquitted by reason of insanity, the jury giving their verdict of not guilty shall state that it was given for such cause, and thereupon if the discharge or going at large of such person is manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, is not forbidden by the constitution of the United States or the constitution of Washington. (pp. 872, 873.)

INSANE PERSONS, Order Requiring the Imprisonment of, when not Void for Uncertainty.—An order of court that a person acquitted of murder on account of his insanity be confined in the county jail until the further order of the court is not void for uncertainty. (p. 873.)

J. R. Buxton and A. J. Falknor, for the respondent.

Maurice A. Langhorne and C. H. Forney, for the petitioner.

162 HADLEY, J. The petitioner made original application in this court for a writ of habeas corpus, directed to the sheriff of Lewis county. He asserts that he is unlawfully detained and imprisoned. His petition shows that he was regularly tried in the superior court of said county on the charge of murder in the first degree, to which charge he had interposed the plea of not guilty. The verdict returned was as follows: "We, the jury, find the defendant not guilty by reason of insanity."

Immediately after the return of the verdict, on the first day of May, 1905, the trial court ordered the sheriff to return the petitioner to the county jail, to await the further order of the

court. He was accordingly detained in jail until the eighth day of said month, when the trial judge ordered ¹⁶³ him to be brought into court. The petition alleges that the court thereupon, without any hearing or trial, and without giving the petitioner any opportunity to be heard in his own behalf, arbitrarily of its own motion announced that, because of the verdict of the jury, which established that the petitioner was not guilty by reason of insanity, the court considered that his discharge and going at large would be manifestly dangerous to the peace and safety of the community. It is further shown that, for the above reasons, an order was entered to the effect that the petitioner shall be, by the sheriff, confined in the county jail, until the further order of the court.

The sheriff made return to the petition by way of answer. The answer avers that the petitioner was charged with murder in the first degree, for the killing of his father; that he pleaded and urged, as a defense to said charge, insanity caused by epilepsy, cruel treatment by his father, and the degeneracy of the latter prior to the birth of the petitioner; that he offered proof during the trial of continuous and permanent insanity from said causes, and that his demeanor during the trial appeared to be consistent with his claim of general insanity. The above alleged facts are not controverted by the petitioner.

The court acted on the authority of a statute of this state which is set forth in Ballinger's Code, section 6959. It is as follows: "When any person indicted or informed against for an offense shall, on trial, be acquitted by reason of insanity, the jury, in giving their verdict of not guilty, shall state that it was given for such cause; and thereupon, if the discharge or going at large of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, or may give him into the care of his friends, if they shall give bonds, with surety to the satisfaction of the court, conditioned that he shall be well and securely kept, otherwise he shall be discharged."

¹⁶⁴ The petitioner contends that the statute violates the following portion of the fourteenth amendment to the constitution of the United States: "Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

It is further insisted that the statute violates the following provisions of sections 3, 14, 21, and 22, of article 1 of our state constitution:

“Sec. 3. No person shall be deprived of life, liberty, or property without due process of law.”

“Sec. 14. Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.”

“Sec. 21. The right of trial by jury shall remain inviolate.

“Sec. 22. In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases.”

Has the petitioner been deprived of due process of law in the premises? He was tried before a jury to whom he himself submitted the issue that he was insane when the crime was committed. He was permitted to fully introduce his evidence upon that subject, and the jury were instructed as to their duty in the premises. The verdict returned was in his favor upon the issue which he tendered, and he was therefore accorded due process of law and the right of trial by jury upon that subject. The jury found that he was insane, and it was the manifest duty of the court to enter some kind of a judgment upon the finding of the jury. The petitioner erroneously assumes that it was a judgment entered ¹⁶⁵ in a new and original proceeding, without due process of law and without opportunity for a hearing. It was, however, a judgment rendered upon the verdict of a jury, which had been regularly returned in a proceeding wherein all constitutional rights had been accorded. Should it have been a judgment of discharge, according to petitioner his liberty? He does not allege that he is now sane. The solemn verdict of a jury, after due trial, establishes that he was insane when the killing occurred. The record before us shows that the character of insanity considered was not of a temporary sort, but was rather progressive and permanent in its nature, by reason of epilepsy and congenital conditions.

"The presumption being that general insanity once shown to exist still continues, unless of a temporary sort, like the delirium of drunkenness or a fever, the burden of proof to establish a lucid interval or mental restoration rests upon the party who asserts it": Schouler on Wills, 3d ed., sec. 189, and cases cited.

In the chapter on the subject of "Insanity," in 16 American and English Encyclopedia of Law, second edition, under the discussion of the continuance of insanity of a permanent nature, at page 604 of said volume, the following statement of the rule as to presumption is made: "When habitual insanity in the mind of the person whose act is in question is once established, then the party who would take advantage of the fact of restoration to a sane condition or of an interval of reason must prove it, for insanity of that character is presumed to continue until the contrary is shown."

Decisions from twenty-six of the American states are cited in support of the above text, as well as a long list of English decisions. With such an array of citation, it would seem that the rule is well established, and that a review of the decisions is unnecessary. We have examined a number of the authorities cited, and find that they fully sustain ¹⁶⁶ the rule announced by the text-writer, that, when insanity of a permanent character is once established, it is presumed to continue, and the presumption prevails until the contrary is shown, the burden of showing which is upon him who asserts sanity. Therefore, inasmuch as it was a fact established after a full hearing that the petitioner was insane at the time of the homicide, the presumption is that the same condition continues, and the burden is upon him to show to the contrary. The record does not show that he has ever offered to make such showing to the court below, but rather that he demands his release as an absolute right.

- We have thus seen that, as to the issue of insanity, the petitioner was accorded the constitutional rights of due process of law, trial by jury, and the privilege of appearing and presenting his case in person and by counsel. The additional constitutional objection urged is that no cruel punishment shall be inflicted. The statute authorizes the court, among other things, to commit one acquitted by reason of insanity to prison. No particular prison is specified, and it may be reasonably inferred that any prison coming within

the committing jurisdiction of the court trying the cause may be selected, such as the county jail of the proper county, or the state penitentiary. In this instance the commitment was to the county jail.

May the state, in the exercise of its sovereignty and in its endeavor to protect its people from dangerous insane characters, provide for their confinement in a prison? It is the policy of the state to confine such persons, but it is ordinarily done in an asylum, and not in a prison, so-called. We know of no reason, however, why the state may not classify insane persons and require that those whose dangerous tendencies have been manifested by the perpetration of acts imperiling the safety of the community shall, after a full hearing establishing the fact of insanity, be confined in prison while that condition continues. While confinement of any character may, in a sense, contain elements of cruelty,¹⁶⁷ yet the safety of the people requires that such persons shall be confined.

It is urged that the order of the court is void for uncertainty, in that it is indefinite as to time. The imprisonment is to continue until the further order of the court. The order conforms to the statute in that particular. No time is specified in the statute for the duration of the imprisonment. In the nature of the subject treated by the statute, it must be so. It was the undoubted intention of the legislature that imprisonment shall not be continued after restoration to sanity, and that the court shall so retain control of its order in the premises that it may afterward modify it to suit changed conditions of mind or body, as they may be made to appear. Such an order is analogous to one disposing of the custody of the children in a divorce proceeding, which is made to continue until further order of the court, and subject to modification with changed conditions. Although the fact of insanity has been regularly established, and that condition is presumed to continue until the contrary is shown, yet the petitioner has the undoubted right at any time to assert that he is restored to sanity, and to demand that the court shall duly investigate that subject. The statute in no way attempts to prevent such a demand upon his part, and cannot be held to be invalid on the ground that it prevents him from exercising such privilege.

The petitioner cites *Underwood v. People*, 32 Mich. 1, 20 Am. Rep. 633, in support of his contention against this legis-

lation; but an examination of that case discloses that the Michigan statute provided that one acquitted on the ground of insanity should remain confined in an asylum until an investigation as to his restoration should be set in motion by the prison inspectors. The court said: "It practically leaves the liberty of the person confined to depend upon the controlled pleasure of the inspectors." Under that statute the prisoner could take no step on his own initiative, but was left entirely to the will of others. Such a provision manifestly ¹⁶⁸ violated a personal right. But our statute makes no such attempt to prevent the exercise of a fundamental privilege. The petitioner quotes extensively in his brief from a note in Cooley on Torts, second edition, pages 206, 207. The quotation does not, however, conflict with our argument above that, with the presumption of insanity continuing, confinement is enforceable when the law does not attempt to prevent a judicial investigation as to restored sanity, and which may be initiated at the pleasure of the one confined.

We find no constitutional objections to the statute, and the order of the court is in strict conformity with its provisions. For the foregoing reason, we think the petitioner has not shown sufficient grounds for his discharge, and the writ is denied.

Mount, C. J., Fullerton, Crow, Rudkin, Root and Dunbar, JJ., concur.

A Statute Providing that When a Person is acquitted of a capital offense, on the ground of insanity, the court shall, in its discretion, commit him to the hospital for the dangerous insane, and that he shall not be discharged therefrom except by act of the legislature, is declared unconstitutional in Re Boyett, 136 N. C. 415, 103 Am. St. Rep. 944.

STATE v. CASE.

[39 Wash. 177, 81 Pac. 554.]

TAXATION, Charges Which Amount to.—A statute respecting fees in probate which exacts a charge regulated by the value of the estate and provides for the payment into the county treasury of the moneys, they to become a part of the public funds, cannot be regarded as fixing compensation for services performed by public officers. The demand thus exacted is a taxation on property. (p. 878.)

CONSTITUTIONAL LAW—Estates of Decedents, Imposition of Fees Regulated by the Value of the Estate.—A statute imposing on estates in probate graduated fees regulated by the value of the estate, cannot be sustained under a constitution providing for the taxation of property in proportion to its value, and that all of the taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same. (p. 880.)

CONSTITUTIONAL LAW—Title of Statutes, When does not Include the Subject.—A statute, the title to which declares that it is in relation to the fees of state and county officers, and imposes on estates in probate a fee or charge regulated by their value, and therefore amounts to taxation, is invalid, because it includes a subject not mentioned in the title. (p. 880.)

Kenneth Mackintosh and Ernest B. Herald, for the appellant.

Allen, Allen & Stratton, for the respondent.

¹⁷⁷ HADLEY, J. The relators applied to the superior court for a writ of mandate, directed to the county clerk of King county, requiring him to receive and file certain papers in probate proceedings. An alternative writ was issued. By the demurrer to the petition and alternative writ, the following facts are admitted: D. McL. Brown died in King ¹⁷⁸ county, on the twenty-third day of January, 1905, he being at the time of his death a member of the partnership consisting of himself, W. A. Brown, D. A. Brown and C. M. Nettleton, doing business under the firm name of Seattle Bridge Company. Thereafter the said Nettleton was duly appointed as administrator of said partnership estate, and he qualified as such. An inventory and appraisement of the estate were duly prepared, the appraisement showing the valuation of the property belonging to the partnership at \$127,655.50.

The administrator presented the inventory and appraisement to the clerk for filing, whereupon the latter demanded that the administrator should pay the sum of \$225 as probate fees, and refused to file the papers until said sum should be paid to him. Thereafter the administrator also prepared

a petition for an order to sell certain real estate belonging to the partnership, and thereupon tendered the petition to the clerk for filing, together with filing fees; but the clerk refused to file the same, or to accept the sum tendered otherwise than on account of part payment of said demand of \$225. The demurrer challenged the sufficiency of the above recited facts to authorize the issuance of the writ of mandate, and the same was overruled. The clerk declined to further answer, and it was thereupon ordered that a peremptory writ of mandate should issue, commanding him to immediately file the papers mentioned. From said order he has appealed.

The appeal involves the constitutionality of an act of the legislature of 1903, relating to the fees of state and county officers, witnesses, and jurors: See Laws 1903, p. 290. That portion of the act particularly involved here relates to the charges in probate proceedings, and will be found at pages 293, 294 of said Session Laws. The trial court held the said provisions to be unconstitutional.

It will be observed that the statute requires the payment of \$5, in probate proceedings, at the time the first paper therein shall be filed. In addition to the above amount, a ¹⁷⁹ graduated schedule of fees is provided. Increased amounts are chargeable to estates of \$1,000 or more. The sum to be paid increases according to the value of the estate involved, the amount to be determined by the appraisement returned into court. When the amount of the estate is \$1,000 or more, and less than \$2,000 the additional sum required is \$2.50. The amount is thereafter increased, based upon stated estate values, until the valuation reaches \$50,000 or more, and less than \$100,000, in which case the sum of \$125 shall be paid. It is then provided that estates exceeding \$100,000 shall pay, in addition to the said \$125, the sum of \$50 for each additional \$20,000 valuation above \$100,000. The estate at bar, as we have seen, is valued somewhat in excess of \$127,000, and the fee demanded by the clerk was \$225. Whether the amount demanded is excessive, even under the terms of the statute, we shall neither discuss nor decide, since that matter is not discussed by counsel. The constitutionality of the statute is alone considered in the briefs.

The increased fees provided by the statute are based upon an ad valorem theory, and regulated according to the amount of property owned by an estate. It was the view of the trial court that charges so exacted amount to a property tax, and

that the statute therefore violates our state constitutional provisions with respect to the uniformity of property taxation. Section 1 of article 7 of the constitution provides that: "All property in the state not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law."

Section 2 of the same article also requires that: "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation ¹⁸⁰ shall pay a tax in proportion to the value of his, her or its property."

Section 9 of the same article also contains the following: "For all corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes, and such taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same."

It does not appear that the property of the estate at bar is exempt from taxation, under the first constitutional provision above quoted, but it is subject to the burden thereof, and must be taxed uniformly with other property according to its value. If, therefore, the charges imposed by the statute in question are in the nature of a tax upon the property, they would seem to impose a burden thereon in addition to that borne by property in general.

Appellant argues that, even in cases of taxation, the rule of equality and uniformity does not forbid a liberal classification, and that, since this law classifies estates according to their value, all in each particular class are affected alike. He cites *State v. Clark*, 30 Wash. 439, 71 Pac. 20, and *State v. Sharpless*, 31 Wash. 191, 96 Am. St. Rep. 893, 71 Pac. 737. Neither of said cases relates to property taxation. The first discusses the inheritance tax law, and expressly holds that such a tax is not a property tax, but is a mere charge for the privilege of succession to the ownership and enjoyment of property, following *Magoun v. Illinois Trust etc. Bank*, 170 U. S. 283, 18 Sup. Ct. Rep. 594, 42 L. ed. 1037, which expressly distinguished such a charge from property taxes, which must be uniform and equal under the state constitutions.

The second case cited discusses a license or occupation tax statute. Such statutes do not provide for property taxes, but are usually based upon the necessity for police regulation. It is true such statutes usually contain revenue features, and some may be entirely for revenue purposes and not for regulation; yet their exaction of revenue is not a ¹⁸¹ property tax, but is in the nature of an occupation tax for the privilege of conducting a particular business.

No authority has been called to our attention which holds that property itself may be so classified that it shall bear a burden greater than that of other property of like value within the same assessment jurisdiction. If, then, the exactions from estates required by this statute amount to property taxes, we think the statute cannot be upheld.

It is provided that the money thus collected shall be paid into the county treasury, and it thus becomes a part of the public funds, like that derived from ordinary taxation. Appellant further argues that the same is true of the ordinary fees collected by the clerk for services rendered; that the charge in question here may be regarded not as a tax upon property, but as a fee for services rendered; and that the legislature has the right to fix the amount of such fee. It is true the statute calls the charge a "fee," but if it is apparent upon the face of the statute that the charge is in fact not based upon actual and necessary services rendered or to be rendered, but is based entirely upon a property valuation, thereby partaking of the nature of a tax, it would seem to be wholly immaterial by what name the statute may designate it. The statute in terms shows that the charge is based upon the value of the estate, and shall we conclude that the legislature intended to say, in effect, that the amount of actual and required services varies according to the value of the estate only? If the legislature intended to so declare, it cannot be said that the declaration is supported by experience. Can the legislature arbitrarily say that greater service is required in the settlement of an estate valued at \$1,000 than one valued at \$999.99? We think not; and yet such is the exact effect of this statute, if it shall be held that these charges are fees for services only.

It seems apparent to us that the legislature cannot arbitrarily adopt such a standard for measurement of the value of the services of the clerk in probate proceedings. It is

¹⁸² true, our statutes fix the compensation of an administrator according to the value of the estate which comes into his hands, but such a measurement of value, we apprehend, is chiefly founded upon the degree of responsibility assumed, an element of proper consideration in fixing the value of an administrator's services. No such element exists in the case of the clerk. His services in the premises are purely clerical, and the amount thereof depends upon the filings and records of each particular case, which can in no reasonable sense be said to depend in each given case upon the value of the estate. It seems clear, therefore, that this statute exacts payments regulated by property valuations alone, and that it must therefore be a tax upon property. Taxes are defined to be "burdens or charges imposed by legislative authority on persons or property, to raise money for public purposes, or, more briefly, 'an imposition for the supply of the public treasury'": 27 Am. & Eng. Ency. of Law, 2d ed., 578. The charges here discussed, and which are imposed by the statute in question, seem to include every element comprehended in the above definition.

Appellant has not called our attention to any decided cases bearing directly upon legislation of a character similar to that here under examination. Relators, upon the other hand, cite decisions from two jurisdictions which are adverse to such statutes. A statute essentially similar to ours was passed in Minnesota. By the terms of that statute, a charge of \$10 was exacted when the inventory valuation of the estate exceeded \$2,000 and did not exceed \$5,000. A charge of \$25 was required when the valuation exceeded \$5,000 and did not exceed \$10,000, and by similar increases the charges were greater for greater valuations. The supreme court of Minnesota held that the statute was unconstitutional in *State v. Gorman*, 40 Minn. 232, 41 N. W. 948. The court reasoned as follows: "But the sums required by this act to be paid into the county treasury must be regarded as taxes, in the ordinary ¹⁸³ sense of that word, and as it is used in the constitution. They are not in any proper sense fees or costs assessed impartially, or with regard to the expense occasioned or services performed. The amounts are regulated wholly, but arbitrarily, with regard to the value of the estate. They have no proximate relation to the amount of the compensation to be paid to the probate judge, nor to the other expenses of the court, nor to the nature or extent of the services which may

become necessary in the proceedings. There is no necessary, natural, or even probable correspondence between the sums to be paid (widely different in amounts with respect to estates of different values) and the nature of the proceedings, or the character or extent of the services, which may be required in the probate court. It cannot be assumed, upon any ground of probability, that these proceedings or services will be different or greater in the case of an estate of the value of more than \$500,000 than in one of the value of from \$35,000 to \$50,000—yet in the former case \$5,000 must be paid, in the latter \$100. . . . The purpose for which such payments are required is strictly public in its nature, being directly 'for the use and benefit of the county,' as the law declares, and indirectly for the support of a court established by the constitution, with exclusive original jurisdiction in certain matters of great and general public concern. Nor is it practically optional with executors or administrators, or those interested in the settlement of the estates of deceased persons, as to whether they will pay these exactions or not. If the law is valid, payment is practically necessary in the great majority of cases; and the mode adopted by the statute of securing payment by making that a condition precedent to the exercise of the functions of the probate court is as really compulsory, and perhaps as effectual in general, as the means generally employed to enforce the payment of taxes."

In 1895 the legislature of California enacted a similar statute. It was provided that a fee of \$5 should first be paid by all estates, and an additional fee of \$1 for each additional \$1,000 in excess of \$3,000 of valuation. In *Fatjo v. Pfister*, 117 Cal. 83, 48 Pac. 1012, the statute was held unconstitutional. The court said: "It is perfectly plain that the legislature has attempted by that portion of section 1, above quoted to levy a property ¹⁸⁴ tax upon all estates of decedents, infants and incompetents. The ad valorem charge for filing the inventory is in no sense a fee, or compensation for the services of the officers, which are the same, as respects this matter, in every state large or small. To call it a fee is a transparent evasion. And it is not merely an inheritance tax, or at all analogous to an inheritance tax, as counsel would contend; for, in the first place, it applies not only to the estates of decedents, but also to the estates of minors and incompetents under guardianship; and, as to the estates of decedents, it applies not to the distributable residue after payment of debts

and expenses of administration, but to the whole body of the estate, and would be collectible, if the law were valid, from an insolvent estate, as well as from one of equal appraised value and with no liabilities. As an attempt to levy a property tax, the act is in this particular invalid for several reasons: 1. It violates section 1 of article 13 of the constitution. in imposing an extraordinary tax upon the property to which it applies, in addition to the equal and uniform tax to which alone all property in the state is liable; 2. The subject of the act is not expressed in its title, and is in no wise germane thereto—a violation of section 24 of article 4 of the constitution, which requires that every act shall embrace but one subject, which subject shall be expressed in its title.”

It will be observed from the closing words of the last above quotation that the California statute was also held invalid for the further reason that the subject was not mentioned in its title. The title was essentially similar to that of our own statute, and was as follows: “An act to establish the fees of county, township, and other officers, and of jurors and witnesses in this state.”

The title of our statute is as follows: “An act in relation to the fees of state and county officers, witnesses and jurors, and repealing an act entitled ‘An act in relation to the fees of state and county officers, witnesses and jurors and amending section 2086 of the Code of Washington of 1881,’ the same being approved March 15, 1893.”

¹⁸⁵ By no reasonable exercise of the imagination can it be inferred from the above title that the act treats of the subject of exacting an ad valorem charge or tax from the property of estates. It therefore violates section 19 of article 2 of our state constitution, which requires that “No bill shall embrace more than one subject, and that shall be expressed in the title.”

For the reasons hereinbefore assigned, and also upon authority of decisions cited, we believe the act in question is unconstitutional, in the particular here involved, and that the conclusion of the lower court was right. The judgment is therefore affirmed.

Mount, C. J., Fullerton, Crow, Rudkin and Dunbar, J.J., concur.

A Statute Imposing a Direct Tax on property is unconstitutional if it does not apportion the burden equally among the owners of es-

tates sought to be taxed: *Matter of Pell*, 171 N. Y. 48, 89 Am. St. Rep. 791; *Mauldin v. City Council*, 42 S. C. 293, 46 Am. St. Rep. 723; *High School Dist. v. Lancaster County*, 60 Neb. 147, 83 Am. St. Rep. 525.

A Tax is a Tribute for the support of government, imposed upon property in return for the protection and advantages which the government affords to the owner: See the notes to *New Orleans v. Telephone etc. Co.*, 8 Am. St. Rep. 506; *Zigler v. Menges*, 16 Am. St. Rep. 365. Or a tax is a tribute commanded by sovereignty of the subject, for which his property is held: *Lemont v. Jenks*, 197 Ill. 363, 90 Am. St. Rep. 172.

STRATTON v. NICHOLS LUMBER COMPANY.

[39 Wash. 323, 81 Pac. 831.]

TRIAL—Indemnity Insurance, Reference to by Counsel.—On the trial of an action to recover for the alleged negligence of the defendant, it is improper and prejudicial error for counsel for the plaintiff, in the presence of the jury, to refer or call their attention to the fact that the defendant is indemnified from loss by a casualty indemnity company, and that one of its attorneys is present at the trial. (p. 884.)

TRIAL—Misconduct of Counsel.—It is prejudicial error entitling the losing party to a new trial for the counsel of his adversary, in the guise of questions proposed to witnesses, to place himself in the attitude of making alleged statements of fact, doing so repeatedly over the objections of opposing counsel. (p. 884.)

NEGLIGENCE—Burden of Proof of Causing Accident.—Though it be proved that the defendant was negligent, recovery cannot be sustained against it for personal injury resulting in the death of one of its employes, if there is no evidence tending to show that the accident was the proximate result of such negligence, as where no one saw the accident or knew how the deceased came in contact with the appliance inflicting the injury. (p. 886.)

MASTER AND SERVANT—Unnecessarily Placing Oneself in a Dangerous Position.—If a servant has an opportunity of doing work in two ways, one of which is dangerous and the other not, and attempts the dangerous method, he is guilty of contributory negligence, and cannot recover, though his master is also negligent. (p. 887.)

NEGLIGENCE, Evidence, When does not Support Charge of.—A recovery cannot be sustained on the ground that the defendant's foreman was guilty of negligence in ordering a mill started while the person injured was tying a belt, when it appears that, before such starting, a signal was given by two blasts from a steam whistle, and that the mill had been running two or three minutes before the accident occurred. (pp. 887, 888.)

Root, Palmer & Brown, and Douglas, Lane & Douglas, for the appellants.

John B. Hart and Robert W. Prigmore, for the respondents.

329 CROW, J. This action was brought by respondents, widow and minor son of George Stratton, to recover damages for his death, which occurred while he was working as an employé in the shingle-mill of C. H. Nichols Lumber Company, one of the appellants, at Ballard, King county, Washington. From a judgment awarding damages in the sum of twenty thousand dollars, this appeal has been taken.

George Stratton, a millman of twenty years' experience, was employed in appellant's mill as a shingle sawyer, being in charge of a "ten-block" machine. Within six feet of him was another "ten-block" machine operated by one Freeman Jensen, a fellow-servant. The mill was a two-story structure, the ten-block machines being located in the upper story and operated by power transmitted by means of certain shafts, belts, and pulleys. In the lower story was the main shaft, which was supported by hangers and cross-trees suspended from the ceiling, said shaft being about three inches in diameter and about nine feet above the floor. On this shaft was a pulley, over and from which an endless leather belt passed to another pulley on a countershaft in the upper room. On the countershaft were two other pulleys, from which belts passed to the machine, transmitting the power by which it was operated. The main shaft when in operation made about six hundred revolutions per minute. On the outside of the hanger from the main pulley, and toward the end of the shaft, a collar was placed, which was held in position by an exposed set screw, also about nine feet above the floor. The belt running from the main shaft pulley to the countershaft pulley was new, and respondents contend was too tight. On the upper floor an idler, or tightener, was provided, being **330** so arranged as to be thrown against the belt taking up slack, thereby causing friction and operating the ten-block machine. The pulley on the main shaft was forty-two inches in diameter, and the one on the countershaft thirty-two inches in diameter.

The accident causing the death of George Stratton occurred on December 18, 1902, at about 8 o'clock A. M. A short time before, Matthew Carey, the foreman of the mill and one of the appellants herein, ordered Mr. Stratton to cut out his ten-block machine until quartering time, which would be about 9:30 o'clock A. M., and respondents contend that Mr. Carey also ordered him to go below and tie back his main belt so as to prevent it from burning by rubbing against the main shaft pulley. The mill was stopped. Stratton threw

off the belt, took two pieces of rope, and went below to tie it back. While the mill was stopped, his fellow-servant, Jensen, took advantage of the opportunity to change the saws on his ten-block machine. Respondents claim that, while Mr. Stratton was tying back the belt, the foreman, Mr. Carey, ordered the mill to start. This is denied by appellants. A signal whistle was given, the mill started, and in about two or three minutes thereafter an unusual sound being heard below, the mill was stopped, when Stratton's dead body was found on the floor almost under the shaft, hanger, and set-screw, while his clothing and one piece of the rope which he had carried were wrapped around the end of the shaft, the collar, and the set-screw near the bridge-tree, on the side opposite from the main pulley. One side of the belt had been tied to the hanger or bridge-tree, but the other was not tied back. As above stated, the main shaft was about nine feet from the floor. On the lower floor, and almost under the shaft, were two benches, one being about twenty-four inches in height and the other about twenty-six. Below the main shaft and pulley, suspended from the hangers and cross-trees, probably about six feet from the floor, was a rack constructed of light pieces of timber, used for holding shingle bands. Opposite this ³³¹ rack was a window, in the side of the building, with a sill or a cleat nailed across it. When last seen alive Mr. Stratton was up near the shaft with one foot on the band rack and the other on the window sill or cleat, tying back one side of the belt. No one saw him come in contact with the set-screw, nor was anyone able to tell how he happened to get caught.

Negligence on the part of appellants is claimed by respondents: 1. In that Carey ordered Stratton to go below and tie back the belt, which was not a part of his usual employment; 2. In the use of the unguarded set-screw, which is claimed to have been a dangerous device not commonly used, recently placed on the shaft without Stratton's knowledge, without notice to him, and improperly adjusted; 3. In using a belt from the main pulley to the countershaft pulley which was too tight and therefore difficult to remove; 4. In that Carey ordered the mill started while Stratton was tying back the belt. All of these claims are vigorously denied by appellants.

Many assignments of error have been presented, a number of which are sufficient to warrant a reversal; but as we have arrived at a conclusion which necessitates a dismissal of this

action, we will not consider them further than to discuss one based upon misconduct of counsel. At the time of impaneling the jury, respondents' attorney persisted in asking each of the jurors on their voir dire whether they were connected with any guaranty or casualty insurance company, saying in explanation: "Any kind that insured a mill company against loss; that is, if the mill company was negligent, why then some insurance company paid the damages"; and when counsel for appellants objected, remarked: "You don't mean to say that the Nichols mill company is not insured?" Again, upon cross-examination of one E. B. Palmer, an attorney and one of appellants' witnesses, counsel asked if he was not attorney for the casualty company which insured the mill. An objection being sustained, he then offered to prove by cross-examination ³³² of Mr. Palmer that he was such attorney. Under the authority of *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202, and *Lowsit v. Seattle Lumber Co.*, 38 Wash. 290, 80 Pac. 431, this was improper conduct and constituted prejudicial error. Again, under the guise of questions propounded to witnesses, counsel for respondents placed himself in the attitude of making statements of alleged fact, doing so repeatedly, over objection of opposing counsel, so much so in fact that, in making an examination of the record, we ourselves have experienced much difficulty in distinguishing these unsworn statements from evidence given by witnesses. It can be readily seen that a jury might easily get these statements and expressions confused with evidence actually admitted. As one illustration: Counsel for appellants propounded this question to a witness: "Well, now, it is not customary to box shafts that are up over a man's head, is it?" Whereupon counsel for respondents stated: "I object, if your honor please, as incompetent because it is customary to box shafts and protect them wherever they are dangerous, and they are dangerous wherever people have to be." This course of counsel was continuous, being maintained during the entire trial, although constantly objected to by attorney for appellants, and in face of the fact that in nearly every instance such objections were sustained. It is true the trial was bitterly and ably fought on both sides, and in the heat of a strenuous contest counsel may have in part failed to fully realize the course he was pursuing. But such conduct in the presence of a jury is inexcusable, and cannot fail to be highly prejudicial. Were this the only error assigned, we would, in the

light of the record, be compelled to reverse the judgment by reason of such misconduct.

At the close of respondents' case, and again at the close of the entire case, appellants challenged the sufficiency of the evidence and moved for judgment. Many points are presented in support of this motion, but we will consider two only.

333 1. Appellants contend that, even though it be conceded negligence has been proven on their part, still there is an utter failure of evidence showing or tending to show that the accident was the proximate result of such negligence. In other words, it is contended that, as no one saw the accident or knew how the deceased happened to come in contact with the set-screw, it will not do for the court or the jury to speculate, surmise or guess as to how the deceased was caught, or the accident happened. In support of this contention appellants cite *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457, *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038, *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118, which cases we think conclusive on this point. In *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457, this court said: "In order for the respondent to recover for his injury, it was necessary for him to show not only that the appellant had been guilty of negligence, but that such negligence was the cause of his injury. It is not necessary, of course, that the facts be proven by direct evidence. Circumstantial evidence of the fact is sufficient. But there must be some evidence, either direct or circumstantial, that there was negligence on the one side, an injury resulting in damages on the other, and that the injury and damages followed the negligence, and were produced thereby. . . . But there is no direct evidence as to the cause of the injury, and it is not proving his case by circumstantial evidence for the respondent to show that there were causes, for which the appellant would be liable, which could have produced the injury, without showing that it could not have been produced in any other manner, or in a manner for which the appellant would not be liable."

After making the above statement, this court proceeds to quote with approval from the case of *Patton v. Texas etc. R. Co.*, 179 U. S. 658, 21 Sup. Ct. Rep. 275, 45 L. ed. 361, language of Mr. Justice Brewer which is especially pertinent here. In *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac.

1038, Dunbar, J., uses the following language: "But while it is true that the weight of the testimony is entirely for the jury, yet mere speculation and conjecture must not be confused with legitimate testimony. There are ³³⁴ many theories which might be advanced, which would be mere guessing, that would be as reasonable as the theory contended for by appellants."

In addition to the above authorities, the following might be consulted as supporting appellants' proposition: Bailey on Master's Liability, 503 et seq.; Mountain Copper Co. v. Van Buren, 123 Fed. 61. Applying the principles above enunciated, we find an utter absence of evidence showing or tending to show how the deceased came in contact with the set-screw. There is no question but that he was caught. The last seen of him, however, he was on the opposite side of the hanger from the collar and set-screw, with one foot upon the band rack and one on the window-sill, tying back the belt.

Ten special interrogatories were propounded to the jury, two of which, with the answers of the jury, read as follows: "Q. Did he [Stratton] place himself against the set-screw or shaft knowingly and intentionally? A. No. Q. Did he come in contact with it accidentally? A. No."

It is contended by appellants that these answers are absolutely inconsistent. On the other hand, respondents contend they are not inconsistent, but are warranted under all the circumstances of the case, and in support of their contention they urge that the interrogatories were unfair; that their submission was a trick upon the part of appellants, seeking to take advantage of the jury; that the jury did all it could in answering them in the negative; that such answers were correct, for the reason that there was no evidence tending to show how the deceased came in contact with the set-screw. Either the appellants are correct in their position that the answers are inconsistent, or respondents are correct in saying that the answers given became necessary by reason of the absence of evidence. Upon either theory, no explanation of the accident can be made except by speculation, surmise or guess, and under the above authorities this cannot be permitted. We are of the opinion that the answers to these two ³³⁵ interrogatories are inconsistent with the general verdict, and that said verdict should not be sustained.

2. Appellants also contend that, in tying back the belt, the deceased placed himself in a dangerous position, whereas

he could have done it from another position which was perfectly safe and free from danger, and urge that where a servant has an opportunity of doing work in two ways, one safe and the other dangerous, and accepts the dangerous method, he is guilty of contributory negligence and cannot recover even though his master be negligent. In support of this position appellants contend, and we think with much reason, that it was not necessary for the deceased to climb upon the band rack and sill to tie back the belt. It is in evidence that there were two benches under the shaft, twenty-four and twenty-six inches in height, respectively. The shaft was nine feet from the floor, or about seven feet above these benches. The pulley was forty-two inches in diameter, which necessarily brought the belt at least twenty-one inches below the shaft, or about five feet and three inches above the benches; and appellants contend that, instead of climbing upon the band rack, the deceased could have easily stood upon these benches and tied back the belt without coming near, or in contact with, the shaft or set-screw; that this method was perfectly safe, and that, had it been adopted, Stratton would have been in no danger whatever whether the machinery was moving or not. We think this contention should be sustained: *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Glassheim v. New York Economical Print. Co.*, 13 Misc. Rep. 174, 34 N. Y. Supp. 69; *Kennedy v. Merrimack Paving Co.*, 185 Mass. 442, 70 N. E. 437.

It is urged, however, by respondents that it was necessary for Stratton to climb up on the band rack to take off the belt, as it was too tight and could not be readily removed from below. The record shows that, before leaving the ten-block machine above, he removed the belt. The upper pulley was thirty-two inches in diameter, and when the belt was removed ³³⁶ from said pulley it would have necessarily fallen at least sixteen inches. It could not, therefore, have been too tight. It must have been off of and below the lower pulley when Stratton went downstairs. In any event, he had tied it back to one hanger before he was hurt, and must have had it off the pulley at that time. It appears to be a proposition capable of mathematical demonstration that it was absolutely unnecessary for the deceased to climb upon the band rack to tie back the belt, and that he could have tied it back while standing on the benches.

It is also contended by respondents that the foreman was guilty of negligence in ordering the mill started while Stratton was tying back the belt. There is no evidence that any intention existed of not starting the mill, or that it was not customary for it to be in operation while an employé was tying back a belt. But in any event, it is in evidence that, before the mill was started, a signal was given by two blasts from a steam whistle, and that the mill had been running two or three minutes before the accident occurred. It is self-evident that a person caught upon a shaft revolving at the rate of six hundred revolutions a minute would be thrown off in not to exceed one or two seconds of time. The mill, therefore, must have been running for a considerable time before deceased was caught on the set-screw. In any event, he had ample notice of the starting of the mill by the giving of the signal, which could be readily heard where he was working.

We have before us a large model of the mill, introduced in evidence by respondents, which shows the relative positions of the shafts, pulleys, collar, set-screws, hangers, band rack, belts, benches, idler, ten-block machine, and, in fact, all appliances in the mill material to a correct understanding of the situation. After a most painstaking and careful examination of all the evidence, aided by the presence of this model, we are unable to see how it can be successfully contended that the deceased was not guilty of contributory negligence. ³³⁷ The accident was a most lamentable and unfortunate one. The respondents have been deprived of husband and father, and their loss is immeasurable. This, however, is not sufficient reason for awarding damages against the appellants, who are not liable. The courts must administer the law according to its well-established principles.

The judgment of the trial court is reversed, and the cause remanded, with instructions to dismiss the action.

Mount, C. J., Fullerton, Hadley and Rudkin, JJ., concur.

Root, J., having been of counsel, took no part.

An Employé who selects a dangerous method of doing work, knowing it to be such, when there is a comparatively safe method open to him, does so at his own risk and ordinarily cannot hold his employer answerable if he suffers injury: See the monographic note to *Houston etc. Ry. Co. v. De Walt*, 97 Am. St. Rep. 895.

**SMITH v. ST. PAUL, MINNEAPOLIS AND MANITOBA
RAILWAY COMPANY.**

[39 Wash. 355, 81 Pac. 840.]

CONSTITUTIONAL AND STATUTORY LAW, Interpretation of.—In Considering a Word or Expression of a Statute or Constitution Susceptible of Two or More Meanings, the court will give that interpretation most in accord with the manifest purpose of the statute or constitutional provision. Where the word or expression constitutes an amendment, the court will consider the late law, the mischief sought to be corrected, and the remedy. With all this in mind, the court will give the new language such construction as will effectuate the evident intention and purpose of the makers. (p. 892.)

CONSTITUTIONAL LAW—Damaging Property, What is.—The word “damaged” as used in the provision of the constitution providing that private property shall not be taken or damaged for public or private use without just compensation having been first made or paid into court does not give a right of action in a case where the injury would have been, in the absence of such word, *damnum absque injuria* in an action against a natural person or a private corporation. (p. 893.)

RAILWAYS, When do not Damage Property Within the Meaning of the Constitution.—A railway, the operation of which on its own land by the ringing of bells, the sounding of whistles, and other noises incident to the running of trains, together with the smoke, soot, fumes and cinders from its locomotives, and the jarring of the earth by passing trains, lessens the value of real property, does not damage such property, where the road does not pass through nor immediately adjoining it, within the meaning of the constitution declaring that no property shall be taken or damaged for public or private use without just compensation being first made or paid into court. (p. 896.)

RAILWAYS, Damage by Excavating Through Cross-streets.—Excavations by a railway company through cross-streets affecting accessibility to other streets do not constitute damage to property therein within the meaning of the constitution, for which the property owner may recover, though he uses such streets more than anyone else. (p. 896.)

M. J. Gordon and C. A. Murray, for the appellant.

Barnes & Latimer, S. C. Hyde and W. F. Townsend, for the respondents.

355 ROOT, J. Respondents are the owners of lots 7 and 8, in block 6, of Ide & Kauffman's addition to Spokane, which lots face upon the north side of Bridge avenue, a public street **356** sixty feet in width, having an east and west course. Said lots extend from said avenue northerly one hundred and seventeen feet along the line of Cannon street, which is sixty feet wide, running north and south. Prior to this action appellant had constructed and was operating a railway line,

which, for a distance of about a quarter of a mile to the east, and for a half mile to the west, of respondent's property, paralleled said Bridge avenue at a distance of sixty-three and one-half feet to the south thereof. In front of respondents' property, and for some distance on either side, there is an excavation or cut of some twelve feet in depth, in which appellant's railway track is laid. The nearest rail is one hundred and twenty-three and one-half feet distant from the nearest portion of respondents' property. Respondents allege that the ringing of bells, the sounding of whistles, and other noise incidental to the running of trains upon this railway track, together with the smoke, fumes, soot and cinders from the locomotives, and the jarring of the earth by passing trains and the excavations in cross-streets, have occasioned serious damage to their property and have materially reduced the market value thereof. They brought this action to recover said damages, basing their right of action upon that portion of section 16, article 1, of the state constitution, which reads as follows: "No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner." They recovered judgment in the lower court, from which appeal is taken to this court.

It is not contended that the noises or other annoyances complained of are other than those which are naturally and necessarily incident to the proper operation of the railway, and it is not contended that any or all of these things constitute a nuisance. But it is urged that their property is "damaged," within the meaning of that term as used in the constitution. This railway is built upon land purchased or ³⁵⁷ condemned by the railway company, except where it crosses public streets. No street is crossed at any point adjacent to respondents' property. It is contended, however, that, inasmuch as appellant has made an excavation through the streets, which has impaired the accessibility of said streets near respondents' property, they are injured thereby.

Appellant contends that all of these injuries complained of by respondents are occasioned by results which are naturally and necessarily incident to the operation of the road, which is a legitimate business, and that they do not constitute damages such as are contemplated by the constitutional provision aforesaid. It is urged that, in so far as they are injurious to respondents at all, they are *damnum absque in-*

juria. Appellant maintains that the constitutional provision, *supra*, and similar provisions found in various state constitutions, were inserted, not with the intention of giving a cause of action for every injury which might occur, but to place public corporations upon a plane with private corporations and individuals, and to make such public corporations liable under the same circumstances that would hold persons and private corporations liable.

It seems to be conceded that, prior to the adoption of these constitutional provisions containing the word "damaged," or equivalent expressions, the word "taken," as found in most of the constitutions was not construed to give any right of action against states, counties and cities, public or quasi public corporations, where no tangible property was physically taken, even though the use of said property was materially interfered with and its value depreciated. Several of the older states amended their constitutions by adding the word "damaged," and a number of the new states placed said word in their organic law at the time of its original adoption. Our attention has been called to this, or a similar provision, in the constitutions of the following states: California, Colorado, Georgia, Illinois, Missouri, Nebraska, Pennsylvania, Texas, and West Virginia; and we believe the same, or similar ³⁵⁸ provisions, are found in the constitutions of Arkansas, Kentucky, Montana, and the Dakotas.

In California, Georgia, Illinois, Missouri, Pennsylvania, and West Virginia, the contention of appellant appears to be upheld, and damages seem not to be allowed where the same are consequential or incidental merely to the carrying on of a legitimate business. In Nebraska and Texas the courts evidently hold the other way. There are many cases holding that any obstruction to a public street in front of, or adjacent to, real property entitles the owner of said property to a right of recovery against the one causing said obstructions, even though they be used as a railway, viaduct, or for other legitimate purposes. But the weight of authority appears to be against the right of a property owner recovering for damages occasioned by the legitimate use by another of his own property, so long as said damages are not such as physically affect his property, or some right appurtenant thereto. This was the rule of law prior to the adoption of these constitutional provisions including the word "damaged" and there seems to be sound reason for the contention that this term

was placed in new and amended constitutions so that public and quasi public corporations should be held for damages upon the same grounds as others.

Such seems to have been the view taken by this court in the case of *Brown v. City of Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, where the following language was used: "The earlier constitutions of the several states in the Union contained, with but few exceptions, a provision that private property should not be taken for public use without just compensation. The constitution of the United States contains substantially the same provision, which was applicable to the territory. Under these provisions, however, owing to the interpretation put upon the word 'taken' by the courts of the several states, with the exception of the court of Ohio, great and manifest injury was constantly done by the states, counties and cities to the private citizen without any legal ³⁵⁹ means of reimbursement. The theory was that wherever the state, through its legislative acts, authorized any of its agents to make public improvements, so long as these agents carried on their work within the scope of their authority, and without negligence, they were liable to no one, whatever damages might accrue. A citizen was thus left without protection in all that large class of cases where, through some act done for the public benefit, or for a use public or quasi public, although no part of his tangible property was physically taken, the use or value of his property was palpably impaired, or was stripped of incidents comprised within the conception of complete property rights which brought to those rights, quite as much value as the mere possession of the property."

In construing a word or expression of a statute or constitution susceptible of two or more meanings, the court will give that interpretation most in accord with the manifest purpose of the statute or constitutional provision. Where the word or expression constitutes an amendment, the court will consider the old law, the mischief sought to be corrected, and the remedy. With all these in mind, the court will give the new term or language such construction as will effectuate the evident intention and purpose of the makers. Under the constitutions providing compensation for the taking of property, it was almost uniformly held that public corporations might in different ways greatly injure the property and property rights of others, but could not be held in damages unless there was an actual taking of some portion. The word "damaged"

being employed to give relief to those thus affected by the actions of public or quasi public corporations, it is argued that it should not be assumed that said word was intended to have any other and wider meaning than it then possessed as a well understood legal term. Ordinarily one may use his own property in any legitimate manner he chooses; and, prior to the employment of the word "damaged" in state constitutions, no such property owner was liable to anyone else for any injuries consequent upon, or incidental to, such lawful use of his own property.

³⁰⁰ Applying to the constitutional provision in question the usual tests and rules, and having due consideration for the weight of judicial opinion, as we find it expressed by the courts that have passed upon this question, we are disposed to hold that the word "damaged," as used in our constitution does not give a right of action in a case where the injuries would have been, in the absence of said word, *damnum absque injuria* in an action against a natural person or private corporation.

It would seem to be only reasonable to suppose that persons acquiring property in a thickly settled community must have anticipated the use of neighboring property in a manner not always to be agreeable and pleasant. A person buying property in a growing city must be presumed to have done so for the benefits to come to him by reason of being a property owner in such a city. The presence and operation of railroads are necessarily attendant upon the growth and prosperity of such a city as Spokane. Probably respondents would not have become property owners therein had it not been for the present and prospective railroad facilities of the city. As such purchasers and owners, they knew that more railways would be required as the city grew and became more important. The very growth and development which made city property, as a whole, more valuable and opportunities for business prosperity greater, required the building and operation of more railway lines. No one could buy property in such a growing city without realizing that this would be a natural and necessary result. Where such new lines might be constructed, a person could not foretell. But he would know that they must be near other property, and that their operation, however legitimate and careful, must entail consequential injuries upon the owners of such near-by property. Electing to purchase property in such a community where

his property might profit by the industrial and commercial activities of others, it is but just to hold that, with the advantages, he should also accept the burdens necessarily incidental ³⁶¹ thereto. If one resides on a parcel of city property, his neighbors on three sides may lawfully erect high buildings for legitimate purposes which will entirely shut off access, light and air from those three sides. This greatly reduces the value of his home. It makes it unpleasant and undesirable, increases his insurance rates, subjects him to unpleasant noises and disagreeable sights. But so long as these neighbors use their property lawfully and avoid creating a nuisance, he has no right of action against them. So it is when near-by property is used in a proper manner for railway purposes. So long as such use does not affect the property of others in a physical manner to its detriment, the consequential injuries do not come within the meaning of the word "damaged," as used in the constitution—providing, of course, that a nuisance is not created.

In the case at bar, appellant is operating its railway upon its own property except where the same crosses the public streets. No nuisance is alleged. Complaint is made of the ringing of bells, sounding of whistles, rumbling of cars, jarring of the earth, and the casting of cinders and soot upon, and smoke and fumes across, respondent's premises. They claim also to be injured by reason of the uncovered cuts through the cross-streets, and the wooden bridges over other of said cuts, which make the use of such streets more difficult.

The jarring of the earth of respondents' lots and the casting of soot and cinders thereupon, and the emission of smoke physically injuring property, are injurious physical effects to the corpus of respondents' property, which, we think, come within the scope of the term "damaged," as used in the constitutional provision. If a railroad company cannot carry on its business upon its own property without necessarily disturbing the physical conditions of other property, it is evident that such company has not acquired sufficient property for the conduct of its business, and it should be required to pay such damages as the actual physical disturbance of ³⁶² the neighboring property entails thereupon. But the ringing of bells, sounding of whistles, rumbling of trains, and other usual noises, and the emission of smoke, gases, fumes and odors are necessarily incidental to the proper operation

of the road, and when not resulting from negligence, are such consequential injuries as must be held to have been anticipated by anyone acquiring property in or about such a city, and are regarded as *damnum absque injuria*.

It is urged that the excavations made through the cross-streets in respondents' neighborhood constituted an injury for which they are entitled to damages. We think not. If the railroad was constructed in the public street adjacent to respondents' lots, they would be entitled to recover whatever damages were occasioned thereby. This is upon the theory that every owner of property bordering upon the street has a right to access, light and air therefrom, which right is an appurtenant to the land, and any physical impairment of that right is regarded as actionable. Such an injury is one peculiar to the land owner, and not shared in kind by others. But where the injury complained of is an obstruction, not adjacent to the land of the person in question, but to a street in the neighborhood which he uses, or might use, in common with the public in general, he has no right of action as an owner of injured property. That he may use the street more often than most or all others makes a difference only in degree and not in character, and does not entitle him to damages by reason of injury to his property.

The questions involved herein have been carefully considered and passed upon by many courts; and in view of the importance of said questions, we feel that we may very properly set forth extracts from several of the opinion of these courts. In the case of *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, this court used the following language: "The makers of the Illinois constitution used the word in that instrument for some purpose. Other states changed their constitutions for substantially the same purpose. They ³⁶³ took the new phrase subject to the general rule of construction, that the adoption of constitutional or statutory language by one state from another adopts to some extent, at least, the construction put upon the borrowed language by the courts of the state from which it came. After almost twenty years of discussion and decision in Illinois and other states, we put the words 'taken or damaged' into our constitution, and they must have their effect."

In view of the principle of construction thus recognized, it becomes important to see what the courts of Illinois hold upon this proposition. In the case of *Aldrich v. Metropolitan*

etc. R. Co., 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237, the supreme court of that state quotes approvingly from one of its former decisions, as follows: "The question then recurs, What additional class of cases did the framers of the new constitution intend to provide for which are not embraced in the old? While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not and never has afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street. If it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery it must appear there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject the common law afforded redress in all ³⁶⁴ such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law."

And then makes the following observations: "That case, ever since its decision, has been regarded as laying down the proper rule on the subject, and is, we think, conclusive of the case at bar. Here there has been no direct physical disturbance of any right, public or private, which the plaintiff enjoys in connection with her property and which gives to it an additional value, whereby she has sustained a special damage in excess of that sustained by the public generally. The damages sued for are of the same kind and character as those sustained by the public generally in the ownership of property, which property may have been lessened in value by the

construction and operation of the road. Noise, the obstruction of light and of view, are necessary incidents of the construction and operation of such roads, and if every property owner could recover in all such cases, the making of public improvement would become practically impossible. This road is not constructed along the street in front of the plaintiff's property, thus injuring or destroying a public right which she enjoyed in connection with her property, but, as before said, it is constructed on its own land or right of way. Therefore, what the rights of an abutter would be in such a case it is not necessary to consider. In *Illinois Cent. R. R. Co. v. Grabill*, 50 Ill. 241, in speaking of the annoyances of running engines, the escape of steam, etc., near the plaintiff's premises, this court said (page 244): 'Such consequences of the construction and use of railroads must be borne by all living near them, without complaint and without hope of redress, for they are inseparable from the purposes and objects of such structures, but that a recovery can and should be had for such damages as arise out of the careless and negligent acts of a railroad company in regard to any usual and necessary appurtenances to their road cannot be denied': *City of Chicago v. Union Stock Yards*, 164 Ill. 224, 45 N. E. 430, 36 L. R. A. 374. A railroad constructed and operated by authority of law cannot be a nuisance, and there was no right of action at common law for the depreciation in value of property so caused. The company is liable for negligent ³⁶⁵ or willful injury, as others are, but not for doing the things which the law authorizes it to do. Nor can we agree that the constitution of 1870 gives, or was intended to give, a remedy for all incidental losses, or for the depreciation of the value of property, caused by the construction and operation of railroads in the vicinity, but as said in the *Rigney* case, it was intended only to restore a remedy which existed at common law but which had been denied by legislation and the constitution of 1848."

In the recent case of *Bennett v. Long Island R. Co.*, 181 N. E. 431, 74 N. E. 418, the court of appeals of New York adopts the language of the appellate division of the supreme court as follows: "The rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around the curves, the emission of smoke, soot and cinders, all of which accompany the operation

of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense, but, as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by the legislative authority which created the corporation and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent." And, after referring to certain peculiarities of the case, the court of appeals makes the following statement: "But underlying even these cogent considerations there is the basic distinction that when the legislature authorizes the operation of a steam surface railroad it impliedly sanctions and legalizes those inconveniences and annoyances to others which are inseparable from the proper conduct of such an enterprise."

In the case of *Pennsylvania R. Co. v. Marchant*, 119 Pa. St. 541, 4 Am. St. Rep. 659, 13 Atl. 690, the supreme court, in an elaborate and instructive opinion, says:

"No principle of law is better settled than that a man has the right to the lawful use and enjoyment of his own property, ³⁶⁶ and that if in the enjoyment of such right, without negligence or malice, an inconvenience or loss occurs to his neighbor, it is *damnum absque injuria*. This must be so, or every man would be at the mercy of his neighbor in the use and enjoyment of his own. . . . The necessities of a railroad company and the character of its business compel it to seek the heart of a great city. This is as much for the convenience of the public as for its own. Hence the transportation of passengers and freight as near to the center of a town as possible is in the direct line of its duty, whether that duty be performed by a corporation or individual. It is a part of the lawful use and enjoyment of property, and where it is done without negligence, entails no legal liability therefor. . . . We understand the word 'injury' or ('injured'), as used in the constitution, to mean such a legal wrong as would be the subject of an action for damages at common law. For such injuries, both corporations and individuals now stand upon the same plane of responsibility. That I am correct in the meaning we attach to the word 'injured,' appears abundantly by our own authorities. . . . The language of the constitution is not equivocal and is entirely free from ambiguity. The framers of that instrument understood the meaning of words, and many of them were among the

ablest lawyers in the state. Two of them occupy seats upon this bench. Hence, when they extended the protection of the constitution to persons whose property should be injured or destroyed by corporations in the construction or enlargement of their works, we must presume they meant just what they said; that they intended to give a remedy merely for legal wrongs, and not for such injuries as were *damnum absque injuria*. Among the latter class of injuries are those which result from the use and enjoyment of a man's own property in a lawful manner, without negligence and without malice. Such injuries have never been actionable since the foundation of the world."

The same court, in *Pennsylvania R. Co. v. Lippincott*, 116 Pa. St. 472, 2 Am. St. Rep. 618, 9 Atl. 871, said: "We agree, indeed, that if the ordinary and proper use of the railway is to be regarded as an element of damage, as to a certain extent it is in the case of a condemnation, the rule stated is the correct one; but as this rule is not one of common ³⁶⁷ law out of statute, it cannot apply to the case now being considered: *Philadelphia etc. R. R. Co. v. Yeiser*, 8 Pa. St. 366. Unless, therefore, the case can be brought within some statute, the rule by which damages are measured by advantages and disadvantages ought not to have been adopted; for, as was said, in the case cited, per Mr. Justice Rogers, 'it is a principle well settled by many adjudicated cases that an action does not lie for a reasonable use of one's right though it be to the injury of another. For the lawful use of his own property, a party is not answerable in damages, unless on proof of negligence.' How, then, we ask, can a lawful erection by the Pennsylvania Railroad Company on its own ground, be the subject of damage to the adjoining land owners? And why may it not, as put by the defendant's first point, operate and use, in a lawful manner, its Filbert street branch without subjecting itself to an action for damage? It seems to be very clear that a private person could do with impunity, on his own property, just what the railroad company has done. He might build a house, and thus shut out his neighbor's view, light and air; he might build an embankment, or run a road on or along his own line, and be liable for nothing so long as he used his house, embankment or road in a lawful manner, although in either case an injury may have been done to the adjacent property. Who does not know that even in this country no householder escapes injury and annoyance

from clouds of dust raised in dry weather by the passage of teams over the common roads? And in the cities this grievance is further aggravated by the intolerable noise occasioned by the use of stone pavements. Nevertheless, we have yet to hear of a case where one lawfully using such road or street was held liable for the injury thus occasioned. When a company takes, by its right of eminent domain, part of a tract of land, and the damage to the balance is to be measured by the advantage over the disadvantage resulting from the company's works, in such case, as we held in *Searle v. Lackawanna etc. R. R. Co.*, 33 Pa. St. 57, contingent and even imaginary damages may be considered by way of offset to the alleged advantages. But whilst this is so, such damages cannot be regarded as a substantive claim."

The supreme court of Georgia, in an elaborate opinion reviewing many authorities and bearing evidence of careful ³⁶⁸ consideration, among other things, in the case of *Austin v. Augusta etc. R. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, says: "In this sense, and as a well-defined law term, it was used in the constitution to give the owner of private property compensation for the actionable wrong whereby his property had been damnified, but it did not give him compensation for depreciation in value caused by any legal act, since in law such an act was innocent, and therefore harmless, or, if not actually harmless, '*damnum absque injuria*.' There is nothing in the language of the constitution, or in the debates or in the proceedings of the convention, which shows any intent to enlarge its definition, or to make it mean more than it had always meant as a law term. Nor was this sentence framed with a view of changing the substantive law of damages, or of making that actionable which before that time had been nonactionable. Rather, the purpose was, to make the law of damages uniform, so that a plaintiff could recover against a city or railroad under the same circumstances that would have authorized a recovery against those not armed and protected by the power of eminent domain. . . . Properly conducted, decently appointed, and orderly managed stores, shops, factories, and business houses, erected in close proximity to residential quarters, frequently cause great depreciation in values; in the popular sense they cause damage, but in such cases the annoyances, the inconveniences occasioning the loss in value, are not actionable, because they arise from lawful uses. The owners of these establishments are as

much entitled to the use and enjoyment of their property as is the owner of the residence property reduced in value by their presence. The first occupier of land does not acquire the right to prevent his neighbor from erecting walls, digging excavations, erecting buildings, or engaging in manufacturing or merchantile business thereon, no matter how seriously such acts may depreciate the market price of adjoining property. If the acts complained of do not amount to a nuisance, there is neither legal nor moral wrong done to the plaintiff. . . . For a physical invasion or wrongful interference with property or its appurtenances, resulting in damage, the plaintiff may recover. Without some wrongful act on the ³⁶⁹ part of the defendant she cannot recover, even though there is deterioration in the value of her property."

As bearing upon the claim of damage on account of excavating across neighboring streets, the following three cases show the trend of judicial decision:

Van De Vere v. Kansas City, 107 Mo. 83, 28 Am. St. Rep 396, 17 S. W. 695, wherein the supreme court of Missouri said: "What we say is this that he must show that the property itself, or some right or easement connected therewith, is directly affected, and that it is specially affected. . . . His property is not specially affected. If the plaintiff is entitled to damages in this case, then compensation must be allowed for any depreciation in the market value of property arising from the erection of a courthouse, jail, or other public building. The text-writers cited say such cases are not within the amendment, and to this we agree."

The case of Brown v. Board of Supervisors, 124 Cal. 274, 57 Pac. 82, where the supreme court of California spoke as follows: "The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action. . . . The provision in the constitution invoked by them was inserted therein to provide for instances in which property was not taken from the possession of the owner, or into physical occupancy by the public, and applies only to such damages as may be recoverable under established rules

of law. The damage which the appellants may sustain by reason of a diminution in value of their lands is not damage for which they are entitled to compensation."

The opinion in the case of *Gilbert v. Greeley etc. R. Co.*, 13 Colo. 501, 22 Pac. 814, contains an able discussion of the subject, from which we present the following extracts: 370 "The corpus of his property is not affected by any physical contact with the railroad tracks, nor is any street or alley, so far as the same borders on his premises, in any way interfered with. . . . One traveler has no more legal ground of complaint on account of an obstruction in the public highway than others, unless he be entitled to use the highway at the point of such obstruction for a different purpose than other people, or has suffered some special injury therefrom. The fact that he may be more frequently inconvenienced thereby does not give a cause of action. . . . His damage, therefore, may or may not differ in degree. It certainly does not differ in kind from that of the general public. . . . The constitution of Colorado, article 2, section 15, provides 'that private property shall not be taken or damaged for public or private use without just compensation.' . . . Private property must be taken, or private property must be damaged, before a cause of action arises. The damage must be to the property, or its appurtenances, or it must affect some right or interest which the owner enjoys in connection with the property, and which is not shared with or enjoyed by the public generally. . . . While it is admitted that plaintiff's property is rendered less valuable by reason of such obstruction, yet, to bring the case within the meaning of the constitution it must also appear that he has some special private property, right or interest, as a private right of way or user, in Twelfth street, at the point of obstruction, other or different from the right or interest of the general public, and that such property, right or interest of plaintiff has been damaged for public use. Notwithstanding the broad terms of our constitution, and the unqualified expressions of certain judicial opinions, we are not prepared to say that whenever a depreciation in private property is caused by some public or private improvement the owner of the property thus depreciated may recover compensation against the party making such improvement. It is probable that, in consequence of every improvement resulting from new inventions or discoveries, the private property, rights or interests of some person or persons have been dam-

aged or injuriously affected. In many instances the construction and operation of railroads have driven stage companies and post-chaises out of existence, and rendered the property invested therein, as well as such business, comparatively valueless. . . . It ³⁷¹ may be susceptible of demonstration that every railroad company running its trains across a street or public highway causes damage or inconvenience in a greater or less degree to every traveler having occasion to use the street or highway at the point of such crossing, as well as to every person owning or occupying real estate anywhere in the vicinity of such crossing; and yet there is no remedy for such damage, under ordinary circumstances, for the reason that as a general rule no one has any special, private property or interest in the public highway other or different from the general public, and the damage thus suffered is common to all having occasion to use the street or highway. In such case, therefore, private property cannot be said to be taken or damaged for public use, within the sense or meaning of the constitution. It is only when some specific private property, or some right or interest therein or incident thereto, peculiar to the owner, is taken or damaged for public or private use that the constitution guarantees compensation therefor: *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Denver Circle R. R. Co. v. Nestor*, 10 Colo. 403, 15 Pac. 714; *Whitsett v. Union Depot etc. R. R. Co.*, 10 Colo. 243, 15 Pac. 339; *Rude v. City of St. Louis*, 93 Mo. 408, 6 S. W. 241; *Morgan v. Des Moines etc. Ry. Co.*, 64 Iowa, 589, 52 Am. Rep. 462, 21 N. W. 96; *Shaubut v. St. Paul etc. R. R. Co.*, 21 Minn. 502."

Lewis on Eminent Domain, second edition, section 236, says: "Every owner takes the chance of having the value of his property enhanced or diminished by the use made of surrounding property, and the character of the improvements put upon it. He has no cause of complaint on account of the nature of such uses or improvements, unless they amount in law to a nuisance. The grievances which lead to the insertion of the words 'damaged' or 'injured' in recent constitutions did not consist in the fact that such damages as have just been referred to went without redress, but in the fact that, under the restricted interpretation put upon the word 'taken,' private property might be subjected to physical injuries, and valuable rights appurtenant thereto or connected therewith, might be impaired or destroyed for public use without com-

pensation. These words were not inserted for the purpose of preventing the public from doing what every private individual may do without liability to his neighbor. They were not intended to confer a right of action for a use of ³⁷² property by the public, which a private individual might make without legislative authority."

In addition to the foregoing authorities, the following shed light upon the questions under consideration, viz.: *Jordan v. City of Benwood*, 42 W. Va. 312, 57 Am. St. Rep. 859, 26 S. E. 266, 36 L. R. A. 519; *Adams v. Chicago etc. R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629, 1 L. R. A. 493; *Carroll v. Wisconsin Cent. R. Co.*, 40 Minn. 168, 41 N. W. 661; *Rinard v. Burlington etc. R. Co.*, 66 Iowa, 440, 23 N. W. 914; *Dunsmore v. Central Iowa R. Co.*, 72 Iowa, 182, 33 N. W. 456; *Hanlin v. Chicago etc. R. Co.*, 61 Wis. 515, 21 N. W. 623; *Presbrey v. Old Colony etc. R. Co.*, 103 Mass. 1; *Columbia Delaware Bridge Co. v. Geisse*, 35 N. J. L. 558; *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235, 13 Atl. 164; *Ricket v. Metropolitan R. Co.*, L. R. 2 H. L. 198; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 256; *Fobes v. Rome etc. R. Co.*, 121 N. Y. 505, 24 N. E. 919, 8 L. R. A. 453; *Decker v. Evansville etc. R. Co.*, 133 Ind. 493, 33 N. E. 349; *Werges v. St. Louis etc. R. Co.*, 35 La. Ann. 641.

To sustain respondents' contention that each and every of the matters complained of constitutes a cause of action would be to open the door to endless litigation over damages remote, vague, indefinite and uncertain, and against corporations and persons engaged in all lines of industrial activities. We believe this would be decidedly obnoxious to sound public policy, and cannot believe the framers of the constitution, or the people in adopting it, ever intended such results.

The learned trial judge having made certain rulings inconsistent with the conclusion herein reached, and to the prejudice of appellant, the judgment of the superior court is reversed and the case remanded for a new trial.

Mount, C. J., Crow, Rudkin, Fullerton and Hadley, JJ., concur.

MEANING OF THE WORD "DAMAGED" IN THE CONSTITUTIONAL GUARANTY THAT PRIVATE PROPERTY SHALL NOT BE TAKEN OR DAMAGED FOR PUBLIC USE WITHOUT JUST COMPENSATION.

I. Interpretation of Constitutional Guaranty, in General.

a. Taking of Property, 905.

b. Damage to Property Itself, 906.

- c. Damage to Right Appurtenant to Property, 907.
- d. Damage in Fact, 907.
- e. Damage in Law—*Damnum Absque Injuria*, 908.
- f. Special and Peculiar Damage, 909.
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- i. Damage from Taking Part of Property, 910.
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II. Interpretation of Guaranty as Applied to Particular Injuries.

- a. Change in Grade of Street, 911.
- b. Obstruction of Street—Interference with Right of Access, 911.
- c. Obstruction of Light and Air, 912.
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- e. Closing or Vacation of Street or Highway, 913.
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- i. Flooding of Land, 916.
- j. Removal of Lateral Support, 917.

I. Interpretation of Constitutional Guaranty, in General.

a. **Taking of Property.**—It seems that the right to compensation, when private property is appropriated for a public use, is an inseparable incident of the ownership of property recognized by the common law of England and by the general law of European nations. The right exists independently of any express constitutional guaranty. And the provisions of the constitutions of the United States and of the several states of the Union, that private property shall not be taken for public use without just compensation, are intended to establish this principle beyond legislative control: *City of Mansfield v. Balliett*, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628; *Pumpelly v. Canal Co.*, 80 U. S. (13 Wall.) 166, 20 L. ed. 557.

The meaning of the word "taken," as used in the constitutional limitation, has provoked a vast amount of discussion, without, however, becoming well settled. Probably authorities can be found which affirm that nothing less than an exclusive, tangible appropriation of property amounts to a "taking" of it. "But the rule more frequently held, and we think the more enlightened rule, is that the limitation of the term 'taking' to the actual physical appropriation of the corpus is too narrow a construction to meet the demands of justice, and that, from the very nature of the right of user and exclusion, it is evident that they cannot be materially abridged without necessarily taking the owner's property; for, if the right of user is an essential element of ownership, then whatever physical interference annuls this right takes property": *Callen v. Columbus Edison Elec. L. Co.*, 66 Ohio St. 166, 64 N. E. 141, 58 L. R. A. 782. To the same effect, see *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335.

"It is not necessary," said Justice Miller, "that property should be absolutely taken, in the narrowest sense of that word, to bring the case within the protection of the constitutional provision. There may be such a serious interruption to the common and necessary use of the property as will be equivalent to a taking within the meaning

of the constitution. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation": *Pumpelly v. Canal Co.*, 80 U. S. (13 Wall.) 166, 20 L. ed. 557.

b. **Damage to Property Itself.**—This somewhat liberal interpretation of the word "taken" prevailed in Illinois, when in 1870 it declared in its revised constitution that private property shall not be "taken or damaged" for public use without compensation: *Rigney v. City of Chicago*, 102 Ill. 64; *City of Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. Rep. 820, 31 L. ed. 638. It would seem clear that the words "or damaged" would still further liberalize the law and give a right of recovery in many instances wherein previously there had been no redress. And this the courts of Illinois, as well as the courts of other commonwealths which followed the lead of that state in changing their constitutional provisions, have repeatedly affirmed: "Under the old constitution, which allowed compensation only for property 'taken,' the rule was established that any direct physical injury, such as overflowing, or casting sparks and cinders upon private property, was a 'taking' to the extent of the injury so caused. The addition of the word 'damaged' in the constitution of 1870 created a new rule, whereby compensation may be given, although there has been no direct physical invasion of the res, provided direct physical injury has been inflicted on the right of user, enjoyment and disposition of the res": *Metropolitan etc. R. R. Co. v. Gon*, 100 Ill. App. 323. "Under the present constitution it is sufficient if there is a direct physical obstruction or injury to the right of user, or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which, by the common law, would, in the absence of any constitutional or statutory provisions, give a right of action": *Rigney v. City of Chicago*, 102 Ill. 64.

The language of the Illinois court in this last case plainly carries the intimation that, while the right to compensation under the law of eminent domain was materially extended by the addition of the word "damaged" to the constitutional guaranty, nevertheless the word "damaged," as so used, has a more or less restricted meaning. But before investigating this question further, it may be well to note the changes in other state constitutions made subsequently to that in the organic law of Illinois. Some of the states, in following the example of Illinois, adopt the language of its revised constitution, and declare that private property shall not be "taken or damaged" without compensation: See the principal case, ante, p. 889; *Lucas v. Los Angeles etc. Ry. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; *City of Omaha v. Kramer*, 25 Neb. 489, 13 Am. St. Rep. 504, 41 N. W. 295. Other state constitutions employ the words "taken, injured, or destroyed": *City of Henderson v. McClain*, 102 Ky. 404,

43 S. W. 700, 39 L. R. A. 349; *Gumbes v. City of Philadelphia*, 191 Pa. St. 153, 43 Atl. 88. The English statute uses the words "injuriously affected": See *Regina v. Metropolitan Board of Works*, 4 Q. B. 358. All of these terms, however, are believed to be practically equivalent in meaning: *Peel v. City of Atlanta*, 85 Ga. 138, 11 S. E. 582, 8 L. R. A. 787; *Brown v. City of Seattle*, 5 Wash. 35, 31 Pac. 613, 32 Pac. 214, 18 L. R. A. 161.

c. **Damage to Right Appurtenant to Property.**—Under constitutional provisions that private property shall not be "damaged" or "injured" for public use without compensation, it is not necessary, to constitute a damage or an injury, that there be an actual trespass or physical invasion of the property affected. It is enough that there is a physical disturbance of some right which the owner enjoys in connection with his property, which disturbance affects him in a special manner, unfelt by the public at large: *City Council of Montgomery v. Townsend*, 80 Ala. 489, 60 Am. Rep. 112, 2 South. 155; *Chicago etc. v. Ayres*, 106 Ill. 511; *City of Henderson v. McClain*, 102 Ky. 402, 43 S. W. 700, 39 L. R. A. 349; *Griffin v. Shreveport etc. R. R. Co.*, 41 La. Ann. 808, 6 South. 624; *Chicago etc. Ry. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93; *Jaynes v. Omaha St. Ry. Co.*, 53 Neb. 631, 74 N. W. 67, 39 L. R. A. 751; *Edmondson v. Pittsburg etc. Ry. Co.*, 111 Pa. St. 316, 2 Atl. 404; *D. M. Osborne & Co. v. Missouri Pac. Ry. Co.*, 147 U. S. 248, 13 Sup. Ct. Rep. 299, 37 L. R. A. 155. "The present constitution," it is said in *Ludlow v. Detweller* (Ky.), 47 S. W. 881, "made a change in the organic law of the state, and abolished the requirement of direct physical injury to the property in order to establish a claim for consequential damages, and requires compensation in all cases where it appears that there has been some physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his property, and which gives to it an additional value, and that by reason of such disturbance he has sustained special damages with respect to his property, in excess of that sustained by the public generally." "The damages," to quote from *Pause v. City of Atlanta*, 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489, "that an individual may recover for injuries to his property need not necessarily be caused by acts amounting to a trespass, or by an actual physical invasion of his real estate; but if his property be depreciated in value by his being deprived of some right of user or enjoyment growing out of and appurtenant to his estate, as the direct consequence of the construction and use of any public improvement, his right of action is complete, and he may recover to the extent of the injury sustained."

d. **Damage in Fact.**—The supreme court of Pennsylvania in the case of *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541, 4 Am. St. Rep. 659, 13 Atl. 690, construes the word "injury" to mean such a wrong as would be the subject of an action for damages at the common law. Other courts have come to a like conclusion, as will presently be seen. The supreme court of Nebraska, however, in *City*

of *Omaha v. Kramer*, 25 Neb. 489, 13 Am. St. Rep. 504, 41 N. W. 295, declines to accept this doctrine of limiting the right of recovery to legal injuries, as distinguished from injuries in fact. Said the court: "The test is, excluding general benefits, is the property in fact damaged? If so, the owner is entitled to compensation. . . . The words 'or damaged' include all actual damages resulting from the exercise of the right of eminent domain which diminish the market value of private property." Other authorities, perhaps, may be found which do not limit the right of compensation to cases where an action would, without any constitutional provision, lie at the common law: *City of Denver v. Boyer*, 7 Colo. 113, 2 Pac. 6.

e. **Damage in Law—Damnum Absque Injuria.**—However, it is pretty generally conceded that not every injury suffered by a person in respect to his property will entitle him to compensation under constitutional provisions that private property shall not be damaged or injured for public use without compensation. According to the great majority of decided cases, "the effect of such provisions is not to authorize compensation in all cases where property may be injured by public works, but only where the enjoyment of some right of the plaintiff in reference to his property is interfered with, and the property thereby rendered less valuable. The test is, would the injury, if caused by a private person without authority of statute, give the plaintiff a cause of action against such person? If so, then he is entitled to compensation, notwithstanding the statute which legalizes the damaging work. The constitutional or statutory provision simply prevents the defendant from shielding himself under legislative authority against liability for damages consequent upon the work": *Peel v. City of Atlanta*, 85 Ga. 138, 11 S. E. 582, 8 L. R. A. 787; *Metropolitan etc. R. R. Co. v. Goll*, 100 Ill. App. 323.

"The question then recurs," to quote from the leading case of *Rigney v. City of Chicago*, 102 Ill. 64, "what additional class of cases did the framers of the new constitution intend to provide for which are not embraced in the old? While it is clear that the present constitution was intended to afford redress in a certain class of cases for which there was no remedy under the old constitution, yet we think it equally clear that it was not intended to reach every possible injury that might be occasioned by a public improvement. There are certain injuries which are necessarily incident to the ownership of property in towns or cities which directly impair the value of private property, for which the law does not, and never has, afforded any relief. For instance, the building of a jail, police station, or the like, will generally cause a direct depreciation in the value of neighboring property, yet that is clearly a case of *damnum absque injuria*. So as to an obstruction in a public street—if it does not practically affect the use or enjoyment of neighboring property, and thereby impair its value, no action will lie. In all cases, to warrant a recovery, it must appear that there has been some direct physical disturbance of a right, either public or private, which the plaintiff enjoys in connection with his prop-

erty, and which gives to it an additional value and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. In the absence of any statutory or constitutional provisions on the subject, the common law afforded redress in all such cases, and we have no doubt it was the intention of the framers of the present constitution to require compensation to be made in all cases where, but for some legislative enactment, an action would lie by the common law." This language and doctrine are approved in the principal case and in *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. Rep. 290, 26 S. E. 489; *Aldrich v. Metropolitan etc. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237. The following authorities, moreover, may be said to lend support to this view of the law: *Brown v. Board of Supervisors*, 124 Cal. 274, 57 Pac. 82; *Trinity etc. Ry. Co. v. Meadows*, 73 Tex. 32, 11 S. W. 145, 3 L. R. A. 565; *Pennsylvania R. R. Co. v. Marchant*, 119 Pa. St. 541, 4 Am. St. Rep. 659, 13 Atl. 690.

f. Special and Peculiar Damage.—To entitle a property owner to compensation for damages caused by a public improvement, he must sustain special injury over and above that suffered by the community in general. And it is not enough that the injury be greater in degree than that suffered by the public generally; it must be greater in kind: *Metropolitan etc. R. R. Co. v. Goll*, 100 Ill. App. 323; *Van De Vere v. Kansas City*, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695; *Gates v. Kansas City etc. Ry. Co.*, 111 Mo. 28, 19 S. W. 957. "The damage must be to the property or its appurtenances; or it must affect some right or interest which the owner enjoys in connection with the property, not shared or enjoyed by the public generally. The damage must differ in kind, not merely in degree": *Gilbert v. Greely etc. Ry. Co.*, 13 Colo. 501, 22 Pac. 814.

g. Nominal Damage.—Under a constitutional provision that private property shall not be taken or damaged for public use without just compensation, the gist of an action for compensation is for substantial damages, and not merely an invasion of a legal right, and therefore nominal damages, as such, are not recoverable: *Swift v. City of Newport News (Va.)*, 52 S. E. 821.

h. Damage to Person.—It seems clear that the damage contemplated by the constitutional guaranty that private property shall not be taken or damaged without compensation must be some injury to the property itself, or to some right thereto appurtenant, as distinguished from personal inconvenience, discomfort, or injury to the owner or occupant of the property: *Campbell v. Metropolitan St. Ry. Co.*, 82 Ga. 320, 9 S. E. 1078; *Illinois Cent. R. R. Co. v. Trustees of Schools*, 212 Ill. 406, 72 N. E. 39. This question most frequently arises in case of annoyance and discomfort occasioned by the operation of railroads. "The framers of the constitution knew," to quote from *Austin v. Augusta T. Ry. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755, "that railroads would take private property, would

damage private property and would annoy and inconvenience the holders of private property. For the first two of these consequences they provided a remedy. They could have done so as to the third. But they did not use the apt words to show that such was their intention. On the contrary, the guaranty of compensation was restricted to damages to property, not damages to person. They not only used a word which meant actionable wrong, but was identical with that already construed in Massachusetts, and the equivalent of injuriously affected," which at that time had been finally construed, under the English condemnation acts, to require a taking or a physical interference with the land, or some right appurtenant thereto, in order to entitle the plaintiff to recover. It will be found that in every decision by this court where a plaintiff was held entitled to recover for damages occasioned by works of public use there was always some physical interference with an easement, right of way, obstruction of the street near the premises, or some direct invasion of an appurtenance connected with the land."

The Georgia court then held that to "damage" property, within the meaning of the constitution, there must be some physical interference with property, or physical interference with a right or use appurtenant to property; and therefore a railroad company is not liable to the owner of real property for a diminution in the market value thereof, resulting from the making of noise, or from the sending forth of smoke and cinders, in the prosecution of the company's lawful business, which does not physically affect or injure the property itself, but merely causes personal inconvenience or discomfort to the occupants of the same: See, also, the principal case, ante, p. 889.

i. **Damage from Taking Part of Property.**—Whenever a proposed public use causes to property, no part of which is taken, an injury of such a character as, if it accrued when a portion of the property was taken, would form a proper element of the damages to the part not taken, there is a damage within the scope and protection of the constitutional provision that private property shall not be "damaged" without compensation: *Omaha Horse Ry. Co. v. Cable Tramway Co.*, 32 Fed. 727. The use of the word "damaged," however, does not affect the rule of compensation in condemnation proceedings in which either the whole or a part of a piece of property is taken for a public use. That rule is the same as to property actually taken, in whole or in part, as it was before the change in the constitutional limitation: *St. Louis etc. R. R. Co. v. Knapp*, 160 Mo. 396, 61 S. W. 300.

j. **Consideration of Benefits.**—Property not taken by a public improvement is not "damaged," unless its market value is lessened. If the market value of a property, considering the benefits of the improvement, is as great or even greater after the construction of a railroad or the completion of a public work, the property cannot

be said to have suffered damage within the meaning of the constitutional provision: *Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; *Hurt v. Atlanta*, 100 Ga. 274, 28 S. E. 65; *Metropolitan etc. Ry. Co. v. Stickney*, 150 Ill. 362, 37 N. E. 1098, 26 L. R. A. 773; *Schroöder v. City of Joliet*, 189 Ill. 48, 59 N. E. 550, 52 L. R. A. 634.

II. Interpretation of Guaranty as Applied to Particular Injuries.

a. Change in Grade of Street.—Under constitutional provisions that private property shall not be “taken” for a public use without compensation, it has generally been held that a municipality incurs no liability to abutting owners when it changes the grade of a street or highway. But under constitutional provisions that private property shall not be “taken or damaged” for a public use without compensation, it has uniformly been held that where a city or county changes the natural grade of a street or highway, or changes a re-established grade in such thoroughfares, thereby obstructing the right of access of an abutting owner and inflicting consequential damages in excess of the benefits derived and of a character differing in kind from the damages sustained by the public in general, the municipality is liable to him, although there has been no actual physical invasion of his land: See the monographic note to *O’Brien v. Philadelphia*, 30 Am. St. Rep. 837-845; *Eachus v. Los Angeles etc. Ry. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; *Eachus v. Los Angeles*, 130 Cal. 492, 80 Am. St. Rep. 147, 62 Pac. 829; *Denver v. Bonesteel*, 30 Colo. 105, 69 Pac. 595; *City of Macon v. Wing*, 113 Ga. 90, 38 S. E. 392; *Roughton v. Atlanta*, 113 Ga. 948, 39 S. E. 316; *City of Bloomington v. Pollock*, 141 Ill. 346, 31 N. E. 146; *Layman v. Beeler*, 24 Ky. Law Rep. 174, 67 S. W. 995; *Frankfort v. Edelen*, 26 Ky. Law Rep. 601, 82 S. W. 279; *Less v. Butte*, 28 Mont. 27, 98 Am. St. Rep. 545, 72 Pac. 140, 61 L. R. A. 601; *Hickman v. City of Kansas*, 120 Mo. 110, 42 Am. St. Rep. 684, 25 S. W. 225, 23 L. R. A. 658; *Gardner v. St. Joseph*, 96 Mo. App. 657, 71 S. W. 63; *In re Chatham Street*, 191 Pa. St. 604, 43 Atl. 365; *Searle v. City of Lead*, 10 S. Dak. 312, 73 N. W. 101, 39 L. R. A. 345; *Brown v. City of Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161; *Blair v. Charleston*, 43 W. Va. 62, 64 Am. St. Rep. 837, 26 S. E. 341, 35 L. R. A. 852. If a city, in changing the grade of a street, leaves dangerous holes in the thoroughfare, it is answerable in damages to the abutting owner: *City of San Antonio v. Mullaly*, 11 Tex. Civ. App. 596, 33 S. W. 256.

b. Obstruction of Street—Interference with Right of Access.—Where injury is occasioned to an abutting owner by an improvement, made by a city or a railroad corporation in the street in front of his premises, whereby the right of ingress or egress is injuriously affected, this is generally regarded as a “damage” to property, which must be compensated under the law of eminent domain: *City of Pueblo v. Strait*, 20 Colo. 13, 46 Am. St. Rep. 273, 36 Pac. 789,

24 L. R. A. 392; *City of Macon v. Wing*, 113 Ga. 90, 38 S. E. 392; *Chesapeake etc. Ry. Co. v. Rice* (Ky.), 50 S. W. 541; *Pennsylvania etc. R. R. Co. v. Walsh*, 124 Pa. St. 544, 10 Am. St. Rep. 611, 17 Atl. 186; *City of Houston v. Kleinecke* (Tex. Civ. App.), 26 S. W. 250. The damage suffered by the property owner, however, must, in order to entitle him to compensation, be special to him, and differ in kind, not merely in degree, from that suffered by members of the community generally. An improvement or obstruction in a street near his property but on which his property does not abut, or an obstruction or improvement in a street on which his property does abut but not in front of his premises, ordinarily does not, except where his access to the general system of public highways of the municipality is cut off or very substantially impaired, enable him to recover damages under a constitutional provision that private property shall not be taken for a public use without just compensation: *Gilbert v. Greely etc. R. R. Co.*, 13 Colo. 501, 22 Pac. 814; *Union Pac. Ry. Co. v. Foley*, 19 Colo. 280, 35 Pac. 542; *Aldrich v. Metropolitan etc. R. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237; *Davis v. County Commissioners*, 153 Mass. 218, 26 N. E. 848, 11 L. R. A. 750; *Putnam v. Boston etc. Corp.*, 182 Mass. 351, 65 N. E. 790; *Rochette v. Chicago etc. Ry. Co.*, 32 Minn. 201, 20 N. W. 140; *Rude v. City of St. Louis*, 93 Mo. 408, 6 S. W. 257; *Hartman v. Pittsburg Incline Plane Co.*, 159 Pa. St. 442, 28 Atl. 145. See, in this connection, the principal case, ante, p. 889.

Where the right of access to property is impaired or destroyed, and the owner is thereby specially injured, by the construction of a viaduct in a street, either by the city or a railroad company, he is "damaged" within the meaning of the constitution: *City of Pueblo v. Strait*, 20 Colo. 13, 46 Am. St. Rep. 273, 36 Pac. 789, 24 L. R. A. 392; *Rigney v. City of Chicago*, 102 Ill. 64; *Camden Interstate Ry. Co. v. Smiley*, 27 Ky. Law Rep. 134, 84 S. W. 523; *Spencer v. Metropolitan St. Ry. Co.*, 120 Mo. 154, 23 S. W. 126, 22 L. R. A. 668; *City of Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. Rep. 820, 31 L. ed. 638. And the same is true where a railway company throws up an embankment in the street in front of private property, or changes the grade of the street, so as to interfere with the owner's right of access: *Hot Springs R. R. Co. v. Williamson*, 45 Ark. 429; *Chicago etc. R. R. Co. v. Ayres*, 106 Ill. 511; *Atchison etc. Ry. Co. v. Pratt*, 53 Ill. App. 263; *Fort Scott etc. Ry. Co. v. Fox*, 42 Kan. 490, 22 Pac. 583; *Leavenworth etc. Ry. Co. v. Curtan*, 51 Kan. 432, 33 Pac. 297; *Yates v. Big Sandy Ry. Co.* (Ky.), 89 S. W. 108; *Farrar v. Midland Elec. Ry. Co.*, 101 Mo. App. 140, 74 S. W. 500; *Chicago etc. Ry. Co. v. Hazels*, 26 Neb. 364, 42 N. W. 93; *McQuaid v. Portland etc. Ry. Co.*, 18 Or. 237, 22 Pac. 899.

c. **Obstruction of Light and Air.**—Along with the easement of access is placed the easement of light and air, the one no more important than the other, except in degree. And the law is settled that an abutting lot owner has a right to the unobstructed passage

of light and air from the public street to his property, regardless of the ownership of the fee: *First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46, 32 South. 144, 59 L. R. A. 399; *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441, 49 Atl. 629, 52 L. R. A. 409; monographic note to *Field v. Barling*, 41 Am. St. Rep. 324. An obstruction of this easement, by the construction of an elevated roadway or a high railway trestle in the street, is a "damage" to the adjoining property within the meaning of the constitutional provision that private property shall not be taken or damaged without just compensation: *State v. Superior Court*, 26 Wash. 278, 66 Pac. 385; *Seattle Transfer Co. v. City of Seattle*, 27 Wash. 520, 68 Pac. 90; *L. S. Adams v. Chicago etc. R. R. Co.*, 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629, 1 L. R. A. 493; note to *Mordhurst v. Ft. Wayne etc. Co.*, 106 Am. St. Rep. 265.

d. **Imposition of Additional Servitude on Street.**—The imposition of an additional servitude on a public street or highway, such as the construction and operation of a railroad, may "damage" abutting property, so that the owner thereof is entitled to compensation under the rule that private property shall not be taken or damaged without just compensation: *Penn Mutual Life Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273, 31 N. E. 138; *De Geofroy v. Merchants' etc. Ry. Co.*, 179 Mo. 698, 101 Am. St. Rep. 524, 64 L. R. A. 959, 79 S. W. 386; *Omaha etc. R. R. Co. v. Janeczek*, 30 Neb. 276, 27 Am. St. Rep. 399, 46 N. W. 478. The question of what constitutes an additional servitude in streets and highways has been so recently considered in this series (see the extended note to *Mordhurst v. Ft. Wayne etc. Co.*, 106 Am. St. Rep. 232-268), that we shall refrain from entering into the question further at this time.

e. **Closing or Vacation of a Street or Highway**, by municipal authority, in the prosecution of an improvement of a public nature, does not ordinarily constitute a "taking" or "damaging" of neighboring or abutting property, unless the access from such property to the general system of highways of the municipality is substantially impaired or entirely cut off. Damages sustained by a property owner of the same kind as those suffered by the public in general and differing therefrom only in degree, are usually not recoverable: *Levee District v. Farmer*, 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, 10 N. E. 395; *Winnetka v. Clifford*, 201 Ill. 475, 66 N. E. 384; *Stanwood v. City of Malden*, 157 Mass. 17, 31 N. E. 702, 16 L. R. A. 591; *Pearsall v. Board of Supervisors*, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193; *Glasgow v. St. Louis*, 107 Mo. 198, 17 S. W. 743; *McGee's Appeal*, 114 Pa. St. 470, 8 Atl. 237; *Howell v. Morrisville (Pa. St.)*, 61 Atl. 932. Diminishing the width of a street is held not to entitle an abutting owner to compensation: *Brown v. Board of Supervisors*, 124 Cal. 274, 57 Pac. 82. So, the vacation of a road by a railroad company, where it substitutes another therefor, does not render it

answerable in damages to a land owner: *Rockafeller v. Northern Cent. Ry. Co.* (Pa. St.), 61 Atl. 960.

But if the vacation of a street destroys or substantially impairs a lot owner's right of access, his property is "damaged," and the public must make just compensation therefor: *City of Chicago v. Bureky*, 158 Ill. 103, 49 Am. St. Rep. 142, 42 N. E. 178, 29 L. R. A. 568; *Heinrich v. City of St. Louis*, 125 Mo. 424, 28 S. W. 626, 46 Am. St. Rep. 490, and note. See, too, *Texarkana v. Leach*, 66 Ark. 40, 74 Am. St. Rep. 68, 48 S. W. 807.

f. Erection of Objectionable Buildings.—The constitutional guaranty that private property shall not be taken or damaged for a public use without compensation is not violated, in respect to owners of adjacent property who do not suffer special damages from the structure and the incidents thereof, where a city erects a fire-engine house (*Van De Vere v. Kansas City*, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695), or a prison (*Long v. City of Elberton*, 109 Ga. 28, 77 Am. St. Rep. 363, 34 S. E. 333, 46 L. R. A. 428), or, perhaps, a smallpox hospital or pesthouse: *Frazer v. City of Chicago*, 186 Ill. 480, 78 Am. St. Rep. 296, 57 N. E. 1055, 51 L. R. A. 306. Compare, however, *Anable v. Board of Commissioners*, 34 Ind. App. 72, 107 Am. St. Rep. 173, 71 N. E. 272; *City of Paducah v. Allen*, 111 Ky. 361, 98 Am. St. Rep. 422, 63 S. W. 981; *Baltimore v. Fairfield Imp. Co.*, 87 Md. 352, 67 Am. St. Rep. 344, 39 Atl. 1081, 40 L. R. A. 494. But it has been held that a railroad company is liable to adjacent property owners in damages where it erects and operates stockpens: *Bramlette v. Louisville etc. R. R. Co.*, 24 Ky. Law Rep. 180, 68 S. W. 145. So the location and operation of an electric plant may entitle neighboring property owners to compensation under the law of eminent domain: *City of Greenville v. Alland* (Tex. Civ. App.), 27 S. W. 292.

g. Noise, Smoke, and Cinders from Railroad.—The prevailing opinion is that injuries occasioned to a person through the prudent operation of railroads from noise, vibration, smoke, cinders, and the like, when suffered by him in common with other members of the community, though perhaps in greater degree, and affecting his personal convenience and comfort rather than the corpus of his property, or rights thereto appurtenant, although lessening its market value, do not entitle him to compensation under constitutional provisions that private property shall not be taken or damaged for public use without compensation: See the principal case, ante, p. 889; *Campbell v. Metropolitan St. R. R. Co.*, 82 Ga. 320, 9 S. E. 1078; *Austin v. Augusta T. Ry. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755; *Aldrich v. Metropolitan etc. R. R. Co.*, 195 Ill. 456, 63 N. E. 155, 57 L. R. A. 237; *Illinois Cent. R. R. Co. v. Trustees of Schools*, 212 Ill. 406, 72 N. E. 39; *New Orleans etc. R. R. Co. v. Barton*, 43 La. Ann. 171, 9 South. 19; *Carroll v. Wisconsin Cent. R. R. Co.*, 40 Minn. 168, 41 N. W. 661; *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. St. 472, 2 Am. St. Rep. 618, 9 Atl. 871; *Pennsylvania R. R.*

Co. v. Marchant, 119 Pa. St. 541, 4 Am. St. Rep. 659, 13 Atl. 690; Jones v. Erie etc. R. R. Co., 151 Pa. St. 30, 31 Am. St. Rep. 722, 25 Atl. 134, 17 L. R. A. 758.

The case of St. Louis etc. Ry. Co. v. Shaw (Tex. Civ. App.), 88 S. W. 817, may possibly lend itself to a contrary conclusion. Perhaps, however, the noise, smoke, and vibration in that case amounted to a private nuisance. If the noise and disturbance caused by the trains and locomotives of a railroad company are such as would, in the absence of legislative authority, constitute an actionable nuisance, the existence of such authority in no way relieves them of the damaging effect, so as to take away from property owners their right to redress, or so as to convert what was before actionable into a case of *damnum absque injuria*: Chicago etc. Ry. Co. v. Darke, 148 Ill. 226, 35 N. E. 750; Illinois Cent. R. R. Co. v. Knehle, 95 Ill. App. 185; Baker v. Boston etc. Ry. Co., 183 Mass. 178, 66 N. E. 711; Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; Missouri etc. Ry. Co. v. Anderson, 36 Tex. Civ. App. 121, 81 S. W. 781.

And where the disturbance and annoyance incident to the construction and operation of a railroad visit special injuries upon a property owner, differing in kind from those sustained by the public generally, as when the smoke, cinders, and ashes from passing trains are precipitated upon his dwelling or cultivated field, property is "taken or damaged" within the meaning of the constitutional guaranty: Chicago etc. R. R. Co. v. Atterbury, 156 Ill. 281, 40 N. E. 826; Calumet etc. Dock Co. v. Morawetz, 195 Ill. 398, 63 N. E. 165; Illinois Cent. R. R. Co. v. Turner, 97 Ill. App. 219; Davenport etc. Ry. Co. v. Sinnet, 111 Ill. App. 75; Elizabeth etc. R. R. Co. v. Combs, 73 Ky. (10 Bush) 382, 19 Am. Rep. 67; Henderson Belt R. R. Co. v. Dechamp, 95 Ky. 219, 24 S. W. 605; Baltimore Belt R. R. Co. v. Sattler, 100 Md. 306, 59 Atl. 654; Adams v. Chicago etc. R. R. Co., 39 Minn. 286, 12 Am. St. Rep. 644, 39 N. W. 629, 1 L. R. A. 493; Omaha etc. R. R. Co. v. Janecek, 30 Neb. 276, 27 Am. St. Rep. 399, 46 N. W. 478; Lahr v. Metropolitan Elevated R. R. Co., 104 N. Y. 268, 10 N. E. 528; Columbus etc. Ry. Co. v. Gardner, 45 Ohio St. 309, 13 N. E. 69; Gainsville etc. Ry. Co. v. Hall, 78 Tex. 169, 22 Am. St. Rep. 42, 14 S. W. 259, 9 L. R. A. 298; Missouri etc. Ry. Co. v. Calkins (Tex. Civ. App.), 79 S. W. 852; Stockdale v. Rio Grande etc. Ry. Co., 28 Utah, 201, 77 Pac. 849.

The noise and jarring occasioned by passing trains are often considered as elements of damage in determining the amount of compensation to which one owning property in close proximity to a railroad is entitled: See the monographic note to Board of Trade Tel. Co. v. Darst, 85 Am. St. Rep. 309; Chicago etc. R. R. Co. v. Leah, 152 Ill. 249, 38 N. E. 556; Illinois Cent. R. R. Co. v. Turner, 194 Ill. 575, 62 N. E. 798; Board of County Commrs. v. St. Paul etc. R. R. Co., 28 Minn. 503, 11 N. W. 73. But it is said that the effect of noise and smoke are considered, not as independent elements

of damage, but as tending to prove the value of the property after the railroad has taken or damaged it or some right appurtenant thereto: *Austin v. Augusta etc. Ry. Co.*, 108 Ga. 671, 34 S. E. 852, 47 L. R. A. 755.

h. Pollution of Waters by Sewage.—The pollution of the waters of a stream by the sewage of a city, to the injury of the property of riparian owners, is usually considered to be a “taking or damaging” of property within the meaning of constitutional provisions that private property shall not be taken or injured for public use without just compensation: See the monographic note to *Winchell v. Waukesha*, 84 Am. St. Rep. 924-926, where the authorities on this question are collected. This doctrine is applied in *New Odorless Sewerage Co. v. Wisdom*, 30 Tex. Civ. App. 224, 70 S. W. 354, where the sewer system of a city was constructed and operated by a private corporation, and occasioned an injury to farming lands.

i. Flooding of Land.—Where, in the course of a public improvement, the waters of a stream are dammed back and made to permanently flood and overflow adjacent land, such land is “taken or damaged,” and the owner must be compensated for his loss: *Fredericks v. Pennsylvania Canal Co.*, 148 Pa. St. 317, 23 Atl. 1067; *Pumpelly v. Canal Co.*, 80 U. S. (13 Wall.) 166, 20 L. ed. 557; *King v. United States*, 59 Fed. 9.

The liability which attends the interference with surface waters, either by impeding or accelerating its flow, to the injury of neighboring property, is discussed at length in the monographic note to *Mizell v. McGowan*, 85 Am. St. Rep. 715-735. Under constitutional provisions that private property shall not be damaged for a public use without compensation, it is clear that a municipal corporation or railroad company which, in making improvements, interferes with the natural flow of surface water to the extent of casting it in a body upon private premises, must respond in damages for the diminution in value which the property suffers: *Rudel v. Los Angeles County*, 118 Cal. 281, Pac. 50 Pac. 400; *Mayor etc. of Albany v. Sikes*, 94 Ga. 30, 47 Am. St. Rep. 132, 20 S. E. 257, 26 L. R. A. 653; *City of Mt. Sterling v. Jephson (Ky.)*, 53 S. W. 1046; *Stith v. Louisville etc. R. R. Co.*, 109 Ky. 168, 58 S. W. 600; *Louisville etc. R. R. Co. v. Brinton*, 109 Ky. 180, 58 S. W. 604; *Raney v. Hinds County*, 78 Miss. 308, 28 South. 875; *In re Chatham Street*, 191 Pa. St. 604, 43 Atl. 365; note to *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 302. It seems, however, that the constitutional guaranty does not render a municipality liable to a lot owner whose property is damaged by a change in the grade of a street whereby surface waters are thrown upon it, if a private individual or corporation might have inflicted a like injury without being answerable to the lot owner therefor: *Jordan v. City of Benwood*, 42 W. Va. 312, 57 Am. St. Rep. 859, 26 S. E. 266, 36 L. R. A. 519. In other words, the flow of surface water upon property, though causing injury, caused by a change in the grade of a street, will not render a city liable in damages; but

if the municipality thereby collects a body of water, so that it ceases to be a mere drainage of surface water, and casts it in a mass upon a lot, it is answerable: *McCray v. Town of Fairmont*, 46 W. Va. 442, 33 S. E. 245.

j. Removal of Lateral Support.—If a municipal corporation or a railroad company, in making improvements, removes the lateral support to adjacent property, this amounts to a “taking or damaging” within the constitutional guaranty that private property shall not be taken or damaged for public use without compensation: *McCullough v. St. Paul etc. Ry. Co.*, 52 Minn. 12, 53 N. W. 802; *City of Platts-mouth v. Boeck*, 32 Neb. 297, 49 N. W. 167; *Mosier v. Oregon etc. Nav. Co.*, 39 Or. 256, 87 Am. St. Rep. 652, 64 Pac. 453; *Snyder v. Lancaster (Pa.)*, 11 Atl. 872; *Stearns v. City of Richmond*, 88 Va. 992, 29 Am. St. Rep. 758, 14 S. E. 847; *Johnson v. St. Louis*, 137 Fed. 439. In this last case a city was held answerable where in constructing a sewer close to the foundations of a building it caused them to settle. See, in this connection, the note to *Board of Trade Tel. Co. v. Darst*, 85 Am. St. Rep. 303.

MILLER v. MORAN BROS. COMPANY.

[39 Wash. 631, 81 Pac. 1089.]

MASTER AND SERVANT—Independent Contractor, Liability of Employés of.—If one who employs an independent contractor is not under any duty to furnish him with appliances with which to work, it is the duty of such independent contractor alone, for the breach of which his employés cannot recover of the original employer, though injured thereby. (p. 920.)

CONTRACTOR.—The Relation of an Independent Contractor Under a Person Having a Contract with the Government is not changed by the fact that general supervision over his work is exercised by the principal contractor and by the government, to both of whom the result of his work is required to be satisfactory. (p. 920.)

MASTER AND SERVANT—Independent Contractor.—Even if the principal contractor is under the duty of furnishing an independent contractor under him with appliances with which to work, this duty will be fulfilled by furnishing them on request, if they can be provided, where they have been so furnished. (p. 920.)

MASTER AND SERVANT—Liability to Employés of an Independent Contractor for not Furnishing Proper Appliances.—Conceding it to be the duty of the principal contractor to furnish appliances with which an independent contractor and his employés shall work, still such principal contractor is not rendered liable to the servants of the independent contractor by the fact that his fellow-servants, instead of asking where the proper appliances could be found, went to a pile of iron and selected a bar which they used, and the defects in which caused the injury to such servant. (pp. 920, 981.)

MASTER AND SERVANT—Principal Contractor and Independent Contractor and Their Duties to Their Employés.—As an independent contractor owes to his employés the duty of furnishing reasonably safe appliances, the principal contractor has the right to presume that such independent contractor will observe his obligations toward his employés; and if it is the duty of the principal contractor to furnish suitable appliances to the independent contractor, the former has the right to presume that the latter will request them through some one having authority, and is not liable because, without such request, such independent contractor or his servants selected a defective appliance, the use of which caused injury to one of his servants. (pp. 920, 921.)

MASTER AND SERVANT—Reasonably Safe Place in Which to Work, Master When not Liable for not Furnishing.—If a servant is in as good a position as the master for ascertaining and understanding the situation, and equally well knows and appreciates the conditions, he cannot be allowed to complain for injuries sustained by working therein. (p. 921.)

MASTER AND SERVANT—Independent Contractor, When not Liable for Acts of.—The principal contractor is not concerned with the details of the performance of the work of an independent contractor, and is not required to know whether he is using appliances which were unsafe for his employés, and is not liable to the employés of such independent contractor because he uses unsafe appliances resulting in their injury. (p. 923.)

MASTER AND SERVANT—Inspection, Duty of, When Rests on Servant.—When the nature of the work in which a servant is employed necessarily constantly changes, and a safe place one moment may become a dangerous one next by the ordinary and necessary operation of the work, and without fault on the part of anyone, a servant working under these conditions must, to a certain extent, be his own inspector, and cannot complain because his master, with less opportunity than he, fails in a given instance to detect or anticipate an unexpected occurrence. (p. 923.)

MASTER AND SERVANT.—An employé who stands under a heavy suspended steel plate, knowing its tendency to swing, and where there is obvious possibility that the plate may fall and inflict serious injury, is guilty of contributory negligence, and cannot recover if injured by such falling. (pp. 923, 924.)

Benson, Hall & Higgins, for the appellant.

Kerr & McCord, for the respondent.

633 **ROOT, J.** Appellant was employed as a carpenter by respondent, a corporation, engaged in building the battleship "Nebraska" for the United States government. Respondent had in its employ over seven hundred men, some working by the hour, some by the day, and some by contract, on certain portions of the work, for fixed amounts. Appellant's duties required him to go from place to place about said ship, putting in and changing stanchions or shores, used to support the vessel in position. One Kelly had a contract from respondent to place, upon the sides of the ship, certain steel

plates. He was to be paid a gross sum for doing said work. He was given full power to hire and discharge men, and had the control and supervision of them while engaged in the work, they all being subject, however, to the general rules of the shipyard. The work was required to be satisfactory to respondent and the United States government, both of whom had superintendents about the premises. The appliances used by Kelly were furnished by respondent, although the written contract between them—which appears to have been the only contract governing them—is silent as to who should furnish the tools and appliances.

On the sixteenth day of November, 1903, while appellant was working in the vicinity of some of Kelly's workmen, he was seriously injured by the falling of a steel plate, weighing about two thousand pounds. In raising this plate, a chain and tackle were fastened to an iron bar, placed lengthwise across a manhole extending about nine inches on each side of said opening, which was eighteen inches in diameter. By chains extending from the tackle to the plate, the latter was raised from the floor to the side of the ship, where said plate was to be adjusted. While the plate was suspended in the air, appellant helped shove and "steady" it awhile, and then proceeded to do something about his own work under said suspended plate.

In attempting to get the plate into proper position on ⁶³⁴ the side of the vessel, one of the workmen, in using a wrench as a lever to push the plate along, let said wrench slip, which caused the plate to swing back on the chain, and, by its swinging motion and momentum, to occasion a slipping of the iron bar supporting the tackle. One end of the bar thereupon came through the opening, releasing the tackle, and permitting the plate to fall.

It appears by the evidence that an appliance, known as a grappling hook or as a clamp, could have been used instead of the iron bar; and, if properly adjusted, would have avoided this accident. Two of the workmen went to the tool house to get such an appliance but were told by the keeper in charge thereof that there was no such appliance there at that time. It appears by the evidence that there were probably such appliances about the yard. No request for such was made of any superintendent, foreman, or officer of respondent. The workmen selected the iron bar from certain of respondent's material found near by.

Appellant instituted this action against respondent to recover damages occasioned by reason of the injuries sustained as aforesaid. At the close of his case, a motion for nonsuit was sustained by the trial court. From the judgment of dismissal, this appeal is taken. It is claimed by appellant that it was respondent's duty to furnish a reasonably safe appliance to Kelly for raising these plates, and that, inasmuch as it did not do so, it must respond in damages to appellant for the injuries he sustained.

In the first place, the only contract shown to exist between respondent and Kelly does not place upon respondent any obligation to furnish any tools or appliances. In the next place, it does not appear that respondent, or any of its officers, superintendents, or foremen refused to furnish necessary and safe appliances. The unsafe appliance was not furnished by respondent. There is no evidence that respondent, or any of its agents, knew anything about Kelly's men having taken or used the iron bar in question. These ⁶³⁵ men went upon their own motion and selected the bar in question. There is nothing to show that grappling hooks could not have been obtained, if requested of respondent's officers or foremen. It appears that there were doubtless some of these appliances on the premises. If there was any obligation on the part of respondent to furnish Kelly with appliances, it was a duty due to Kelly, and for any breach thereof it would be holden to Kelly, and not to appellant. That Kelly was an independent contractor is shown by the written contract in evidence. This relationship was not changed by the fact that general supervision was exercised over his work by respondent and the government, to both of whom the result of his work was required to be satisfactory. The choice of men, appliances and methods was left to him, and for any negligence touching any of these matters, he, and not respondent, was answerable.

Even conceding it to have been the duty of respondent to furnish Kelly with appliances—and this is not shown by the evidence—this duty would be fulfilled by delivering suitable appliances to Kelly upon his request therefor. If there were such appliances provided in the yard where Kelly could secure them upon demand, it was a sufficient compliance with the duty: *Steeple v. Panel etc. Box Co.*, 33 Wash. 359, 74 Pac. 475. It appears that respondent, by some official, gave Kelly's workmen an order on the keeper of the toolhouse for one of these grappling hooks. None was there at the time. Instead

of going to some foreman and asking as to where such an appliance could be found, these men went to a pile of iron near by, and selected the bar which was used. It was not the duty of respondent to keep watch of Kelly and deliver his appliances at the place of use.

As an independent contractor, Kelly owed his servants the duty of furnishing reasonably safe appliances. Toward others working in his vicinity, he owed the duty of ordinary care. Respondent had the right to presume that Kelly would ⁶³⁶ observe these obligations in the conduct of his work. If it were respondent's duty to furnish suitable appliances, it would have the right to presume that Kelly would request them from some one having authority, when they were needed, if they were not at hand. As the written contract did not require respondent to furnish appliances, the fact that respondent had been doing so would not render it liable in a given instance where the contractor or his servants selected an unsafe device. We can find nothing in the evidence showing any breach of duty on the part of respondent in the matter of furnishing, or neglecting to furnish, appliances. Such a breach must be shown before negligence is established: *Singleton v. Felton*, 42 C. C. A. 57, 101 Fed. 526.

A breach of respondent's duty to furnish appellant a safe place to work is suggested. That the master is under obligations to give the servant a reasonably safe place to work is, of course, a well-established principle of law. But where the servant is in as good a position as the master to ascertain and understand the situation, and does equally well know and appreciate the existing conditions, he cannot be heard to complain from injuries sustained by working therein: *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410; *Tham v. Steeb Shipping Co.*, 39 Wash. 272, 81 Pac. 711.

In the case of *Wilson v. Northern Pac. R. Co.*, 3 Wash. 67, 71 Pac. 713, this court, speaking by Mount, J., said: "If defendants are liable at all, they are liable because of some neglect of duty owing from defendants to plaintiff. . . . They were not obliged to guarantee the safety of the place, but they were in duty bound to make a reasonable inspection. . . . His [the servant's] inspection was the inspection of a reasonably careful man. The foreman, no doubt, also inspected the ground in the same way for the same purpose, and saw the same as the plaintiff saw, and came to the same

conclusion. . . . When the danger is not known, and not suspected, and where there ⁶³⁷ are no circumstances which would cause a reasonably careful man to investigate and ascertain the danger, the law will not impute knowledge of danger where the knowledge is not shown in fact. When reasonably careful men conduct their business in a reasonably careful manner, there is no negligence."

In *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 157, 41 L. R. A. 410, this court, speaking through Dunbar, J., said: "If the employé does know of the defect, or has equal means of knowing with the employer, then, certainly, it is his unquestioned duty to investigate before proceeding"; and the following quotations were made with approval: "Where the danger is alike open to the observation of all, both master and servant are upon an equality, and the master is not liable for an injury resulting from the dangers of the business"—taken from *Griffin v. Ohio etc. R. Co.*, 124 Ind. 326, 24 N. E. 888. "A master is not liable for injuries to his servant while using machinery in the employment, if the servant has the same knowledge of its defects, or the danger incident to its use, as the master, or if in the exercise of due care, he ought to have such knowledge"—quoted from *Wood on Master and Servant*, section 366. "Knowledge on the part of the employer, and ignorance on the part of the employé, are of the essence of the action,"—quoted from *Beach on Contributory Negligence*, section 346.

In the case of *Tham v. Steeb Shipping Co.*, 39 Wash. 272, 81 Pac. 711, this court upheld an instruction of the trial court given in the following language: "If you find from the evidence that the danger was alike open and obvious to the plaintiff and to the defendant, both the plaintiff and the defendant are upon an equality, and the master is not liable for an injury resulting from the dangers incident to the employment."

In the case before us, there was no occasion for respondent's supposing that Kelly would be using the iron bar mentioned. Respondent was concerned with the results of ⁶³⁸ Kelly's work, but not with the details of its performance. It was not required to know that he was using an unsafe appliance at the particular time, and there is no evidence that any of its officers or agents did know. Appellant was at the place. So far as the evidence shows, he was in a better position to know of the character of his appliance and its dangers than

any officer or agent of respondent. Appellant's work was constantly being changed from place to place in removing and adjusting the shores about the ship. This particular place was rendered unsafe only at the moment when they began to elevate this heavy plate. The entire situation may have been thoroughly inspected and found safe a minute before, so far as the evidence shows. Respondent was under no obligation to have an officer constantly follow appellant around to protect him from situations made dangerous by occurrences unusual and unexpected by either master or servant. It was daylight, and appellant could have seen this iron bar as well as any foreman. Seeing it, he would know that there was more or less danger in its use. The very nature of the work of building a ship necessitates constant changes. A place perfectly safe one minute may become extremely dangerous the next by the ordinary and necessary operation of the work, and without fault on the part of anyone. A servant working in the capacity of this appellant knows all this, and must be held to be, to a certain extent, his own inspector. He cannot complain because the master, with less opportunity than he, has failed in a given instance to detect or anticipate an unexpected occurrence: *Weideman v. Tacoma etc. Motor Co.*, 7 Wash. 517, 35 Pac. 414; *Decker v. Stimson Mill Co.*, 31 Wash. 522, 72 Pac. 98; *Cully v. Northern Pac. R. Co.*, 35 Wash. 241, 77 Pac. 202. There is no evidence to show that respondent knew, or had any reason to suspect, that appellant's working place had been made dangerous by Kelly, or anyone. It therefore follows that appellant's action cannot be sustained on that ground.

639 The defenses of contributory negligence and assumed risk are interposed by respondent, and are not without support in the evidence. Appellant offers no good reason for standing under the suspended steel plate. He knew its tendency to swing—as he admits that he helped to “steady” it. It would seem that common prudence ought to suggest to any person of ordinary intelligence the propriety of “standing from under” while a two-thousand pound weight was swinging over his head in the air. Where a heavy steel plate is being handled with chains and other metallic appliances, in the manner open and apparent as was this, the risk of danger from standing under it would be evident to anyone. To be sure, there was no certainty of injury, perhaps no probability; but there was an obvious possibility, and the serious character

of the danger, in case the heavy plate should fall, would be apparent to any person of ordinary intelligence. It is inconceivable that any person of ordinary prudence would have stood under such a swinging mass of steel. No emergency, direct orders, or unusual occurrence is shown in justification of appellant's presence in a place of such danger.

It is urged by appellant that he did not know that Kelly was an independent contractor, and that he had a right to suppose that Kelly's men were servants of respondent, and that it was respondent's duty to furnish them with safe appliances. We are shown no facts or law making it the duty of respondent to inform appellant that Kelly was such contractor. None such occur to us. Neither has our attention been called to any authority giving a servant a right of action for a breach of duty on the part of the master toward an independent contractor and his men, said servant not working for, or under the direction of, said contractor.

Perceiving no error in the ruling of the trial court, the judgment is affirmed.

Mount, C. J., Rudkin, Crow and Hadley, JJ., concur.

The Duty and Liability of a Master in furnishing safe and suitable appliances to an independent contractor are discussed in the monographic note to *Brazil Block Coal Co. v. Gibson*, 98 Am. St. Rep. 309. The liability for the negligence of independent contractors is discussed at length in the monographic note to *Covington etc. Bridge Co. v. Stenibrock*, 76 Am. St. Rep. 382-428. The general rule is well understood that the principle of respondeat superior does not ordinarily extend to the acts of independent contractors: *Chicago v. Murdock*, 212 Ill. 9, 103 Am. St. Rep. 221; *Hoff v. Shockley*, 122 Iowa, 720, 101 Am. St. Rep. 289; *Richmond v. Sitterding*, 101 Va. 354, 99 Am. St. Rep. 879.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

AEBI v. BANK OF EVANSVILLE.

[124 Wis. 73, 102 N. W. 329.]

BANKS AND BANKING—Deposit of Indorsed Check.—If a check upon another bank is indorsed by the payee and deposited in the bank where he keeps an account, and the latter accepts it and credits the amount as cash to the depositor's account, to be checked against, with nothing to qualify the effect of such acts, the bank accepting the check, *prima facie*, becomes the owner, as distinguished from a mere agent to collect. (p. 926.)

BANKS AND BANKING — Checks — Indorsement. — In order to charge an indorser upon a check or inland bill of exchange payable on demand, presentment must be made by the holder within a reasonable time after it comes into his possession, and such reasonable time, in the absence of special circumstances, is limited to the next business day, or if the payee bank is in another place, the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment; otherwise, the indorser is discharged. (pp. 926, 927.)

BANKS AND BANKING—Checks—Presentment.—The holder of a check upon learning that an attempted presentation by mail has failed, and that the check is lost at least for the purpose of immediate presentment, owes the duty to the payee of the check to at once make substituted presentment and demand by means of a copy or sufficient description of the check, and, in case of nonpayment, to give notice to the payee. (p. 927.)

BANKS AND BANKING—Check—Failure to Present—Discharge of Indorser.—Failure to present a check for payment, and to give notice of dishonor within a reasonable time, absolutely discharges the indorser without proof of damage or injury to him. (p. 927.)

BANKS AND BANKING—Checks—Failure to Present—Discharge of Indorser.—If an indorser of a check is absolutely discharged by failure to present it for payment, any renewal of his liability must be by a new contract, and his subsequent act in connection with the indorsee in obtaining and indorsing a duplicate check at the request of the latter to enable him to obtain payment, does not constitute a waiver of his previous omissions in failing to make due presentment of the check for payment, nor does it constitute a new contract. (pp. 929, 930.)

BANKS AND BANKING—Checks—Discharge of Indorser—New Contract.—Only when an indorser of a check is informed of all the material facts resulting in his discharge from liability, will a new promise of liability be implied from acts which otherwise justify it. (p. 930.)

Richmond & Richmond and F. J. Lamb, for the appellant.

J. L. Sherron and T. Luchsinger, for the respondent.

⁷⁶ DODGE, J. We have no doubt of the correctness of the court's finding of fact that by the general indorsement of the check in question, its acceptance by the bank, and the credit of the amount as cash to the plaintiff in his general account to be checked against as he saw fit, with nothing to qualify the effect of such acts, the bank became the owner of the check, as distinguished from a mere agent to collect the same on behalf of the plaintiff. All of the acts above recited ⁷⁷ *prima facie* indicate the discount and completed transfer of the check: 2 Morse on Banks and Banking, sec. 573; Shawmut Nat. Bank v. Manson, 168 Mass. 425, 47 N. E. 196; Taft v. Quinsigamond Nat. Bank, 172 Mass. 363, 52 N. E. 387; Burton v. United States, 196 U. S. 283, 25 Sup. Ct. Rep. 243, 49 L. ed. 482. Only by clear evidence could a contrary significance be accorded them. There is no such evidence sufficient to constitute a clear preponderance such as would be necessary to warrant us in disagreeing with this finding.

Such being the transaction, the right of the defendant to charge back the amount of this check or to collect from the plaintiff is only that resulting from the relation of indorsee and indorser. The rules governing that relation are familiar, and largely now codified in our negotiable instrument law (Laws 1899, c. 356). In order to charge indorser upon a check or inland bill of exchange payable on demand, presentment must be made by the holder within a reasonable time after it comes to his possession: Sec. 1684—2. Such reasonable time is not fixed by statute, but by consensus of authority, in absence of special circumstances of excuse, is limited to the next business day, or, if the bank upon which the check is drawn is at another place, the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment: Gifford v. Hardell, 88 Wis. 538, 43 Am. St. Rep. 925, 60 N. W. 1064; Lloyd v. Osborne, 92 Wis. 93, 65 N. W. 859; Grange v. Reigh, 93 Wis. 552, 67 N. W. 1130. The check in question never was presented for payment until October

25th or 26th, and clearly, by such delay, the indorser was discharged unless such delay was excused. The only excuse suggested is the loss of the check. If it be conceded that the defendant was guilty of no negligence in adopting the United States mails as a method of transmission, nor in sending the check direct to the bank upon which it was drawn, thus taking chances of acquiring prompt knowledge whether it was honored or dishonored when it reached the payee, nevertheless ⁷⁸ it is excused from making presentment and demand only so long as, consistently with reasonable diligence, it was prevented by the loss of the check: Negotiable Instrument Law, sec. 1678—11. It would seem extremely doubtful whether defendant could claim, in the exercise of due care, to have been so prevented even during the ten days which it waited after mailing the check before making any inquiry about it and before learning of its loss. By ordinary course of mail the check should have reached the Brodhead Bank as early as the 23d, and, unless there was some difficulty, plaintiff should have been notified of its payment or refusal at least as early as the 24th of September. We shall not deem it necessary to decide whether it was not the duty of the defendant to make inquiry immediately upon failure to receive such notification in such ordinary course of mail. Even if that were not so, it did receive notice of the failure of the check to reach its destination some time about the 1st of October. Upon learning that its attempted presentment by mail had failed, and that the check was lost, at least for the purposes of immediate presentment, defendant had the opportunity and owed the duty to at once make substituted presentment and demand by means of a copy or sufficient description of the check, and in case of nonpayment to give notice to the indorser: 1 Parsons on Notes and Bills, 368, 448, 530; 2 Parsons on Notes and Bills, 260, 261; 2 Edwards on Bills, secs. 672, 697; Smith v. Rockwell, 2 Hill, 482; Hinsdale v. Miles, 5 Conn. 331; Negotiable Instrument Law, sec. 1681—17. Surely reasonable diligence would have enabled presentation long before October 19th. While the effect of the failure to present for payment and to give notice of dishonor within a reasonable time absolutely discharges the indorser without proof of damage or injury to him, it may be pointed out that in this case damage is quite obvious. The defendant having affirmatively learned of the loss of the check somewhere about October 1st, it appears that on the 1st,

the morning of the 2d, ⁷⁹ and on the 3d of October, Speich had a bank balance more than sufficient to meet this check; hence a prompt presentment at any one of those times would in all probability have secured its payment. But, if that were not so, Speich was in active business, and in apparent credit to an amount more than sufficient to satisfy such demand up to about October 23d, and, had plaintiff been promptly notified on or about October 1st of either the loss or the dishonor of the check, he would have had opportunity to make demand, and probably to secure payment from the maker: See *Shipsey v. Bowery Nat. Bank*, 59 N. Y. 485.

From the foregoing no conclusion is possible save that long prior to October 19th, when defendant informed him of the loss of the check, plaintiff had been discharged from liability thereon as indorser. But it is urged that, by co-operating at the request of the defendant in obtaining a duplicate in order that the same might be used in lieu of the original, he waived the previous omissions on the part of the defendant, and renewed his liability. Having been entirely discharged, any renewal of his liability must be by new contract: *Tebbetts v. Dowd*, 23 Wend. 379; *Knapp v. Runals*, 37 Wis. 135. The question therefore arises whether the transaction detailed in the evidence, about which there is no substantial dispute, amounted to a contract on the part of the plaintiff to assume a new liability as indorser on Speich's new check. Doubtless, when a check has been lost or destroyed, so that the payee or his assigns has not received the money thereby ordered paid, the drawer may give a new and independent check, treating the old transaction as canceled, and in that case the rights and liabilities of all parties may be as if the new check were given upon any other consideration. Equally, however, the parties may proceed on the purpose of merely supplying written evidence of the former transaction, to take the place of that lost, simply to facilitate proceedings or perfect records. In that case no new contract is made. All ⁸⁰ rights grow out of the original transaction or contract, and are exactly the same as if such transaction were proved orally instead of by the new or duplicate written evidence which the parties have supplied. In the latter case the equitable assignment worked by a check under Wisconsin decisions prior to the new statute would be complete from the original date—just as in the case of a lost deed the making of a duplicate would not change the time of trans-

fer of title nor make any new covenants of warranty. Hence the giving of a new check after loss or destruction of a former one is of itself alone ambiguous, and may evince intent to enter into new relations, or merely supply evidence of those already existing, according to the surrounding circumstances. The dating back of the new check to correspond with the lost one and marking it "Duplicate" tend to indicate the latter purpose, for they are wholly immaterial to the mere purpose of enabling the holder to obtain the money which he failed to get on the first check, and, being unusual, are significant. In *Benton v. Martin*, 31 N. Y. 382, it was held that the extrinsic facts accompanying the giving of a duplicate draft indicated an intent to assume new liabilities. Later, in the same case, other extrinsic facts were shown and held to establish the contrary intent, and the drawer was held discharged by omission to seasonably present the original: *Benton v. Martin*, 40 N. Y. 345; 52 N. Y. 570. In these later decisions it is strongly suggested that the word "Duplicate" upon the second instrument tended to refute any purpose to make a new contract, and some other evidence of such purpose would be necessary. In *Moody v. Mack*, 43 Mo. 210, the obtaining and inclosing a duplicate was held ineffective to excuse failure to notify an indorser.

In the case at bar there is certainly nothing, except the obtaining and indorsing of the new check, to prove an intent on part of either plaintiff or defendant that the latter should assume any additional responsibility. All the evidence indicates that the duplicate was deemed to be needed by the ⁸¹ bank, rather than by plaintiff, for the first attempt to obtain it was through its correspondent at Brodhead; and when it did request plaintiff to communicate with Speich it apparently conveyed the impression that it was asking of him a favor in its own behalf. He did not understand that he was interested, or that his credit for the amount was subject to be lost, upon any contingency. Speich also evidently had the same idea, for he mailed the duplicate direct to the bank instead of giving it to the plaintiff, as would have been natural had either of them supposed his interest was to be affected or inconvenienced by the transaction. Of course, plaintiff's indorsement was just as essential to make the paper a duplicate of that which had been lost as to give for-

mal rights upon the new instrument, if such it were. No entry was made on the bank-books to indicate any change in plaintiff's liability. We cannot escape the conviction that the new paper was intended by all parties to be what it was so industriously marked, namely, a fac-simile and duplicate of the former, identical in essence, operation, and legal effect (*State v. Graffam*, 74 Wis. 643, 647, 43 N. W. 727); that when the bank obtained it all parties were placed in exactly the same situation in fact and in law as if the original had that day come back to it through return of the lost letter, and therefore that no new promise or waiver of past neglect was made.

Another consideration which obstructs any implication of waiver or new promise by plaintiff is absence of knowledge on his part of the facts upon which his discharge from liability rested. No information was given him as to when the loss of the check was discovered, or whether a due presentment had been made or payment refused. Only when an indorser is informed of all the material facts is a new promise of liability to be implied from acts which otherwise might justify it: *Low v. Howard*, 10 Cush. 159; *Hamilton v. Winona S. & L. Co.*, 95 Mich. 436, 54 N. W. 903.

⁸² From the foregoing discussion must result the conclusion that plaintiff was fully discharged from any liability to defendant upon the check in question, and was entitled to recover his deposit balance without deduction of the amount of that instrument.

By the COURT. Judgment affirmed.

Where a Bank Receives as Deposits checks and other negotiable instruments, and credits the amount thereof as money, the title thereto vests in the bank: See Wasson v. Lamb, 120 Ind. 514; *In re State Bank*, 56 Minn. 119, 45 Am. St. Rep. 454.

A Bank Check should be Presented for payment within a reasonable time; otherwise the delay is at the peril of the payee: Industrial Trust etc. Co. v. Weakley, 103 Ala. 458, 49 Am. St. Rep. 45; *Morris v. Eufaula Nat. Bank*, 122 Ala. 580, 82 Am. St. Rep. 95; *First Nat. Bank v. Miller*, 37 Neb. 500, 40 Am. St. Rep. 499. That an unreasonable delay in presentment will release indorsers, see *Gifford v. Hardell*, 88 Wis. 538, 43 Am. St. Rep. 925; *Scroggin v. McClelland*, 37 Neb. 644, 40 Am. St. Rep. 520. As to whether such delay will release the drawer, see *Industrial Bank v. Bowes*, 165 Ill. 70, 56 Am. St. Rep. 228; *Industrial Trust etc. Co. v. Weakley*, 103 Ala. 458, 49 Am. St. Rep. 45.

MERRICK v. NORTHWESTERN NATIONAL LIFE INSURANCE COMPANY.

[124 Wis. 221, 102 N. W. 593.]

INSURANCE, LIFE—Wrongful Forfeiture—Right of Action.— If, under the terms of an insurance policy, on a husband's life, the insurance is to go to his wife as her separate estate, if she survives him, otherwise to his heirs, neither he nor his heirs are necessary parties to an action by her against the insurer for damages for wrongfully declaring the policy forfeited. (p. 931.)

INSURANCE, LIFE—Wrongful Forfeiture—Right of Action.— If an insurance company has wrongfully forfeited an insurance policy on the life of a husband naming his wife as beneficiary, she has a cause of action against the insurance company, although he is still living. (p. 932.)

INSURANCE, LIFE—Wrongful Forfeiture—Measure of Damages.— If an insurance company has wrongfully declared forfeited a life policy, the beneficiary named therein is entitled to recover as damages the value of the policy at the time of the breach. (p. 934.)

Action by the beneficiary named in a life insurance policy to recover for the wrongful forfeiture of the policy during the life of the insured. A demurrer to the complaint was sustained and plaintiff appealed.

F. E. Parkinson, for the appellant.

Brown & Kerr and B. W. Jones, for the respondent.

225 CASSODAY, C. J. 1. It is claimed that the demurrer was properly sustained on the ground of defect of parties plaintiff. It appears from the complaint that the plaintiff's husband, who procured the insurance on his own life, is still living, and hence it is claimed that he should have been made a party plaintiff. The contract required the defendant to pay the insurance to the plaintiff in case she should be living at the time of his death. It is alleged that he is in poor health, but, of course, it is possible for him to survive his wife. Her rights in the insurance are to be determined by the contract and section 2347 of the Statutes of 1898. Under that section and the contract the plaintiff was to have the whole of such insurance or none of it. If she died before her husband, then the whole of the insurance was to go to "his heirs"; and if she survived her husband, then the whole of it was to go to her. Subject to such contingency, the insurance was the sole and separate property of the plaintiff, free from the control or disposition of her husband: *Canterbury v. Northwestern etc. Ins. Co.*, 124 Wis. 169, 102

N. W. 1096. If, therefore, the plaintiff has a cause of action, then neither her husband nor his heirs have any interest in such cause of action, and hence are not necessary parties to this action. The husband and wife are not so united in interest as to require that they should be joined as plaintiffs in this action: Stats. 1898, sec. 2604; Barnes v. City of Beloit, 19 Wis. 93; Linden L. Co. v. Milwaukee etc. Co., 107 Wis. 493, 83 N. W. 851.

2. It is claimed that the demurrer was properly sustained because the plaintiff's husband is still living, and hence that the plaintiff's alleged cause of action had not yet accrued. It is well established that: ^{22e} "When one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated, and demand whatever damages he has sustained thereby": Lovell v. St. Louis etc. Ins. Co., 111 U. S. 264, 4 Sup. Ct. Rep. 390, 28 L. ed. 423; Kelley M. & Co. v. La Crosse C. Co., 120 Wis. 84, 89, 90, 102 Am. St. Rep. 971, 97 N. W. 674.

The principal controversies have been as to the proper form of action and the measure of damages. In the case at bar the demurrer concedes that the defendant had wrongfully refused to accept further payments of assessments, and had declared that the insurance had elapsed and the certificate of membership become forfeited. It is claimed that, if this is true, still it only gave to the plaintiff a right of action on the policy after the death of her husband. But there are adjudications to the effect that the policy-holder is not limited to such a remedy. Thus it has been held in Connecticut that, where "a life insurance company refused to receive the premium on one of its policies from a holder on the ground that it had become forfeited by a breach of one of its conditions by the person whose life was insured, . . . there were three courses open to the holder of the policy in the circumstances: 1. He might elect to consider the policy at an end, in which case he could, in a proper action, recover its just value; 2. He might institute an equitable proceeding to have the policy adjudged in force, in which case the question of forfeiture could be determined; 3. He might tender the premium, and wait till the policy became payable by its terms, and then try the question of forfeiture in a proper action on the policy": Day v. Connecticut G. L. Ins. Co., 45 Conn. 480, 29 Am. Rep. 693.

In the case at bar the beneficiary has elected to consider the policy at an end, and is here seeking to recover its value, as damages for the breach of the contract.

In a Virginia case a husband took out a policy of insurance on his own life for the benefit of wife, and, in case she died before he did, then for her children, and paid the premiums ²²⁷ thereon up to the time of the war. After the war the company repudiated the policy. Then the wife died without bringing any suit, leaving only one child her surviving, and that child brought the action during the life of the assured, for damages for the breach of the contract. Pending that suit the insured died, and it was held, in effect, that after the company repudiated the policy the wife might have sued in her own name for damages for the breach of the contract, or she might have waited, and, if she survived her husband, she might have brought an action on the policy; that as she did not survive, but died prior to her husband, such right of action on her death at once became vested in the child; that the war did not abrogate the policy, but only suspended the same; and that the company's repudiation of the policy after the war excused the insured from making any tender of premiums thereafter: *Clemmitt v. New York L. Ins. Co.*, 76 Va. 355; *New York L. Ins. Co. v. Clemmitt*, 77 Va. 366. It was there further held that: "Where breach occurred and suit is brought during insured's life, and he dies before judgment, the value of the policy is the present value, as at the date of the insurance company's repudiation, of the sum assured and payable at the death of the assured, to be diminished, however, at the same date, by the present value of the premiums subsequently accrued, and also by the amount of the premiums previously accrued (which are unpaid), and interest thereon."

It was there strongly intimated that, even if the assured had been "alive at the date of the judgment, with no decrease of health except from efflux of time," still she might have recovered such damages as she had actually sustained. It was there said that "the rule to ascertain the value of a life policy is laid down in *Universal L. Ins. Co. v. Binford*, 76 Va. 103." In that case the company was insolvent, and it was held that the policy-holder was entitled to a sum of money which "would purchase from a solvent company a policy of the same kind, for the same amount, and for the same rate of premium," and that such amount was ascertainable "by treating

²²⁸ the difference between the premiums paid the defendant company and the premiums to be paid to the new insuring company as an annuity for the assured's expectation of life, and calculating its cash value." In the case at bar the company is solvent, and the assured is in poor health and is not insurable.

In Georgia it has been held that, where the company had breached the contract, the holder of the policy was entitled to "recover any damages he may have sustained in consequence thereof": *Alabama G. L. Ins. Co. v. Garmany*, 74 Ga. 51. It has been held in New York that, where the policy-holder is entitled to recover damages for the breach of the contract, the measure of his damages "is the value of the policy destroyed; and in ascertaining this resort may properly be had to tables used in the business of life insurance, showing the average expectancy of life": *People v. Security etc. Co.*, 78 N. Y. 114, 125, 126, 34 Am. Rep. 522. In a later case in New York it was held: "That if, at the time of the refusal of the defendant to accept the premiums, the life of the plaintiff's father was still insurable, the measure of his damages was the difference between the then present value of the premiums he would have been compelled to pay during the life of his father under the policy issued by the defendant and the present value of the premiums which he would be compelled to pay under a policy which could then be obtained from another responsible company; that if at that time the life of his father was not insurable, his damages would be the actual value of the policy at the time of the breach, as being a valid and obligatory claim against an entirely responsible company": *Speer v. Phoenix M. L. Ins. Co.*, 36 Hun, 322.

In that state it is held that in case of such breach of the company the policy-holder is entitled to recover as damages the value of the policy at the time of the breach: *Farley v. Union M. L. Ins. Co.*, 41 Hun, 303; *People v. Empire M. L. Ins. Co.*, 92 N. Y. 105. The latest case in that state which has come to our attention, and applicable here, is *Toplitz v. Bauer*, ²²⁹ 161 N. Y. 325, 336, 55 N. E. 1059, 1062, where it was said by the court and held that: "The insurance company, having thus canceled its obligation, refused to reinstate it. The plaintiffs are entitled to complete indemnity for the loss thus sustained, and the inquiry was, What was the loss in contemplation of law? . . . The reasonable and just rule of damages in such cases would seem to be the cost

of replacing the policy on the same terms in a perfectly sound company at the time of the surrender, but the pledgor had then ceased to be an insurable risk under any circumstances existing in the business of insurance; so that the real loss was the face of the policy less what it would cost to carry it by payment of another premium which fell due before the death of the insured": See 2 May on Insurance, 4th ed., sec. 569.

These New York adjudications seem to indicate the true rule of damages in such cases. Under the allegations of the complaint, which are admitted by the demurrer, the plaintiff is entitled to recover unless she should die before the assured. So, as the case now stands, the complaint states a cause of action.

By the COURT. The order of the circuit court is reversed, and the cause is remanded with direction to overrule the demurrer, and for further proceedings according to law.

Siebecker and Kerwin, JJ., took no part.

The Remedies Which may be Pursued against a life insurance company when it wrongfully repudiates its contract of insurance are discussed in Metropolitan Life Ins. Co. v. McCormick, 19 Ind. App. 49, 65 Am. St. Rep. 392; People v. Security Life Ins. Co., 78 N. Y. 114, 34 Am. Rep. 522; Day v. Connecticut Life Assur. Co., 45 Conn. 480, 29 Am. Rep. 693; McCall v. Phoenix Life Ins. Co., 9 W. Va. 237, 27 Am. Rep. 558.

NEVINS v. CHICAGO, ST. PAUL, MINNEAPOLIS AND OMAHA RAILWAY COMPANY.

[124 Wis. 313, 102 N. W. 489.]

RAILROADS—Carriage of Livestock—Contract Accepting Car.—A stipulation in a shipper's contract for the carriage of livestock, that the shipper accepts the cars furnished by the carrier and acknowledges that they are sufficient and suitable in every respect for the shipment of livestock, does not relieve the carrier from liability for negligence in supplying unsuitable cars. (p. 936.)

Action for injury to livestock resulting from defective condition of the cars in which such stock was shipped. The contract of shipment contained the following stipulation: "The said shipper hereby accepts for transportation and acknowledges and admits the cars furnished by the railroad company to be sufficient and suitable cars in every respect for the shipment of said stock. . . . The car wherein the

said stock is to be carried having been tendered to said shipper by the said railroad company for that purpose, the said shipper hereby agrees that such car fit and proper for the purposes of such transportation." Judgment for plaintiff. Defendant appealed.

Tomkins, Tomkins & Garvin, for the appellant.

E. C. Alvord and H. E. Edwards, for the respondent.

³¹⁴ DODGE, J. The only error assigned is the refusal to direct a verdict for defendant. That is supported by contention that the defect in the car was so open and obvious that plaintiff's agent who loaded the horses must be conclusively presumed to have known of it, and, so knowing, was guilty of such contributory negligence as to preclude recovery; also that, because of such knowledge, plaintiff was bound by the stipulation in the shipping receipt accepting the car and assuming any risks from its condition. The inefficacy of such stipulation to relieve a carrier in case of negligence in supplying unsuitable ³¹⁵ cars is well established by our decisions: *Abrams v. M., L. S. & W. R. Co.*, 87 Wis. 485, 41 Am. St. Rep. 55, 58 N. W. 780; *Loeser v. Chicago etc. R. R. Co.*, 94 Wis. 571, 69 N. W. 372; *Leonard v. Whitcomb*, 95 Wis. 646, 70 N. W. 817. We need not discuss it. It suffices for the present case to say that we cannot agree with appellant's contention that plaintiff's agent must be presumed to have known of the defect in the car. That consisted of an old break of longitudinal boards such as to leave a hole near the car door about three feet long and six to seven inches wide. The agent testified he had no opportunity to inspect the car, as he had to load the horses in a hurry while the train was waiting, and that he had no knowledge of such or any defect. It does not appear whether the pieces of boards whose absence caused the hole were wholly displaced at the time of loading, nor that the horses were loaded on that side of the car, nor that the car was so situated that the side opposite from the loading chute was accessible for inspection. With such facts it surely is not beyond reason to credit the agent's denial of knowledge, or to hold such ignorance consistent with ordinary care. Hence those questions were properly for the jury. Since they have been resolved in favor of plaintiff, we need not consider whether a different finding would have constituted a defense.

By the COURT. Judgment affirmed.

A Carrier of Livestock is bound to furnish reasonably safe cars for the transportation of animals which it undertakes to carry, notwithstanding any stipulation to the contrary, and is liable for defects in cars rendering them unsafe: See the monographic note to *Clarke v. Rochester etc. R. R. Co.*, 67 Am. Dec. 215; *Betts v. Chicago etc. Ry. Co.*, 92 Iowa, 343, 54 Am. St. Rep. 558; *Railroad v. Dies*, 91 Tenn. 177, 30 S. W. 871; *Eckert v. Pennsylvania R. R. Co.*, 211 Pa. St. 267, 107 Am. St. Rep. 571.

HUBER v. STARK.

[124 Wis. 359, 102 N. W. 12.]

TRESPASS—Overhanging Eaves.—An invasion by one of the domain of another by projecting the eaves of his building over the premises of such other, but not to the prejudice of his occupancy of his land up to the boundary line, is remediable by suit to enjoin a continuous trespass, or by action to recover damages. (p. 938.)

TRESPASS—Mitigation of Damages.—It is no ground for mitigation of damages caused to property of one person by a trespass thereon that if such property had been in a good state of repair, the wrongful invasion would not have damaged it. (p. 939.)

LICENSE IN LAND—Revocation.—Mere oral permission by one to use the land to some extent of another, no consideration being paid therefor, although both parties may contemplate that the permission granted shall be permanent and although the licensee, on the faith thereof, enters upon the land and makes valuable improvements, conveys no interest in the land, and creates only a mere license, revocable at the pleasure of the licensor. (p. 940.)

TRESPASS—Discharge of Rainwater.—No one has a right, by an artificial structure of any kind upon his own land, to cause the water which falls and accumulates thereon in rain or snow to be discharged upon the land of an adjoining owner, and such erection, if it causes the water to flow either in the form of a current or stream, or only in drops, works a violation of the adjoining proprietor's rights of property, and constitutes a trespass unless a right exists by express grant, or by prescription. (p. 942.)

D. H. Grady, for the appellants.

Fowler & McNamara, for the respondent.

³⁶² MARSHALL, J. Counsel's first contention is that respondent should have sued in ejectment, and that, as proper objections were made and exceptions to rulings saved to present that question here, a reversal should be granted for failure to invoke the proper jurisdiction.

Whether the invasion by one of the domain of another by that one projecting the eaves of his building over the premises of such other, or by any intrusion into the latter's do-

main, as by projecting a foundation stone beyond the boundary, such other being in no wise disturbed in the occupancy of his own land up to such boundary, is remediable in equity to compel a discontinuance thereof, or by an action for damages as for a trespass, has been solved in the affirmative in some jurisdictions (*Aiken v. Benedict*, 39 Barb. 400; *Vrooman v. Jackson*, 6 Hun, 326; *Meyer v. Metzler*, 51 Cal. 142; *Grove v. Fort Wayne*, 45 Ind. 429, 15 Am. Rep. 262), and in the negative in others (*Sherry v. Frecking*, 4 Duer, 452; *Murphy v. Bolger*, 60 Vt. 723, 15 Atl. 365, 1 L. R. A. 309). It seems that the conflict created in respect to the matter in the New York court at an early date is yet unsolved: *Leprell v. Kleinschmidt*, 112 N. Y. 364, 19 N. E. 812. Probably it is true, as said in 10 American and English Encyclopedia of Law, second edition, 531, the weight of authority is in favor of the remedy in ejectment, but this state is committed to the doctrine that if, notwithstanding the encroachment, the owner of the premises invaded really occupies up to his boundary line, the proper action to address the interference is one for damages, or to abate the aggression as a continuing nuisance: *McCourt v. Eckstein*, 22 Wis. 153, 94 Am. Dec. 594; *Zander v. Valentine Blatz B. Co.*, 95 Wis. 162, 70 N. W. 164; *Rahn v. Milwaukee etc. Co.*, 103 Wis. 467, 79 N. W. 747; *Rasch v. Noth*, 99 Wis. 285, 67 Am. St. Rep. 858, 74 N. W. 820, 40 L. R. A. 577. That, it would seem, would rule this case, if the proposition as to the precise facts were new, but it was seemingly so held in ³⁶³ *Rasch v. Noth*. That was a case of overhanging eaves, and judgment in ejectment was reversed upon the ground that the action should have been in equity to abate a nuisance, or for damages for trespass. In *Rahn v. Milwaukee etc. Co.*, a similar invasion was held to satisfy the rule as to the use of equity jurisdiction to abate a continuing trespass.

Exceptions are urged to several findings of fact as contrary to the clear preponderance of the evidence. It does not seem advisable to discuss the evidence for the purpose of demonstrating the correctness of our conclusion in regard thereto. As we read the record, there is ample evidence to warrant the findings. Counsel view some of them from a radically wrong standpoint. It is said that appellant justified under an oral agreement and the court found such agreement as pleaded, and so should have decided that all interferences complained of were covered by the consideration acquired by respondent

in respect to the new chimney. We are unable to find that the court decided that the agreement was made as pleaded. On the contrary, the decision is to the effect that there was no consideration passing between the parties, except as regards the chimney. The same infirmity appears in counsel's criticism of the court's assessment of damages. This inquiry is made: The court having found the agreement as alleged, "how could damages be possibly assessed for injuries naturally caused in the execution of it?" That is based on the false assumption as to the decision upholding the agreement pleaded. Again, it is said, plaintiff's roof was out of repair, else no damage would have been caused thereby from the source complained of. Manifestly, it is no ground for mitigation of damages caused to the property of one person by a trespass thereon that if such property had been in a good state of repair the wrongful invasion would not have damaged it. Some other criticisms of the findings made by the learned counsel might be referred to, which in our view furnish as ³⁶⁴ little ground for disturbing the judgment as those we have instanced.

It is insisted that the conclusion of law that appellant had no better right to erect and maintain the eave trough than a mere license is wrong, because there was something more than such a right involved, in that the privilege was granted in exchange for a consideration, possession was taken of respondent's property, so far as necessary, to enjoy such privilege, and it was expected that it would be permanent. The premise assumed that there was a consideration given for the privilege is untenable, as we have seen. It follows that the assignment of error based on such premise is likewise untenable.

It is further contended that, conceding the facts as to the agreement between the parties being as found by the court as respondent views such finding, the indications are that it was supposed at the time the agreement was made that the privilege granted to appellant would continue indefinitely, and changes were made in the buildings in harmony therewith, in which circumstances the privilege is more in the character of an easement than a mere license, and therefore was not revocable at the pleasure of the grantor—*Morrill v. Mackman*, 24 Mich. 279, 9 Am. Rep. 124, being referred to. That case has no analogy to the one in hand. The privilege there involved was orally granted upon the promise of an annual

money consideration. It was said that if the agreement had been put in writing the result would have been a tenancy, and since it was not it was good as a lease from year to year. The inference plainly is that the controlling feature in the case was the consideration agreed to be paid. True, it was suggested that the attitude of the parties was such as to indicate a mutual understanding that the privilege would be permanent, but it seems plain such feature of itself would not turn a license into an easement or a lease. We should take note in passing that in *Thoemke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030, Mr. Justice Newman, ³⁶⁵ speaking for the court, in discussing the question of whether a parol license of the sort under consideration can be enforced in equity, used an expression quite similar to that above referred to and in a way that might give rise to the belief that the duration of a mere license as viewed by the parties thereto at the time of the creation thereof would, or might, control as to whether it is revocable at the pleasure of the licensor or not. This is the expression to which we refer: "The case is entirely bare of evidence showing whether such privilege was intended to be perpetual or limited in duration."

That was a mere passing remark. Probably the effect thereof, as it might be viewed apart from the general principle which ruled the case, was not appreciated. Certainly, whether at the inception of a mere license to one to enjoy some privilege in the land of another the parties thereto assume or agree that it shall be permanent does not affect its revocability.

The true rule is that a mere verbal permission by one to use the land, to some extent, of another, no consideration being paid therefor, though that other, on the faith thereof, enters upon such land and makes valuable improvements thereon to enable him to enjoy such permission, conveys no interest in the land and no right which, as to acts done by him after his privilege shall have been revoked, can be successfully asserted, defensibly or otherwise, as against the owner of the premises: *Thoemke v. Fiedler*, 91 Wis. 386, 64 N. W. 1030; *Fryer v. Warne*, 29 Wis. 511; *Tanner v. Volentine*, 75 Ill. 624; *French v. Owen*, 2 Wis. 250; *Clute v. Carr*, 20 Wis. 531, 91 Am. Dec. 442; *Duinneen v. Rich*, 22 Wis. 550.

The further point is made that a license is a full defense to all acts done pursuant thereto. We fail to find anything

in the decision of the trial court not in harmony with that principle. The acts for which the redress was sought and granted are those committed after the license was revoked.

³⁶⁶ The next point made is that the judgment erroneously enjoined appellant absolutely from allowing water from his roof to flow on to the building or premises of the respondent. Whether one has any right whatever to turn water accumulated on his building onto the premises of another, either in a stream or through a spout, or in drops, the modern authorities are not in harmony. This court does not appear to have heretofore spoken decisively on the question. In some jurisdictions it is held that one so turning water onto the premises of another is responsible for actionable wrongdoing only if he acts negligently to the damage of his neighbor: *Underwood v. Waldron*, 33 Mich. 232; *Barry v. Peterson*, 48 Mich. 263, 12 N. W. 181; *Hazeltine v. Edgmand*, 35 Kan. 202, 57 Am. Rep. 157, 10 Pac. 544; *Armstrong v. Luco*, 102 Cal. 272, 36 Pac. 674. Elsewhere the rule is that one property owner is entitled to absolute immunity from having water cast upon his premises from the adjoining building owned by his neighbor. In those cases, while the gist of the actions for violating such right is negligence, it is held that the wrong does not consist in allowing the water accumulating on the premises of one to be cast onto the adjoining premises negligently, but in allowing it, at least with knowledge of the facts, to be so cast at all: *Martin v. Simpson*, 6 Allen, 102; *Tanner v. Volentine*, 75 Ill. 624; *Fitzpatrick v. Welch*, 174 Mass. 486, 55 N. E. 178, 48 L. R. A. 278; *Shipley v. Fifty Associates*, 106 Mass. 194, 198, 8 Am. Rep. 318; *Jutte v. Hughes*, 67 N. Y. 267, 272.

In the last case cited the trial court instructed the jury that "if the water did come from the defendant's yard and he did everything which was possible, under the circumstances, and practicable in the way of drainage to carry it off from the premises, he was not liable." The facts were that defendant paved his yard so that the water falling thereon, which came from the building or otherwise, flowed over such pavement onto the premises of the plaintiff. The instruction was condemned on appeal, the record showing that the circumstances ³⁶⁷ referred to were in part created by the defendant and naturally caused the water that fell on his premises to flow onto those of his neighbor, the court remarking: "He was bound to take care of such water as fell and ac-

cumulated upon his own premises, and to prevent its causing any injury to the property of the plaintiff. It matters not that defendant did all that he reasonably could to take the water off, if he suffered it improperly to increase on his own premises, and so as to flow onto the plaintiff's premises."

In *Martin v. Simpson*, 6 Allen, 102, Bigelow, C. J., speaking on the same subject, said: "No one has a right, by an artificial structure of any kind upon his own land, to cause the water which falls and accumulates thereon in rain or snow to be discharged upon the land of an adjacent proprietor. Such an erection, if it occasions the water to flow, either in the form of a current or stream, or only in drops, works a violation of the adjoining proprietor's right of property, and cannot be justified, unless a right is shown by express grant or by prescription."

Such doctrine seems much more consonant with the common-law rights of property than that of the Michigan court, which seems to be to the effect that there must be, in the nature of things, a sort of neighborly exchange of privileges between the owners of adjoining buildings, permitting each, if he acts with due care, to use the premises of the other as a dumping place for the water accumulating upon his own building.

The right of eavesdrip which one may possess in the land of his neighbor is an interest in realty—an easement, and hence does not exist in any case as a mere appurtenance. It is a property right which must be acquired like any other interest in land—the *stillicidium* as regards the fall of water in drops and *flumen* as to flow of water in a stream from a spout or gutter, as the subject is treated in the civil law. The ancient rule on the subject, which cannot well be ignored without judicially taking property of one person and conferring ³⁶⁸ it on another without compensation, is stated by Mr. Washburn thus: "For one to construct the roof of his house in such a manner as to discharge the water falling thereon in rain, upon the land of an adjacent proprietor, is a violation of the right of such proprietor, if done without his consent, and this consent must be evidenced by express grant or prescription. . . . The mode in which this injury may be occasioned may be by extending the roof of such building beyond the line of separation between the two estates, or by so constructing it as to throw the water falling thereon, by its own impulse and direction, across the line, and thereby caus-

ing it to be discharged upon the estate of the adjacent land owner": Washburn on Easements, *390.

It is strenuously contended that a licensor cannot upon revoking the license rightly compel the licensee to restore the original condition of the premises. If counsel speak only of restoration to the extent of merely terminating the trespass caused by adversely exercising the license after its revocation, he is manifestly wrong. That is all the mandatory part of the judgment is designed to accomplish in this case. It does not require the restoration of any structure, but merely requires appellant to cease trespassing upon respondent's premises by discontinuing the eave spout and its connections and cease permitting the water to flow from his roof on the respondent's premises.

Some other suggestions are made by appellant's counsel, but they either are quite unimportant or are so fully covered by what has been said that we will forego further discussion of the case.

By the COURT. The judgment is affirmed.

A motion for a rehearing, and for a modification of the judgment with respect to the removal of structures and restoration of plaintiff's building, was denied March 14, 1905.

Kerwin, J., took no part.

As to the Right of the Owner of a Building to allow the water from the eaves or roof thereof to drip or run on his neighbor's premises, see Hazeltine v. Edgmand, 35 Kan. 202, 57 Am. Rep. 157; Copper v. Dolvin, 68 Iowa, 757, 56 Am. Rep. 872; Gould v. McKenna, 86 Pa. St. 297, 27 Am. Rep. 705. An examination of these cases will disclose that, as a rule, such a right does not exist. It is held in Davis v. Niagara Falls Tower Co., 171 N. Y. 336, 89 Am. St. Rep. 817, that where a tower, otherwise properly built, is so constructed that large quantities of ice accumulating thereon fall upon and injure adjoining property and endanger human life, it is a private nuisance, and its maintenance in such a condition may be enjoined.

EMERSON v. NASH.

[124 Wis. 369, 102 N. W. 921.]

PLEADING, Construction in Favor of.—The Only Test to be Applied to a Complaint is, will it reasonably permit of a construction sustaining it. If it will satisfy such a test, it is good on demurrer, however plainly it may be open to a motion for indefiniteness and uncertainty. (p. 947.)

PLEADINGS—Cause of Action.—To constitute a cause of action, there must be a primary right possessed by one person and a violation thereof by another. (p. 950.)

PLEADING—"Transaction"—Cause of Action.—Out of one circumstance in its entirety involving two or more persons, denominated by statute as a "transaction," there may result two or more remediable primary rights or causes of action. (p. 950.)

PLEADING—"Transaction"—Cause of Action.—However numerous may be minor transactions, each constituting a primary right enforceable by the proper remedy, so long as they all reach back to the point of union as the parent cause thereof, they all arise out of one "transaction" within the meaning of the statute, and may be vindicated together, each by its proper remedy. (p. 951.)

PLEADING—Cause of Action.—Transaction.—A cause of action consists of those facts as to two or more persons entitling at least one of them to a judicial remedy of some sort against the other, or others, for the redress or prevention of a wrong, and it is essential to the existence of such facts that there should be a right to be violated and a violation thereof. Since these two elements constitute a cause of action, and to satisfy the statute they must arise out of one or more circumstances called a "transaction," the latter is to be viewed as something distinct from the cause of action itself. The occurrence of the "transaction" and of the facts constituting the cause of action may be simultaneous or not. (p. 952.)

PLEADING—Cause of Action—"Transaction."—All causes of action, within the meaning of the statute, arise out of a circumstance denominated therein a "transaction," and the major "transaction" may occur long prior to the violation of the right constituting the last step completing any one of the various causes of action arising out of such major transaction. (p. 952.)

PLEADING—Cause of Action—"Transaction."—Any event in which two or more persons are actors, involving a right which may presently, or by what may proximately occur in respect thereto, be violated, creating a redressible wrong, is a "transaction" within the meaning of the statute giving a cause of action. All such wrongs which, in the regular course of events, through the rights violated, have such proximate relation to that transaction that it can be legitimately said they arise out of it, are remediable in one action, regardless of the form of the remedy required as to each, provided they affect all of the parties and do not require different places of trial. (p. 953.)

PLEADING—Joinder of Causes of Action.—It is no objection to the joinder of causes of action that they concern separate primary rights. If all such causes of action arise out of the same transaction, or transactions connected with the same subject of action, that is sufficient. (p. 956.)

PLEADINGS—Cause of Action—Transaction.—If a contract between two or more on one side and two or more on the other creates a situation involving presently or proximately separate rights upon one side, each of which, with a violation thereof by the other side, would constitute a complete ground of complaint for judicial redress, the initial circumstance—namely, the making of the contract—is a “transaction” within the meaning of the statute, and such grounds of complaint, should they arise, would be separate causes of action arising out of the same transaction within the meaning of the statute. (p. 959.)

B. W. Jones, for the appellants.

J. W. Hicks, J. O’Leary and Reid, Smart & Curtis, for the respondents.

³⁷⁹ MARSHALL, J. We have examined with care the very able analysis of the complaint by appellants’ counsel without being able to reach the conclusion they contend for. The case is by no means clear, and if it were proper to incline to a view which would condemn the pleading because such view is reasonable, there being another such view that will sustain it, a conclusion might be arrived at fatal to the orders appealed from.

We cannot too often recur to the radical change wrought by the code from the common-law rule for determining the sufficiency of pleadings. It must not be forgotten that he who challenges a pleading for insufficiency in any respect cannot rely for success upon mere failure to state expressly or clearly facts essential to sustain it—not in case of conflicting reasonable inferences upon that one being adopted supporting his contention. Formerly, mere ambiguity, resolvable reasonably in a way to defeat a pleading, was sufficient to that end upon the matter in that regard being presented on demurrer. The pleading was required to stand the test of every reasonable intendment and presumption against it: *Morse v. Gilman*, 16 Wis. 504. That was one of the serious obstacles to the speedy, economical and efficient administration of justice, which the code was designed to remove. Because of the inclination of ³⁸⁰ many judges against invasions of the ancient methods of presenting controversies for judicial determination, early manifested after the adoption of the new system, in respect thereto, which has never been wholly changed, though the new system is over half a century old, the full scope of the reform wrought thereby is not yet universally fully appreciated.

“In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties”: Stats. 1898, sec. 2668.

“The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the adverse party”: Stats. 1898, sec. 2829.

That language is unmistakable. Together with the whole framework of the code it shows that the guiding thought of the reformers was that the attainment of justice, the end sought in all litigation, should be wholly free from all interferences in the nature of mere technicalities and illiberal constructions. In harmony with that the statute was very early given a broad and liberal construction to the end that the beneficent purposes thereof might be fully realized. This court declared that “every reasonable intendment and presumption is to be made in favor of a pleading.”

“A complaint to be overthrown by a demurrer or objection to evidence must be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if a good cause of action can be gathered from it, it will stand, however inartificially these facts may be presented, or however defective, uncertain or redundant may be the mode of their statement”: *Morse v. Gilman*, 16 Wis. 504.

Notwithstanding that plain declaration so early made, it has not always been appreciated and applied by judges, and it has often been lost sight of by counsel in the presentation of causes on appeal. The phrasing of the statutory rule by Dixon, C. J., which we have given, has not been materially³⁸¹ improved upon in the numerous elaborations thereof found in our decisions, though, perhaps, it has been thereby re-enforced. In *Miller v. Bayer*, 94 Wis. 123, 68 N. W. 869, the court said, in effect, that the true test to apply to a pleading is, Will the language used permit of a reasonable construction which will sustain it? In *Ean v. Chicago etc. R. R. Co.*, 95 Wis. 69, 69 N. W. 997, it was said, in effect, that for the purpose of sustaining a pleading it should have the support of the most liberal construction which its language will reasonably bear, and all reasonable inferences that can be drawn therefrom. Again, the court said, substantially, in *Kliefoth v. Northwestern I. Co.*, 98 Wis. 495, 74 N. W. 356.

that effect should be given to all allegations of a pleading which will support rather than defeat it, if that can be done without adding thereto, by way of construction, material words not necessarily implied, or giving to the language used a meaning that cannot be reasonably attributed to it. And again, in *Miles v. Mutual R. F. L. Assn.*, 108 Wis. 421, 427, 84 N. W. 159, 162, the court said: "Criticisms of a pleading will not support a challenge for insufficiency to state a cause of action or defense, if sufficiency can be discovered reasonably by judicial construction of the language used and by reasonable inferences from general allegations. Such pleadings may be open to a challenge for uncertainty and indefiniteness, but not insufficiency."

And recently in *Manning v. School Dist. No. 6*, 124 Wis. 84, 102 N. W. 356: Every pleading is to be so construed as to support the purposes of the pleader to state a cause of action, if the facts essential thereto can be found expressly stated or alleged by reasonable inference, looking at the language in its full reasonable scope.

In view of the foregoing it seems plain that it would be a waste of time to follow the analysis of the complaint made by the learned counsel for appellants to see whether the pleading will reasonably permit of the construction they contend ³⁸² for. All might be conceded that is claimed in that regard, and it might be conceded, too, that so viewing the pleading it is fatally defective, without necessarily arriving at a right determination of the controversy now presented, since, as we have seen, the only legitimate test to be applied to the complaint is, Will it reasonably permit of a construction sustaining it? In view of all the facts alleged expressly or by reasonable inference, is the pleading bad as claimed? If it will satisfy such test it is good on demurrer, as indicated, however plainly it may be open to a motion for indefiniteness and uncertainty.

The main contention of appellants' counsel is that the complaint is bad because of misjoinder of causes of action. That involves a concession that there are two or more good causes of action stated (*Bassett v. Warner*, 23 Wis. 673; *Koepke v. Winterfield*, 116 Wis. 44, 92 N. W. 437), but that they are not such as can be united under section 2647 of the Statutes of 1898. For the purposes of the discussion it may be taken for granted that the pleading does state several causes of action, that one is equitable to enforce a vendor's lien, while

the others are legal. They are, nevertheless, properly joined if they "arise out of the same transaction or transactions connected with the same subject of action," affect all of the parties to the action, and do not require different places of trial: Stats. 1898, sec. 2647. There can be and is no controversy but that all of the causes of action, if there be more than one, are triable at the same place. Therefore, we may confine our investigation to whether they arise out of the same "transaction or transactions connected with the same subject of action" and affect all the parties.

It would be very helpful in arriving at a correct conclusion if the learned counsel for appellants had given earnest attention to the meaning of the term "transaction" in section 2647 of the statutes. The reluctance of courts to grapple with doubtful matters, or matters supposed to be doubtful, even when ⁸⁸³ so presented as to afford a perfectly legitimate opportunity for solving the same and blazing out a plain pathway for the bar and trial bench to follow, in the absence of necessity for action in that regard, is by no circumstance better illustrated than the one that, though the term mentioned has been significantly in use in codes for nearly sixty years, it has not been judicially construed with such a degree of definiteness as to furnish any plain rule to go by. In *New York etc. R. Co. v. Schuyler*, 17 N. Y. 592, Comstock, J., after a careful consideration of the matter, confessed inability to suggest a construction of the term filling all situations, independently of the discretion of the trial judge as to what under the circumstances in hand will best promote the ends of justice. He remarked: "Its language is, I think, well chosen for the purpose intended, because it is so obscure and so general as to justify the interpretations which shall be found most convenient and best calculated to promote the ends of justice. It is certainly impossible to extract from a provision so loose and yet so comprehensive any rules less liberal than those which have long prevailed in courts of equity."

In *Keep v. Kaufman*, 56 N. Y. 332, another learned justice confessing the same situation said, apparently in a spirit of lamentation, "There are few rules of pleading in force." No material improvement upon the futile effort of Justice Comstock to construe the statute can be found in the New York decisions. Very little light is thrown on the subject, other than by the application of the statute to the facts of

particular cases. In no one that we can discover has any attempt been made to lay down a comprehensive rule. Without one it is not strange that there are many seeming inconsistencies in decisions, nor strange that in New York in the statute relating to the joinder of actions the word "transaction" has not been applied consistently with the same word in the statute on the subject of counterclaims.

The text-writers all note the failure of courts to meet ²⁸⁴ squarely and solve the situation above indicated. In 1 *Encyclopedia of Pleading and Practice*, 185, it is said: "No satisfactory definition has been given to the term 'transaction.'" In *Bliss on Code Pleading*, section 126, with considerable hesitancy, a construction of the statute is suggested, the author saying, "Its full and exact scope does not seem to have been judicially considered." In *Maxwell on Code Pleading*, at page 343, the author says, "No definition of the word 'transaction' has been attempted by any court as far as I am aware." In *Baylies on Code Pleading and Practice*, second edition, at page 157, the author said: "The language of this provision is very general and very indefinite. The judges have taxed their ingenuity to invent a rule for determining what the 'same transaction' means."

He indicates very clearly a conclusion that all such efforts have been well-nigh fruitless, referring significantly to this expression of Church, C. J., in *Wiles v. Suydam*, 64 N. Y. 173, 177: "This language is very general and very indefinite. I have examined the various authorities upon this clause, and I am satisfied that it is impracticable to lay down a general rule which will serve as an accurate guide for future cases. It is safer for courts to pass upon the question as each case is presented."

In *Pomeroy's Code Remedies*, fourth edition, sections 357-370 (*463-*476), the author appears to have made a more earnest, and perhaps a more successful, effort than had been theretofore or has since been made to lay down some definite rule—freely confessing, however, the difficulty in the way by reason of the dearth of satisfactory authority, and deploring the judicial habit of unwillingness to attempt the discussion and settlement of definitions, principles and doctrines connected with the reformed procedure in a general and comprehensive form, which has resulted in leaving such difficulty so long unsolved.

We cannot expect to do fully what all the text-writers and jurists have avoided doing since 1852, when the term³⁸⁵ "causes of action arising out of the same transaction or transactions connected with the same subject of action," was coined and made a part of code systems of jurisprudence. This is an occasion, in the judgment of the writer, when that valuable service to the bench and bar might be legitimately performed. If it had now been, or at any time in the future should be, determined to remove, so far as possible, uncertainty respecting the matter, the writer would not hesitate to take up the work of speaking for the court to that end, though the difficulty to be overcome, in view of the general attitude on the subject, as before indicated, it is believed is fully appreciated. So far as opportunities are afforded, therefore, the law should be made as plain as judicial labor can reasonably make it. Especially in matters of practice it is better that uncertainties in ambiguous legislation should be removed by definite judicial determinations in the form or effect of plain rules, even if the precise thought of the statute makers is not thereby made effective, than that trial courts and the profession should be left to be guided by mere precedents of the application of the statute to particular circumstances.

Some general observations as to the meaning of the word "transaction" in the statute under consideration will suffice for this case. Professor Pomeroy initiated his treatment of the subject, at section 357, with the statement, "the words of the statute are broad, comprehensive, vague, and uncertain," but believing, as he said, that to leave the matter where Justice Comstock did in *New York etc. R. Co. v. Schuyler*, 17 N. Y. 592, though the easiest way for the courts, so far fails to render efficient what the legislature intended as to be unjust to suitors and the profession, he proceeded to lend the aid of his learning in the matter. His reasoning is logical and his conclusions have met with much favor, though they have not, so far as we are aware, been adopted as judicial rules. We³⁸⁶ approve thereof, generally speaking, and what we say is in harmony therewith.

The statute plainly suggests that out of one circumstance in its entirety involving two or more persons, denominated a transaction, there may result two or more remediable primary rights. It follows necessarily that the legislative idea is that in such primary or major circumstance the minor

circumstances, the several rights, meet. At the point of union we have the transaction of the statute. However numerous may be the minor transactions, each constituting a primary right enforceable by the proper remedy, so long as they all reach back to the point of union as the parent cause thereof—the connection between such point of unity and the various results enforceable as separate grounds for complaint being sufficiently close that the former can clearly be seen to be the proximate cause, so to speak, of the latter—they all grow or arise out of one transaction, within the meaning of the statute, and may be vindicated together, each by its proper remedy, subject to the proviso at the close of section 2647.

A good illustration of the foregoing is found in the recent decision of this court in *Gutzman v. Clancy*, 114 Wis. 589, 90 N. W. 1081, 58 L. R. A. 244. There it was held that in case of a mutual assault the remedial rights of each of the combatants against the other arise out of a single transaction, within the meaning of the statute, and can be vindicated in the same suit, the defendant counterclaiming against the plaintiff's cause of action. Among the earlier cases is *Adams v. Bissell*, 28 Barb. 382. Professor Pomeroy dignifies it by quoting the opinion of Justice Sutherland in full. The defendants, as common carriers, contracted to transport to the city of New York and deliver to plaintiffs, as consignees, a quantity of wheat. The latter, as owners of the bill of lading, made advances on the grain. When the delivery was made there was a shortage of three hundred and forty bushels. Not knowing thereof before paying the freight, the consignees overpaid in that regard to the amount of one hundred and seventy dollars.³⁸⁷ They sued the carrier, joining in the complaint a cause of action for converting the three hundred and forty bushels of wheat and a cause of action to recover the one hundred and seventy dollars overpaid. The court held that the joinder was proper because the contract for the transportation was the transaction out of which the two rights of action arose. The discussion by the learned justice who wrote the opinion, of the clause "transactions connected with the same subject of action," wherein he referred to it as mere surplusage, seems rightly characterized by Professor Pomeroy as unsound. *Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142, is another illustrative case commonly referred to by text-writers. Plaintiff, through the fault of the owners of the steamship "Cortes,"

was induced to purchase a ticket for passage for San Juan, supposing that the ship would land at that place, but it did not, and she was carried to Panama, whereby she was subjected to pecuniary loss and to personal discomfort and injuries. It was held that all remedial rights arising in plaintiff's favor grew out of the transaction whereby she was induced to purchase a ticket for passage on the ship, and that the various causes of action were joinable.

Any number of other illustrations might be given. No considerable aid can be obtained by a further citation of precedents. It is the common opinion of writers that an extended discussion of them rather tends to confuse than enlighten. It is believed that the difficulty, referred to so many times in the books, of understanding the real thought intended to be expressed by the code makers lies largely in the indisposition of judges to take kindly to the code system of pleading, rather than to any real ambiguity in the words used. A cause of action consists of those facts as to two or more persons entitling at least some one of them to a judicial remedy of some sort against the other, or others, for the redress or prevention of a wrong. It is essential to the existence of such facts that there should be a right to be violated and a violation thereof. Since those two elements constitute a cause of ³⁸⁸ action, and to satisfy the statute they must arise out of one or more circumstances called a transaction, the latter is to be viewed as something distinct from the cause of action itself, else the latter could not arise out of the former. The occurrence of the transaction and of the facts constituting the cause of action may be simultaneous or not. A enters into a contract with B. Out of that circumstance grows the right of each against the other to the performance of the contract. That right is the first essential or step to the creation of a cause of action. It necessarily must precede the existence of such cause. Subsequently that right is violated. In that we have the final essential or step to the creation of the cause of action. There may be several such rights and several such violations, hence, necessarily, several such causes of action, produced each by minor circumstances, each set thereof reaching back to the major transaction in which they unite and from which they arise in the regular course of events. Going back from one completed cause of action to the point of unity and thence to another such cause we discover the proximate relation between them. The cause or

circumstance upon which all depend is the transaction of the statute. All the causes of action, within the meaning of the statute, arise out of that. The major transaction may occur long prior to the violation of the right constituting the last step completing any one of the various causes of action. It is easily comprehended that in one circumstance in its entirety there may exist two or more rights, and that there may be distinct invasions thereof, each invasion of itself constituting a separate wrong redressible by the remedy appropriate thereto.

Giving to the words of the statute their plain, ordinary meaning in view of the situation with which the builders of the new system had to deal, the meaning thereof does not seem to be very obscure. If it were not for its having been repeatedly characterized as ambiguous in a high degree we should feel warranted in saying that its meaning is plain.³⁸⁹ Any event in which two or more persons are actors, involving a right which may presently or by what may proximately occur in respect thereto be violated, creating a redressible wrong, is a transaction within the meaning of the statute. All such wrongs which, in the regular course of events, through the rights violated, have such proximate relation to that transaction that it can be legitimately said they arise out of it are redressible in one action, regardless of the form of the remedy required as to each, subject to the proviso of the statute before referred to.

The foregoing analysis of the statute goes far enough for the purposes of this case. We do not need to consider the meaning of the term "transactions connected with the same subject of action," though in passing we may say again that it is not mere surplusage, as suggested in *Adams v. Bissell*, 28 Barb. 382. It covers a different situation than that referred to by the term "causes arising out of the same transaction." Manifestly, there may be such cause and others arising out of transactions connected with the subject thereof, yet the latter not arise out of the transaction first spoken of nor out of such subject. Doubtless, as has been said by text-writers and judges, the second clause of the statute applies more generally, if not exclusively, to equitable suits.

In view of the foregoing, unless we can discover in the complaint the existence of some primary transaction creating directly or proximately the several distinct rights alleged to

have been violated, the demurrer for misjoinder should have been sustained.

At the outset it is alleged that February 8, 1901, "plaintiffs John W. Emerson and David W. Emerson entered into an agreement in writing with Thomas E. Nash and Guy Nash," in which the former obligated themselves in several distinct particulars to the latter, who in consideration therefor obligated themselves as to each such particular to the former. Manifestly, the mutual obligations as to each such matter created ³⁹⁰ corresponding rights to performance, and failure by either party, upon that being due to the other, constituted a remediable wrong and a cause of action arising out of the transaction creating the right itself, to wit, the contract of February 8, 1901. Each such right formed a step toward a possible cause of action, which required only an invasion of it to complete the same.

It is further alleged that September 26, 1901, for the purpose, among other things, of enlarging the scope and amending the terms of said original contract, "plaintiffs John W. Emerson and David W. Emerson, on the one side, and the defendants Thomas E. Nash, Guy Nash, James B. Nash, and William F. Vilas, on the other side, made and entered into certain written articles of agreement under their hands and seals, hereinafter designated as 'articles of agreement,' and that except as amended and modified by said articles of agreement, the said original contract remained in full force and effect, and that thereafter the said original contract and articles of agreement constituted and were treated by the plaintiffs and defendants as one contract." There seems to be a pretty plain statement that the second agreement was but a mere modification and enlargement of the first, whereby all of the parties became mutually obligated as to all particulars of the entire agreement. Excluding from consideration the concluding words of that part of the paragraph commencing with "and that except as amended," etc., still we have a fairly plain statement that the first contract was merely extended and changed by the second transaction, leaving but one entire agreement in which plaintiffs stood for all the obligations on one side and defendants jointly stood for all those on the other. Note the significance of the expression in that regard, "John W. Emerson and David W. Emerson, on the one side, and the defendants Thomas E. Nash, Guy Nash, James B. Nash, and William F. Vilas, on the other

side, made and entered into," etc. It needed no additional language to show that those parts of ³⁹¹ the first agreement not inconsistent with the supplement thereto were preserved as parts of one agreement, which included the amendatory part of the contract of September 26, 1901. The language to the effect that the first transaction and the second constituted one contract and were by all parties so treated ever after the occurrence of the latter, really does not add anything to what preceded it, other than an indication of what the pleader intended theretofore to state. Perhaps in that regard it strengthens such language. However, it seems without any such reinforcement, by reasonable inference at least, the language of the pleader shows he intended to and did state that by the occurrence of September 26th. that of February 8, 1901, was amended and broadened so that the plaintiffs obligated themselves as parties on one side of the amended agreement, and all of the defendants obligated themselves as parties on the other as to all matters involved. The language used is too comprehensive, as it seems, to permit us to hold that it neither states expressly nor by reasonable inference that the two transactions were merged into one, with mutual obligations as to all particulars affecting all the parties, unless there is something later in the pleading so inconsistent therewith as to change that appearance.

The result up to this point indicates that all rights created in plaintiffs' favor by the entire contract—the amended agreement of September 26, 1901, embracing all the matters material to this case included in the transaction of February 8, 1901—relate to one transaction, and the violations of such rights, alleged, created separate causes of action legitimately arising therefrom, within the meaning of the statute.

The point is made that the option mentioned in the first clause of the complaint was accepted by Thomas E. Nash and Guy Nash prior to the occurrence of September 26, 1901, and that thereby that part of the original contract became a completed independent agreement, creating a new primary right, itself a subject of a cause of action contingent upon a ³⁹² violation thereof, and which could not arise out of the transaction of later date, to wit, that of September 26, 1901. In this it seems that counsel make the mistake of supporting that the vindication of the right under the completed feature of the original contract is not enforceable in company with others created by such contract, because it is primary in the

sense that it with a violation thereof constitutes a complete cause of action. That use of such term should not be mistaken for the use when applied to the dominant right in a bill in equity, which may draw a multitude of other matters, each sufficient to form a cause of action, so closely to it that the whole is said to constitute a single cause of action: *Zine C. Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229; *South Bend C. P. Co. v. Geo. C. Cribb Co.*, 105 Wis. 443, 81 N. W. 675; *Gager v. Marsden*, 101 Wis. 598, 77 N. W. 922. It is no objection to the joinder of causes of action that they concern separate primary rights—none whatever. If that were not so there could be no such thing as the joining of several causes of action in one suit, since each such cause must necessarily involve in a sense a single such right. If all such causes arise out of the same transaction, or transactions connected with the same subject of action, that is sufficient.

While it is true it is alleged that Thomas E. Nash and Guy Nash, prior to September 26, 1901, bound themselves absolutely to plaintiffs to purchase and pay for part of the land mentioned in the original contract, the subcontract grew out of the original transaction and was executory at the time of the occurrence of September 26, 1901. It created a primary right in the sense that it made what was theretofore optional on one side absolute so that the invasion of it constituted a cause of action, but not in the sense that it was so disconnected with the parent contract that a cause of action to enforce it could not be reasonably said to arise out of the latter as embodied in the transaction of September 26, 1901. It is considered that since before the subcontract was violated it became ³⁹³ subsidiary to the amended contract, which contained mutual obligations binding on all parties on one side to all the parties on the other as to the whole matter, the completed cause of action to vindicate it arose out of the relations existing between all the parties under such amended contract.

It may be that one might reasonably construe the pleading so as to render the so-called completed contract so disconnected with the transaction of September 26th that the cause of action to enforce it could not well be said to arise out of the latter transaction. True, the allegation that "Thomas E. Nash and Guy Nash duly sold, transferred and assigned to James B. Nash and William F. Vilas an undivided one-half

interest in said completed contract of purchase, so that the same then subsisted between the plaintiffs John W. Emerson and David W. Emerson on the one side and the defendants Thomas E. Nash, Guy Nash, James B. Nash, and William F. Vilas on the other side," might be true in the sense that the executory vendees thereby became jointly entitled to enforce the contract against the executory vendors, upon putting the latter in default—and such vendors be not entitled to enforce the contract against such vendees. If there were a mere assignment of a one-half interest in the completed contract, no mutual obligations were created in respect to the matter as to all the parties. But it was perfectly competent for the assignors and assignees to make their transaction in such form as to put the latter in the same position as to the executory vendors as the assignors. That was the most natural thing to do under the circumstances. It is considered that the allegation of the complaint in regard to the assignment, in connection with what immediately follows as to the change in the original contract, fairly states that as what the parties did do. It is significant that the assignment and the enlargement of the general contract occurred at the same time, apparently as parts of one transaction, and that the allegation as to the nature of the former is in harmony with that as to ³⁹⁴ how the parties dealt in respect to the latter. It is alleged that plaintiffs as one party contracted with all the defendants as the other party, suggesting the creation of mutual obligations affecting all. It should be further noted that the allegation as to the assignment does not state that Thomas E. Nash and Guy Nash assigned an undivided one-half interest in the contract to James B. Nash and William F. Vilas, and that all thereby became contractors on one side with the plaintiffs on the other, but the statement is that the assignment was made "so that the same subsisted between the plaintiffs," or, in other words, became a contract between the plaintiffs "on one side" and all the defendants "on the other side." It was competent to thus plead the facts according to their legal effect, and we must incline to the view that they were so pleaded, since that is reasonable, rather than adopt another view which is unfavorable to the pleader. The view we take of the allegations as to the transaction of September 26, 1901, puts all the defendants in the same relation to the plaintiffs and renders the invasion of every distinct separable right created

thereby the final step in a cause of action arising proximately, at least, out of one transaction commenced February 8, 1901, and completed September 26, 1901.

What has been said leads logically to a disapproval of the contention that the causes of action, so called, stated in paragraphs 44 to 47, inclusive, of the complaint, each being for compensation for services performed under the terms of the contract as made February 8, 1901, embraced, as we have seen, in that of September 26, 1901, cannot be joined with the same cause of action already discussed. All arise in the statutory sense out of one transaction. In discussing this branch of the case the learned counsel for appellants appear to confuse the term "primary right" with the term "transaction." They say, "It is respectfully submitted that there is no sort of chance to contend that the first cause of action arises from the same primary right which is asserted as a basis for ³⁹⁵ the other six." If what one would ordinarily understand by that is what counsel mean, they are in error. Causes of action are not joinable because they arise out of the same primary right, but because they arise out of the same transaction.

What has been said renders it unnecessary to discuss the question of whether all of the causes of action affect all the parties to the action. The affirmative of that proposition is the logical effect of what has already been said.

It is contended that the second cause of action, so called, the one stated in subdivision 42 of the complaint, is not sustainable because it is nowhere alleged that all the defendants became parties to the agreement to pay commissions upon the purchase price of the lands therein mentioned. From the conclusion we have reached that the original contract to pay plaintiffs commissions became incorporated into the agreement of September 26, 1901, with mutual obligations as to all the matters referred to in the beginning, and thereafter as well, it follows that we must regard the facts, which appellants' counsel insist are not pleaded, as fairly stated.

What has been said sufficiently disposes of the objection to the causes of action, so called, stated in paragraphs 44 and 45.

We are unable to appreciate the criticism of the cause of action, so called, stated in paragraph 43 of the complaint. It is said that "aiding plaintiffs in obtaining title to lands owned by Ashland county was not within the scope of the first contract." That suggestion, so far as it is based on the circum-

stance that such contract was originally with but two of the defendants, has been sufficiently met. It is said that county lands were open to any purchaser; that an option to purchase such lands with the privilege of examination, such as respondents agreed to obtain, was not procured, and would not have been legal had it been secured, and that it is not alleged that any such was obtained. The lands mentioned were such as the county had acquired title to with the right to sell the same for cash in the discretion of its governing board. It had the ³⁹⁶ power to proceed in that regard according to the ordinary method of doing such business. It is alleged, in effect, that respondents performed services for defendants, under the contract relating to such matters, in procuring for appellants the opportunity to purchase lands from Ashland county, which were within the territory mentioned in such contract. That was as well within the terms of such contract as services rendered to a like end regarding lands owned by any other party. It is further alleged that respondents pursuant to the terms of the contract arranged for the purchase of the land if the defendants should so elect, and the latter pursuant to such arrangement, and not otherwise, elected to and did purchase the land. If plaintiffs so arranged, they obtained an option within the meaning of the contract, and if subsequently appellants elected to and did purchase the land, they obtained the same pursuant to the option. The contract did not require an option to be obtained in any particular form nor to run any specific period of time. True, according to the terms of the contract, commissions were agreed to be paid to respondents only on the purchase price of lands optioned in their own names in appellants' interest, which the latter, after a proper inspection, elected to purchase, and the agreement necessarily contemplated that the options would provide for time for such inspection. But if in any case an option was obtained in a good faith execution of the contract and appellants elected to take under it, they could not successfully resist the demand for the commission because time for a proper examination of the property was not afforded them.

It is contended that the cause of action, so called, stated in subdivision 47 of the complaint cannot be said to arise out of the same transaction as the others, because the contract did not call for any such services as are there spoken of. We take it that counsel so contend because, whereas under the

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contract commissions were agreed to be paid plaintiffs upon the purchase price of lands taken under options obtained by them ³⁹⁷ in their own names for the use of the defendants, it is not alleged that the lands in question were so optioned. The idea seems to be that, though respondents proceeded in good faith under the contract to obtain options for appellants and expended considerable sums of money in that regard and devoted considerable time thereto and to put appellants in possession of the necessary information to enable them to decide whether to purchase the land or not—no commission was earned because the purchase was made without a preliminary binding option as contemplated. We cannot agree with that. If, as alleged, respondents negotiated with the owners of the land for the purpose of obtaining an option to enable appellants to purchase the same, and as a result of their time and money devoted to the performance of their obligations appellants accepted the land, they became liable for the commission stipulated for in the contract, regardless of whether there was a formal option and an election to take under it or not. The bringing of the parties together, obtaining for appellants the opportunity to make the purchase, aiding them to that end till they were satisfied to take the land, and their doing so substantially satisfied every requirement of the contract not waived by appellants.

There is nothing further that need be said. The general result is that all of the so-called causes of action, including the one for a vendor's lien, affect all of the defendants, and arise out of one transaction embodying the agreement of February 8th, and the addition thereto and change thereof of September 26, 1901, and hence are joinable.

The complaint is by no means a model of conciseness and clearness. There are ambiguities which might well challenge the attention of the careful practitioner. If it were proper to measure the allegations of the pleading with a critical eye, only seeing those facts alleged which are clearly and expressly stated, it probably could not be sustained. It may be, and possibly is, open to objection for indefiniteness and uncertainty ³⁹⁸ at several points, but that is not the question here. Viewing it in the light of the liberal rules that must be applied thereto, it seems that the facts essential to sustain it are alleged expressly or by reasonable inference. Other inferences could probably be drawn from the pleading which would defeat it, but the favorable inference should prevail.

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Many of the facts necessary to sustain the pleading, which we hold are stated by reasonable inference, may not exist at all. For the purpose of sustaining it we must assume, under the circumstances, that they do exist.

By the COURT. The orders appealed from are affirmed
Winslow, J., dissents.

On the Joinder of Causes of Action arising out of the same transaction, see *Pollock v. Building etc. Assn.*, 48 S. C. 65, 59 Am. St. Rep. 695. The test of whether there is more than one cause of action stated, or attempted to be stated, in a complaint, is not whether there are different kinds of relief or objects sought, but whether there is more than one primary right sought to be enforced or one subject of controversy presented for adjudication: *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845.

GREEK-AMERICAN SPONGE COMPANY v. RICHARDSON DRUG COMPANY.

[124 Wis. 469, 102 N. W. 888.]

INTERSTATE COMMERCE carried on by corporations organized within different states stands upon the same footing, and is entitled to the same protection, as if conducted by individuals. (p. 963.)

INTERSTATE COMMERCE.—The right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state. (p. 964.)

INTERSTATE COMMERCE—Foreign Corporations.—A contract for the sale of a lawful article of commerce while it is an article of interstate commerce, is not governed by a state statute prescribing conditions upon which foreign corporations may do business within the state and deprive them of the right in certain cases to recover on a contract made without compliance with its provisions. (p. 965.)

INTERSTATE COMMERCE—Foreign Corporations—Constitutional Law.—A state statute which imposes conditions restricting foreign corporations in their right to make contracts pertaining to commerce between the states is an invasion of their constitutional right, under the provision of the national constitution, which confers upon Congress the power to regulate such commerce and hence such statute is void. (p. 965.)

E. L. Wood and L. R. Worden, for the appellant.

C. T. Hickox, for the respondent.

472 SIEBECKER, J. The appellant urges exceptions to the court's finding to the effect that the bales of goods were

in the custody of plaintiff's agent at the hotel in Milwaukee for the purpose only of giving defendant an opportunity to inspect them, to determine whether they were to be accepted or rejected by it under the contract of sale, and the further finding that the bale of goods, when delivered to defendant, was the original package as transported from Chicago to Milwaukee. The findings are excepted to upon the ground that they are inferences of fact not justifiable from the evidence adduced. Plaintiff's agent, Mr. Leser, is the only witness testifying on this subject. His evidence is that the two bales of goods, consigned in his name, were shipped to Milwaukee by plaintiff for the purpose of affording defendant the opportunity of inspecting them under the terms of the agreement theretofore made between the parties; that he received the two bales, with other goods, at Milwaukee, and transferred them to a hotel for the purpose of having them inspected by their customers for acceptance or rejection; and that if accepted he would deliver them to the purchasers; if rejected, they would be returned to the plaintiff at Chicago. It appears that defendant's officers were unable to make the inspection, but directed plaintiff's agent to select the bale of best value of the two sent ⁴⁷³ for their inspection, deliver it at their place of business, and if it was satisfactory it would be retained; otherwise it would be returned. The evidence on this point of the transaction is that the agent cut the cords fastening the bales, for the purpose of examining the contents, which he did by taking out some sponges. He then put back all he had so taken out, refastened the bales as they were before opening them, and then selected the bale in question for defendant and delivered it at their place of business. This evidence clearly supports the finding of the trial court on this issue. It is to the effect that the sponges were shipped to Milwaukee in bales for the purpose of inspection by defendant, and that they were delivered and transferred to defendant in the original package as transported from Chicago to Milwaukee. We find no tenable grounds for the exceptions urged to these points.

It is further argued, upon the facts as found by the court, that these goods at the time of their delivery to defendant had lost their character as an article of interstate commerce by becoming mingled with and incorporated into the mass of property in this state. To sustain this contention it must appear that at some time after the goods arrived at Milwaukee and

before they were delivered to defendant they were so dealt with as to exclude the inference that plaintiff held them for the purpose of consummating the transaction under the terms of the sale, and that this was part of the process of importing them from Chicago. It is apparent that the arrangement made between the parties at the first interview between plaintiff's agent and defendant's officer amounts to an agreement for a purchase and sale of a bale of sponges, subject to the condition that defendant, after inspecting the goods offered under the agreement, might reject them if not satisfactory. Whatever was done with the goods at Milwaukee before their actual delivery was necessary for the purpose of completing the transfer under the conditions of the agreement of sale, pursuant to which they were shipped. The opening of the bales ⁴⁷⁴ so as to permit an inspection of their contents for the purposes declared can in no sense be construed a dealing with them as merchandise in the market, whereby they were taken out of the process of transportation and thus became a part of the mass of property in the state. These acts were proper steps in the delivery of the property to the purchaser and therefore essential to the performance of the contract. The reasonable inference from these events is that the property was in no way diverted from the original purpose of the shipment, namely to fulfill the agreement of the parties.

The question presented is, Does the transaction come within the protection of the federal constitution regarding interstate commerce? The fact that this transaction is one wherein the parties are corporations organized within different states can in no way affect the question, since the same protection is extended to commerce conducted by corporations as that by individuals. As stated in *Paul v. Virginia*, 8 Wall. 168, at the time this power was conferred upon Congress a large part of the world's commerce was carried on by well-known and noted corporations, and "this state of facts forbids the supposition that it was intended, in the grant of power to Congress, to exclude from its control the commerce of corporations. The language of the grant makes no reference to the instrumentalities by which commerce may be carried on. It is general, and includes alike commerce by individuals, partnerships, associations, and corporations." The facts before us show a course of dealing wherein a foreign corporation, as a dealer, has undertaken to enforce payment for goods which were transported to this state, delivered, and accepted

by a purchaser, under an agreement, made in this state, providing that when the goods were delivered to the purchaser they might be rejected if not satisfactory. It is unquestioned in this case that respondent was engaged in interstate commerce while transporting the goods from Chicago, Illinois, to Milwaukee, Wisconsin; but it is urged that subsequent to ⁴⁷⁵ their arrival in Milwaukee and before their delivery to defendant they ceased to be an article of interstate commerce coming under the commerce clause of the federal constitution, and therefore the provisions of section 1770b of the Statutes of 1898 applied to the transaction had concerning them in Milwaukee, which resulted in a consummation of the sale, and that this renders the contract of sale nonenforceable by the plaintiff.

The extent of the power delegated to Congress to regulate commerce between the states, and to what extent transactions are deemed to be a step in such commerce, have been repeatedly considered by the federal supreme court. In *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, it was declared that the extent of this power "is coextensive with the subject on which it acts, and cannot be stopped at the external boundary of a state, but must enter its interior," and that "sale is the object of importation, and is an essential ingredient of that intercourse of which the importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce." In the case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, 18 Sup. Ct. Rep. 757, 43 L. ed. 49, the court reviews the decisions upon this subject, and reiterates its adhesion to the rules enunciated in *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, and many subsequent cases, and declares that "in the absence of congressional legislation, therefore, the right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state." Among additional authorities on the subject are the following: *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. Rep. 592, 30 L. ed. 694; *Bowman v. Chicago etc. R. Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, 31 L. ed. 700; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. Rep. 681, 34 L. ed. 128; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. Rep. 725, 34 L. ed. 150; *Stockard v. Morgan*, 185 U. S. 27, 22 Sup

Ct. Rep. 576, 46 L. ed. 785; Caldwell v. North Carolina, 187 U. S. 622, 23 Sup. Ct. Rep. 229, 47 L. ed. 336; Norfolk etc. R. Co. v. Sims, ⁴⁷⁶ 191 U. S. 441, 48 L. ed. 254, 24 Sup. Ct. Rep. 151; American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Swift & Co. v. United States, 196 U. S. 375, 25 Sup. Ct. Rep. 276, 49 L. ed. 518.

Within the rule of these adjudications it must be held that the contract of sale sought to be enforced by the respondent pertained to the sale of a lawful article of commerce in its original package while it was an article of interstate commerce. Under these circumstances the contract is exempted from the provisions of section 1770b, and plaintiff is not precluded from enforcing it, though, as a foreign corporation, it has failed to comply with the requirements of this law. The right of the state to prescribe the conditions upon which foreign corporations may carry on business within the state is undisputed and stands approved by the courts. When, however, such regulation imposes conditions which restrict them in their right, as foreign corporations, to make contracts pertaining to commerce between the states, then such legislation is an invasion of their constitutional right, under the provision which confers upon Congress the power to regulate such commerce, and such legislation is invalid to that extent: Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. Rep. 739, 28 L. ed. 1137; Fritts v. Palmer, 132 U. S. 282, 10 Sup. Ct. Rep. 93, 33 L. ed. 317; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851, 35 L. ed. 649

These considerations dispose of the questions involved, and lead to the conclusion that the trial court properly awarded judgment in respondent's favor.

By the COURT. Judgment affirmed.

For Recent Decisions in other jurisdictions bearing upon the principal case, see *Saulsbury v. State*, 43 Tex. Cr. Rep. 90, 96 Am. St. Rep. 837, and note; *State v. Willingham*, 9 Wyo. 290, 87 Am. St. Rep. 948, and cases cited in the cross-reference note thereto; *American Steel etc. Co. v. Speed*, 110 Tenn. 524, 100 Am. St. Rep. 814. Consult, also, the monographic note to *People v. Wemple*, 27 Am. St. Rep. 547.

EAU CLAIRE NATIONAL BANK v. CHIPPEWA VALLEY BANK.

[124 Wis. 520, 102 N. W. 1068.]

GARNISHMENT—Fraudulent Transfers—Bank for Collection.—A bank with which a note and mortgage assigned by a husband to his wife in fraud of creditors is by her placed for collection, and which receives a check for the amount of the note and mortgage payable to its order, and after notice of such fraudulent transfer, is subject to garnishment for the amount of the check by a creditor of the husband. (pp. 967, 968.)

GARNISHMENT is an Effectual Remedy in Reaching Nonleviable Assets, things in action, evidences of debt, credits and effects, or any property held by any sort of conveyance or title void as to creditors of the principal defendant. (p. 968.)

GARNISHMENT—Interpleader.—If a note and mortgage are assigned by the husband, who is mortgagee, to his wife, and placed with a bank for collection and afterward garnishment process is served on both the bank and the wife in a suit against the husband, there is no necessity for an interpleader in order to adjudicate the rights of the parties. (p. 970.)

GARNISHMENT—Interest.—A garnishee is liable for interest on the amount found in his possession only from the date of the judgment in favor of the plaintiff in the original action. (p. 971.)

GARNISHMENT—Costs.—A garnishee who denies all liability is liable for costs. (p. 972.)

Bundy & Wilcox, for the appellant.

Wickham & Farr, for the respondent.

524 CASSODAY, C. J. It is contended by counsel that the Chippewa Valley Bank, as a matter of pure accommodation, received the papers mentioned in the foregoing statement from one party, to be delivered to another, upon payment by that other of a sum of money in exchange for the papers, the bank having no interest whatever in the transaction, not even making a charge for the services. In the principal case relied upon in support of such contention, "the answers of the supposed trustee" disclosed the facts that: "He had been in treaty with the defendant for a cow, to be purchased if approved. No bargain had been completed, and before the time of trying the cow had expired, and before the service of the plaintiff's writ, he had notified the defendant that he should not purchase the cow and had delivered **525** her to him, but the defendant left her in his possession, where she was at the time of the service of the plaintiff's writ": *Staniels v. Raymond*, 4 Cush. 314, 315.

Upon such facts it was there held, in effect, that the mere possession by the garnishee was insufficient to make him liable as the trustee of the owner. It is true, as claimed by counsel, that that case has frequently been cited with approval by this court: *Winterfield v. Milwaukee R. Co.*, 29 Wis. 589; *Bates v. Chicago etc. R. Co.*, 60 Wis. 296, 56 Am. Rep. 369, 19 N. W. 72; *Gleason v. South Milwaukee Nat. Bank*, 89 Wis. 534, 62 N. W. 519; *Gore v. Brucker*, 94 Wis. 65, 68 N. W. 396; *Hussa v. Sikorski*, 101 Wis. 131, 76 N. W. 1117. In *Bates v. Chicago etc. R. Co.*, 60 Wis. 296, 56 Am. Rep. 369, 19 N. W. 72, the attempt was made by garnishment process, served in Milwaukee at 5 A. M., to reach a carload of hogs while in actual transit from Lyons in Walworth county to Chicago, and which was delivered to the consignee at 7:20 o'clock the same morning. In *Gore v. Brucker*, 94 Wis. 65, 68 N. W. 396, an agent of the owner of a chattel mortgage who had taken possession of the property pursuant to the terms of the mortgage, and as such agent held the same for his principal, was not, by reason of such possession, subject to garnishment in an action against the mortgagor, even though the mortgage was void as against the mortgagor's creditors. As stated in that case: "The plaintiff was at perfect liberty to attach the property so in the custody of Brucker, since the same was open and tangible, and, in fact, inspected by the plaintiff's general manager. Had the plaintiff so attached, Lapidus [the owner of the mortgages] would have had an opportunity to assert his right as mortgagee, and to have the same determined in a proper form."

In *Hussa v. Sikorski*, 101 Wis. 131, 76 N. W. 1117, the mortgagor put the money in the hands of an agent to be paid over to the mortgagee in satisfaction of the negotiable note which the mortgage had been given to secure, and it was held that such agent was merely an agent of the mortgagor to transmit the money from him ⁵²⁶ to the mortgagee, who was the principal defendant in the action, "and was not a debtor of the mortgagee, nor liable as his garnishee." In that case the garnishee answered that he was not indebted to and that he had no money or property of the defendant in his possession, except five hundred and ten dollars, which sum he was informed and believed belonged to him, but which was claimed by his wife, and he asked that she be required to interplead, as prescribed by statute (Stats. 1898, sec. 2767), and she was thereupon brought into the action and made answer, and the

question of the ownership of the money was determined upon such answer.

The case at bar differs essentially in its facts from any of the cases thus relied upon. In this case the note and mortgage were payable to Mr. Friend. He assigned them in writing to his wife. The note, mortgage and assignment, with a satisfaction of the same signed by Mrs. Friend, were placed in the Chippewa Valley Bank for collection. The mortgagor caused a check for the amount due on the note and mortgage, and payable to the order of the Chippewa Valley Bank, to be delivered to that bank in payment of the note and mortgage. In that condition of things the garnishee summons was served. The Chippewa Valley Bank thereupon drew the money on the check and paid it over to Mrs. Friend, and delivered the other papers to the mortgagor, notwithstanding the allegation in the garnishee papers that the note and mortgage and the money due thereon were the property of and belonged to Mr. Friend, and that the plaintiff would so maintain notwithstanding its answer. The real controversy was whether such property belonged to Mr. or Mrs. Friend. Instead of submitting the facts to the court and thus relieving itself from all liability, it assumed that such property belonged to Mrs. Friend, and hence denied being indebted to or having in its possession or under its control any property whatever belonging to Mr. Friend.

⁵²⁷ Our statute prescribing the liability of a garnishee is much broader than the Massachusetts statute, and declares that: "From the time of the service of the summons upon the garnishee he shall stand liable to the plaintiff to the amount of the property, moneys, credits and effects in his possession or under his control belonging to the defendant or in which he shall be interested to the extent of his right or interest therein, and of all debts due or to become due to the defendant, except such as may be by law exempt from execution. Any property, moneys, credits and effects held by a conveyance or title void as to the creditors of the defendant shall be embraced in such liability": Stats. 1898, sec. 2768.

The language thus quoted has been in force ever since the revision of 1878. The last sentence thus quoted was, by way of amendment to the prior statutes, added by that revision, so as "to expressly cover property held in fraud of creditors": Revisers' Notes, 1878. This court has repeatedly declared that the words thus added, in connection with other

provisions of the statutes cited, "clearly evince a purpose to make the remedy by garnishment as effectual in reaching nonleviable assets, things in action, evidences of debt, credits, and effects, and in fact any property held by any sort of conveyance or title void as to the creditors of the principal defendant, as the old creditors' bill in chancery. Such is the logical result of previous decisions of this court": *La Crosse Nat. Bank v. Wilson*, 74 Wis. 391, 43 N. W. 153; *Bloodgood v. Meissner*, 84 Wis. 452, 54 N. W. 772; *Bragg v. Gaynor*, 85 Wis. 468, 55 N. W. 919, 21 L. R. A. 161; *Spitz v. Tripp*, 86 Wis. 25, 56 N. W. 330; *Jones v. Alford*, 98 Wis. 245, 73 N. W. 1012; *Dahlman v. Greenwood*, 99 Wis. 163, 74 N. W. 215; *Stannard v. Youmans*, 100 Wis. 275, 75 N. W. 1002. The case presented comes within the comprehensive language of the statute quoted.

Counsel argues that to hold a bank liable as such garnishee ⁶²⁸ is a great annoyance and obstruction to business. But that is a question for the legislature, and not for the courts.

2. It is true the two garnishees were severally proceeded against—Mrs. Friend, as claiming to be the owner of the note and mortgage and the proceeds of the check; and the bank, as the receiver and disposer of the property as mentioned. In such case the statute expressly declares that "any number of garnishees may be embraced in the same affidavit and the summons" therein "provided for": Stats. 1898, sec. 2753. No joint judgment was rendered in the action. No interpleader was necessary, since both claimants of the property were parties to the proceedings—Mrs. Friend as garnishee, and Mr. Friend as principal defendant: *Look v. Brackett*, 74 Me. 347.

3. Error is assigned because the Chippewa Valley Bank was adjudged liable for interest on the eight hundred and forty-four dollars and eighty-eight cents from the date of garnishment, May 28, 1902, to the entry of judgment in the garnishee proceeding, April 11, 1904. The judgment in the original action was not rendered until April 18, 1903. Until that time the plaintiff had no right to the money. The statute quoted only made the garnishee liable for the amount of money, etc., in its possession at the time of garnishment, but is silent as to interest. As soon as the judgment was entered in the original action, however, the plaintiff, as shown by the result of the trial, was entitled to the amount so found to be in the possession of the garnishee. For any delay after that

time the plaintiff is entitled to compensation by way of damages for such delay: *J. I. Case P. Works v. Niles & Scott Co.*, 107 Wis. 9, 82 N. W. 568; *McCall Co. v. Icks*, 107 Wis. 232, 83 N. W. 300; *Hansen v. Allen*, 117 Wis. 61, 93 N. W. 805.

4. There was no error in the trial court allowing costs against the garnishee. Upon the findings of the court the statute expressly authorized judgment for costs against the garnishee: Stats. 1898, sec. 2772.

⁵²⁹ By the COURT. The judgment of the circuit court is hereby modified and reduced so as to entitle the plaintiff only to recover judgment for eight hundred and forty-four dollars and eighty-eight cents, and interest thereon from April 18, 1903, and, as so modified and reduced, the same is affirmed. No costs are allowed in this court to either party, except the plaintiff must pay the clerk's fees.

Garnishment is an Attachment by means of which money or property of a debtor in the hands of third persons, which cannot be levied upon, may be subjected to the payment of the creditor's claim: *American etc. Ins. Co. v. Hettler*, 37 Neb. 849, 40 Am. St. Rep. 522. Its purpose or result is to subrogate the plaintiff to the rights of the defendant against the garnishee: *Neufelder v. German-American Ins. Co.*, 6 Wash. 336, 36 Am. St. Rep. 166. It is not, strictly speaking, an action for the recovery of a debt, but is more in the nature of a bill of discovery: *Phenix Ins. Co. v. Willis*, 70 Tex. 12, 8 Am. St. Rep. 566. The writ may be employed, it seems, to reach property transferred in fraud of creditors: See *Cunningham v. Baker*, 104 Ala. 160, 53 Am. St. Rep. 27.

CASES
IN THE
SUPREME COURT
OF
WYOMING.

BOARD OF COMMISSIONERS OF NATRONA COUNTY
v. SHAFFNER.

[12 Wyo. 177, 74 Pac. 88.]

HOMESTEADS—Taxation.—Public land entered as a homestead is not subject to state taxation until a patent therefor is issued by the United States. (p. 973.)

TAXATION—Delinquent Taxes as Lien on After-acquired Property.—Under a statute providing that in each year the unpaid taxes of that year shall become delinquent and that taxes upon real property shall be made a perpetual lien thereon, against all persons except the United States and the state, and that taxes due from any person on personal property shall be a lien on real estate owned by him, no lien is imposed on land acquired as a homestead from the United States government, for delinquent taxes levied against the homestead claimant for improvements on the homestead claim and for personal property, and accruing prior to the issuance of a patent for the land. (p. 974.)

TAXATION—Lien of Tax.—Taxes are not a lien unless expressly made so, and to authorize a sale of land for taxes, a lien must exist either created in terms by the statute itself or established by some official proceeding under the statute. (p. 974.)

TAXATION—Lien of Tax—Limitation on.—If a statute in terms makes a tax a lien on one species of property, it will not by intendment be extended to any other species of property. (p. 974.)

TAXATION—Lien of Tax—Limitation on.—If a statute in terms makes a tax a lien on all property and rights of property of the person taxed, the lien will be limited to property and rights owned when the tax accrued. (p. 975.)

TAXATION—Lien of—Tax on Homestead Claim Prior to Patent.—State taxes levied and accruing against a homestead claimant on government land, for improvements on the land and for personal property, and which become delinquent prior to the issuance of the patent for the land by the United States, are not a lien on the land unless expressly made so by statute. (p. 975.)

A. T. Butler and J. A. Van Orsdel, for the plaintiff in error.

A. G. Fisher, for the defendant in error.

179 CORN, C. J. The defendant in error brought this suit to quiet title to a certain piece of land as against a lien claimed by plaintiff in error for unpaid taxes. No evidence was introduced, but the case was heard on the pleadings and judgment rendered in favor of the plaintiff below in accordance with the prayer of his petition. It appears that in July, 1893, one Parkhurst entered the land in question as a homestead under the laws of the United States, and in April, 1899, made his proof and obtained his final receipt. On July 20, 1899, Parkhurst conveyed the land to defendant in error, his wife joining in the deed. The lien claimed is for taxes assessed against Parkhurst on the improvements on said land and on other personal property for the years 1894 to 1899, inclusive.

It is not contended by plaintiff in error, as we understand, that the land itself was subject to taxation prior to the issuance of the final receipt in April, 1899. Up to that time it was the property of the United States and not subject to state taxation: *Bronson v. Kukuk*, 3 Dill. 490; *Cooley on Taxation*, 3d ed., 135; *Wyo. Rev. Stats.* 1762. But plaintiff in error maintains in its brief: "That where a person enters a tract of land under the United States homestead law in July, 1893, and final receipt is issued to the entryman in April, 1899, and during said time, 1893 up to and including April, 1899, said entryman returns for taxation personal property and the improvements on said homestead, and the same are regularly assessed without opposition of the entryman during said years, and, at the time final receipt is issued by the United States land officers to the entryman, said taxes are delinquent and unpaid, the land after final receipt is holden for all such delinquent taxes." And, without argument, he cites in support of his statement, *Flanigan v. Forsythe*, 60 Okla. 425, 50 ¹⁸⁰ Pac. 152, *Crocker v. Donovan*, 1 Okla. 165, 30 Pac. 374, *Washington Iron Works v. King County*, 20 Wash. 150, 54 Pac. 1094, *Johnson v. Bering* (Kan. App.), 51 Pac. 804, and *Stark v. Duvall*, 7 Okla. 213, 54 Pac. 453. We have examined the cases referred to and they do not support the proposition contended for.

But it is alleged in the petition and admitted in the answer that final receipt did not issue to Parkhurst until in April, 1899. The precise date is not stated, but it is alleged as "the — day of April, 1899." At that time

it ceased to belong to the United States and became the property of Parkhurst, against whom the taxes in question were assessed. As, confessedly, these taxes could not be a lien upon the land while it remained the property of the United States, the question presented then is whether they became a lien at the time the land passed into the ownership of Parkhurst or at any time subsequent thereto and prior to the conveyance to plaintiff in error. They are not a lien unless by virtue of a statute. Our statute on the subject is Revised Statutes, section 1870: "On the thirty-first day of December, in each year, the unpaid taxes of that year shall become delinquent and shall draw interest at the rate of eight per cent per annum until paid, or collected by distress or sale, in addition to the penalty imposed by the preceding section, and taxes upon real property are hereby made a perpetual lien thereon, against all persons or corporations except the United States and this state, and taxes due from any person or corporation on personal property shall be a lien on real estate owned by such person or corporation." There is no allegation in the pleadings that any lien had been obtained by any suit or proceeding instituted by the taxing authorities and, if any existed, it was by virtue of this section. In some of the states it is provided in substance that taxes due from any person upon personal property shall be a lien upon any real property owned by such person, or to which he may acquire title: *Cummings v. Easton*, 46 Iowa, 184. We have no such provision as to after-acquired property, and it is plain that this was after-acquired ¹⁸¹ property. In *Cooley on Taxation*, third edition, 865, the rule is stated to be: "To authorize a sale of lands for taxes a lien must exist, either created in terms by the statute itself or established by some official proceedings under the statute. . . . The general rule is that taxes are not a lien unless expressly made so; and when liens are expressly created they are not to be enlarged by construction. If, therefore, the statute in terms makes the tax a lien on one species of property, it will not by intendment be extended to any other species. And if in terms it makes the tax a lien on all property and rights of property of the person taxed, the lien will be limited to property and rights owned when the tax accrued." Construing the statute according to the rule as thus stated, it is evident that it imposed no lien upon this land.

Counsel for plaintiff in error also states the propositions, first, "that taxes assessed on improvements made upon public, nonassessable land are taxes upon real estate and a lien upon the improvements," and, second, "that improvements on land held under the homestead laws of the United States, on which final proof has not been made, are subject to taxation." But conceding that these propositions are a correct statement of the law upon that subject, it is not perceived that they in any way affect the question of the lien claimed in this case upon the land, and he does not explain or point out the connection. It appears that taxes were assessed upon improvements on this land, but there is no allegation in the pleadings anywhere that there are now any improvements upon it, or that the improvements assessed for taxation were upon it when plaintiff in error purchased, or that they, or any improvements, were conveyed to him. The claim of plaintiff in error is that the land is subject to the lien, and the attempt is to enforce it against that and not to enforce it against any improvements, either as a part of the real estate or as personal property. There is nothing to connect the matter in any way with this case.

¹⁸² Defendant in error contends that to charge the land with these taxes would be in violation of the provisions of section 2296 of the Revised Statutes of the United States, that such lands shall not be liable for any debt of the entryman prior to the issuance of the patent. But we do not find it necessary to consider this question. We are unwilling to hold that our statute, section 1870, imposes the lien upon after-acquired property, and we have found no case where a statute has been so construed in the absence of an express provision for the purpose. The equities in this case are all in favor of the defendant in error and against the lien. During all these years the property upon which the taxes were assessed was liable for their payment, and it does not appear that any attempt was made to collect them, but Parkhurst was suffered to depart from the county, presumably carrying with him whatever personal property he may have possessed, leaving the taxes unpaid.

Defendant in error alleges, and it is not denied, that he examined the records in the offices of the county clerk and county treasurer and found no delinquent list of un-

paid taxes for any year; that, upon inquiry, he was specifically informed by the county treasurer that there were no unpaid taxes of said Parkhurst or any lien for taxes against the land except the tax against it for the year 1899, unextended upon the tax list, which he tenders, and that he purchased relying upon such information and the absence of any delinquent list as shown by his examination of the records. We think the statute should not be construed to establish a secret lien of this character in the absence of appropriate words clearly showing that such was the intention of the legislature.

The judgment will be affirmed.

Knight, J., and Potter, J., concur.

After a Final Homestead certificate to public lands has been issued, entitling the holder to a patent, the lands are subject to state taxation, although the patent has not yet issued: *Burcham v. Terry*, 55 Ark. 398, 29 Am. St. Rep. 42. And under a statute making personal property taxes a lien on real estate owned or thereafter acquired by the person assessed, a timber culture claim is, after the issuance of the final certificate, subject to a lien for personal property taxes assessed to the owner before the issuance of the certificate: *Danforth v. McCook County*, 11 S. Dak. 258, 74 Am. St. Rep. 808.

HONEYCUTT v. NYQUIST, PETERSEN & CO.

[12 Wyo. 183, 74 Pac. 90.]

SUMMONS—Substituted Service on Person Temporarily within State.—A statute providing for substituted service of summons on a person by leaving a copy thereof at his usual place of residence does not authorize such service upon one who is temporarily within the state simply for the purpose of performing a temporary employment. (p. 978.)

APPEARANCE.—Acceptance of Service by Defendant's Attorney of a motion for an order to sell attached property in a suit against the defendant does not constitute a general appearance on his part when he is not properly served with summons, so as to confer jurisdiction. (p. 978.)

APPEARANCE—Waiver of Defective Service of Summons.—If a person upon whom service of summons is defective voluntarily appears in court in person and by attorney, and agrees to the continuance of the hearing of a motion for an order to sell his attached property, he thereby submits himself to the jurisdiction of the court and waives the defective service of summons. (p. 979.)

SUMMONS—Defective Service—Misnomer—Waiver.—An appearance in court of a person for the purpose of attacking the suit or proceeding on the ground that there is a misnomer of himself, and for that purpose giving his true name, constitutes a waiver of defective service of summons or process and confers jurisdiction upon the court. (p. 985.)

C. P. Arnold, for the plaintiff in error.

N. E. Corthell and Burke & Clark, for the defendants in error.

¹⁸⁷ POTTER, J. The defendants in error brought this suit in the district court for Albany county against J. V. Honeycutt and Ellis Robb upon two causes of action to recover a money judgment. The first cause of action was founded upon an account stated, and the second upon an account for goods sold and delivered. A writ of attachment was sued out at the commencement of the action and certain personal property was levied on, consisting generally of horses, wagons and property belonging to a grading outfit. The sheriff's return upon the summons showed that service thereof upon defendant Honeycutt had been made by leaving a copy at his usual place of residence with a person in his employ over the age of fourteen years. Said defendant filed a motion to quash the service of summons and dismiss the action, alleging that he appeared specially and for the purposes of the motion only. The motion was based on six grounds, as follows: "1. A copy of the summons was not served upon this defendant; 2. A copy of said summons was not left at the usual place of residence of the said defendant; 3. That said defendant, at the time of the alleged service of the summons herein, was, and ever since has been, a nonresident of the state of Wyoming, and did not then have, and does not now have, a place of residence in the said county of Albany; ¹⁸⁸ 4. That it is not true that a copy of the summons issued herein was left at the usual place of residence of said defendant; 5. That the court acquired no jurisdiction over this defendant by the pretended service of summons in this action; 6. That the said defendant is not sued by his true name, and that the true name of said defendant is James V. Honeycutt."

The motion was supported by attached affidavits setting forth that the defendant's true name was James V. Honeycutt, and that he was a resident of the territory of Okla-

homa, but was temporarily within Albany county, in this state, engaged in temporary employment in construction work along the line of the Union Pacific railroad, and had no permanent place of abode within the county.

On the hearing of the motion the defendant offered in evidence the affidavit for attachment, which alleged that he was a nonresident of this state, also the affidavits attached to the motion, and two additional affidavits to the effect that the full name of the defendant was James Vernon Honeycutt; that he was a bona fide resident of Oklahoma Territory; that in June, 1900, he went to Albany county temporarily and located a railroad camp, known as the Honeycutt camp, and engaged in work on the railroad with a grading outfit, remaining there until some time in September, 1900, and at said camp had two tents, one used for sleeping and the other for eating; but that he never established a residence in the state.

The plaintiffs submitted the affidavits of two persons to the effect that they had known the defendant for more than two months while he had been in Wyoming, and that he had been commonly called and known as J. V. Honeycutt, and not as James V. or James Vernon Honeycutt. The plaintiffs introduced also a motion filed by them for an order to sell the attached property, and an acceptance of service thereon indorsed.

¹⁸⁰ Thereupon the motion to quash service and dismiss the action was denied, and defendant excepted. The order denying the motion recites that on the twenty-third day of August, 1900, the defendant, by his attorney, accepted service of notice of the plaintiff's motion for an order to sell attached property; and in response to said notice said defendant, with his said attorney, appeared in court, and the court being otherwise engaged, said attorney agreed in open court with the attorney for the plaintiffs that the hearing upon the motion to sell be continued, and that it was accordingly continued; but that at the final hearing thereon the defendant did not appear in person or by counsel. A motion for new trial upon the motion to quash and dismiss was filed and denied, and the ruling excepted to. That motion was made on the grounds that the findings were contrary to law and not sustained by sufficient evidence, and that the court erred in overruling the motion to

quash. A bill of exceptions was presented, allowed and signed preserving these exceptions.

Thereafter the defendant was ordered to plead, answer or demur on or before November 12, 1900. He did not further appear in the case except to present his bill of exceptions. On November 22, 1901, for failure of the defendant to further answer, plead or demur, he was adjudged to be in default, and final judgment was rendered in favor of the plaintiffs and against said defendant for the sum of eleven hundred and seventy-six dollars with costs.

The defendant brings the case to this court on error. It is contended that there was no legal service of summons, and that the court did not acquire jurisdiction over the person of plaintiff in error. On the other hand, it is contended that the various acts of the defendant and his attorney constituted a general appearance, and hence a waiver of any irregularities in the service.

In the case of an individual defendant, the statute requires the summons to be served by delivering a copy to the defendant personally, or by leaving a copy at his usual place ¹⁹⁰ of residence with some member of his family or other person in his employ over the age of fourteen years: Rev. Stats., sec. 3514. The provision for leaving a copy at the usual place of residence does not contemplate a mere temporary stopping or abiding place as distinguished from a regular or fixed and permanent residence. And upon the showing made it is clear that the plaintiff in error did not have such a residence in Albany county as authorized the service of the summons by leaving a copy thereat: Alderson's Judicial Writs and Process, pp. 176-183; *Thomas v. Thomas*, 96 Me. 223, 90 Am. St. Rep. 342, 52 Atl. 642; *Bradley v. Fraser*, 54 Iowa, 289, 6 N. W. 293; *Wood v. Roeder*, 45 Neb. 311, 63 N. W. 853; *Ames v. Winsor*, 19 Pick. 247; 19 Ency. of Pl. & Pr. 628; *Campbell v. White*, 22 Mich. 178. In *Thomas v. Thomas*, the court said that "the word 'resident' in the statute means one having a permanent residence in the state as distinguished from one who is merely temporarily within the limits of the state." In that case the defendant, a nonresident, was only temporarily in Maine, and the service was held insufficient which had been attempted by leaving a copy at her usual and last place of abode. We do not understand this principle

to be controverted by counsel for defendants in error; at least, it does not seem to be seriously insisted that the attempted service was legal. The contention is made chiefly upon the proposition that the court acquired jurisdiction by reason of the voluntary appearance of plaintiff in error; and this it is claimed resulted from the acceptance of service of a motion to sell the attached property, an agreement in open court to continue the hearing thereon, which occurred prior to the filing of the motion to quash; and also in consequence of the prayer of the motion that the action be dismissed.

We are not inclined to regard the acceptance of service of the motion to sell the attached property as in itself amounting to a general appearance in the action. On the twenty-third day of August, 1900, a motion was filed asking for an order for the sale of the property attached on the ground of the great expense connected with its care and custody, ¹⁹¹ and to that motion was attached a notice upon "M. C. Jahren, attorney for the defendants in the above-entitled action," that the motion would be called up for hearing August 25, 1900, or upon such subsequent date as may suit the convenience of the judge. Upon that motion appears the following indorsement: "Service accepted this 23d day of August, 1900. M. C. Jahren, attorney for defendants." It seems to us that the defendant himself might have acknowledged or accepted service of the motion and signed a statement to that effect, without thereby appearing in the cause. The object of a written acceptance was only to avoid the necessity of proving the service of the notice, if required. An acknowledgment on the back of the summons or petition is expressly constituted by statute an equivalent of service. But the paper referred to was not the summons nor petition. It ought not to be held, we think, that a mere acknowledgment of service upon the defendant of such a motion operates as a submission of his person to the jurisdiction of the court for all purposes of the case. It cannot be said that the fact that a defendant has engaged an attorney to look after his interests either generally or in a particular cause amounts to a voluntary general appearance, for it may occur that the attorney shall conclude that his client's interests will be better subserved by not appear-

ing, or he may be engaged merely to enter a special appearance and contest the question of jurisdiction.

The same reasoning might apply in respect to the mere presence of the defendant and his attorney in court at the time fixed for the hearing of the motion, although it is unnecessary to decide that question. Certainly they would have had a right to be in court as spectators without submitting the person of the defendant to the jurisdiction of the court in a particular case pending therein, if they did not participate in any of the proceedings in the case.

But the presence of defendant and his attorney in the courtroom went beyond that of mere spectators. It is evident from the recitals in the record that they were there ¹⁹² to attend the hearing on the motion for the sale of the attached property; and in open court counsel agreed to a postponement of the hearing. The appearance of defendant on that occasion does not seem to have been at all qualified. Although the mere acceptance of service of the motion as above stated would not, in our opinion, have constituted a general appearance, it became in this cause explanatory somewhat of the subsequent appearance in response to the motion. Counsel whose name was signed to the acceptance as attorney did not then qualify his employment; but it was followed by his presence with that of defendant in open court at the time stated in the notice, and an agreement as to the disposition of the matter at that time.

It has frequently been held, and we think it is the recognized rule, that a request for the continuance of a cause or an agreement to that effect, either orally in open court or by a writing filed in the cause, operates as a voluntary appearance: 2 Ency. of Pl. & Pr. 633, 634; *Auspach v. Ferguson*, 71 Iowa, 144, 32 N. W. 249; *Keeler v. Keeler*, 24 Wis. 522; *Baisley v. Baisley*, 113 Mo. 544, 35 Am. St. Rep. 726, 21 S. W. 29; *Bazzo v. Wallace*, 16 Neb. 290, 20 N. 315; *Lane v. Leech*, 44 Mich. 163, 6 N. W. 228. In the Michigan case, above cited, the court said: "The motion for a continuance was a step in the cause, and one which meant that the action should be presently kept on foot, and there was nothing to qualify it." And in the Missouri case, where the cause was continued by agreement

of plaintiff and defendant to the next term of court, it was held tantamount to a general appearance by the defendant. In *Auspach v. Ferguson*, 71 Iowa, 144, 32 N. W. 249, the defendant appeared before a justice of the peace on the return day, and, without plea, agreed with the plaintiff to a continuance of the cause to a subsequent day, and a continuance was had accordingly. The Iowa court said: "Where an order of court is obtained upon an agreement of parties, there is a virtual request made for the order by both parties. Now, we are not able to see how a party can make a request of a court which shall be of such a character as shall justify the court in ¹⁹⁰³ acting upon it, unless the party is to be regarded as in some way making an appearance. The party invokes the action of the court. If he does it orally he must, of course, be actually in court, either personally or by his authorized representative. If he does it by writing, the writing must have been filed, either by himself personally or by his authorized representative, and that would constitute an appearance. If the defendant had filed a motion and affidavit for continuance, no one would doubt that the act constituted an appearance. The case before us is not different in principle."

It is true that the continuance agreed to was of a hearing upon a motion in an ancillary proceeding. But the attachment proceedings were part of the case; and it is generally held that a motion to dissolve an attachment upon other than jurisdictional grounds is a general appearance in the cause. On principle it is difficult to perceive any difference in this respect between an agreement for such a continuance and the postponement of the trial of the case itself. The general rule is that an appearance for any other purpose than to question the jurisdiction of the court is general: 2 Ency. of Pl. & Pr. 632. And any action on the part of the defendant, except to object to jurisdiction, which recognizes the case as in court will amount to a general appearance: 3 Cyc. 504, and cases cited. The presumption is that any appearance is general: 2 Ency. of Pl. & Pr. 632. It would seem, therefore, that the defendant had submitted himself to the jurisdiction of the court before his motion to quash service was filed.

But if it were not so, the motion itself must be construed as such an appearance as waived the defective service, for the reason that it was not confined to an objection to the service, or to jurisdictional objections. The sixth, and a distinct ground of the motion, was that the defendant had not been sued by his true name, and it went further and stated what his true name was. In legal effect this is the same as if an independent motion to quash and dismiss ¹⁰⁴ had been filed on that ground. Counsel for plaintiff in error indeed seems to have so regarded it, as it is argued that there is no authority to sue a defendant by his initials, unless the suit is brought upon a written instrument so executed: Rev. Stats., sec. 3484.

This is not a case where the defendant is sued by a fictitious name. Where that is done, the summons must contain the words "real name unknown," and service is then permissible only by delivering a copy to the defendant personally: Rev. Stats., sec. 3592. That provision was not taken advantage of. On the face of the petition and summons it could not be said that a fictitious name was employed, merely because the Christian name was designated by a letter or letters. In *Perkins v. McDowell*, 3 Wyo 328, 23 Pac. 71, the plaintiff described himself as "J. M. McDowell," and the court, by Chief Justice Van Devanter, said: "While it does not occur frequently, there are many instances where single letters constitute the only Christian name. We cannot, then, judicially know that the letters 'J. M.' are not a name, and, as the petition does not disclose that the letters 'J. M.' are not the Christian name of the plaintiff, it follows that there is no defect apparent on the face of the petition in this respect."

In *Taylor v. Insley*, 7 Colo. App. 175, 42 Pac. 1046, a motion had been made to quash the summons and strike the complaint from the files, "for the reason that there is no plaintiff, nor the name of any plaintiff, designated therein; the initials 'M. H.' preceding the word 'Insley,' as used therein, constituting no name." The court of appeals say: "But no authority is cited to show that 'M. H.' may not be the Christian name and all there is of it. I know of no good reason, legal or otherwise, why parents may not select any letter or letters of the alphabet as the

name of a child; and, although each individual has a Christian and surname, there is no legal presumption, when a man sues as 'M. H.,' that that is not all there is of it, unless the fact is brought to the knowledge of the court by a plea in abatement, or in ¹⁹⁵ some manner that will inform the court, not only that the letters used are initials, but what the name is; in the language of the books, 'give the plaintiff a better writ.' " And further: "The use of initials instead of full names has been indulged in to such an extent that to now hold that the courts had no jurisdiction would result disastrously."

Hence, had the motion attacked the petition and process on the sole ground that the defendant had been sued by the initials of his given name instead of the name itself, and stopped there, without disclosing what the name was—that is to say, had it been sought to quash summons and dismiss the action for the reason that the Christian name of defendant was designated by a letter only instead of the full name, it would have been without merit, relying upon what appeared on the petition and summons. But the motion went beyond that. It alleged that the defendant had not been sued by his true name, and, in the same connection, alleged his true name. In other words, then, it charged a misnomer; and we are led to inquire as to the legal effect of the motion in that respect.

At common law misnomer was properly pleadable in abatement: 14 Ency. of Pl. & Pr. 295; 1 Chitty on Pleading, 265, 266, 467; *Kronski v. Missouri Pac. Ry. Co.*, 77 Mo. 362; Bliss on Code Pleading, sec. 427; *State v. Bell Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 293. It seems, however, that in some cases in the English courts the defendant was allowed, before otherwise appearing, to move a dismissal of the proceeding for the misnomer: See *Mann v. Carley*, 4 Cow. 148; *Herf v. Shulze*, 10 Ohio, 263. And Mr. Bliss states that, under the code, nothing seems to be settled upon authority as to the remedy, except that the objection for misnomer is waived by answering to the merits: Bliss on Code Pleading, 427. In some states the practice is to move for a correction of the mistake: *Beavers v. Baucum*, 33 Ark 722; *Kenyon v. Semon*, 43 Minn. 180, 45 N. W. 10. In a case in New York it was held that the defense should be pleaded quasi in abatement, and the

plaintiff should be given a better ¹⁹⁶ writ by an allegation of the correct name: *White v. Miller*, 7 Hun, 427. It is said that a correction will always be made upon motion filed for that purpose, so that the defect cannot be looked upon as fatal in the strict sense of the term: 1 Kinkead on Code Pleading, sec. 48.

As pleas to the jurisdiction preceded pleas in abatement in the recognized order of pleading at common law, a plea in abatement waived any matter which might have been set up by a plea to the jurisdiction: 1 Chitty on Pleading, 456. And so the various matters which might be pleaded in abatement were pleadable in a particular order, whereby each subsequent plea admitted that there was no foundation for the former, and precluded the defendant from afterward availing himself of the matter. The plea in abatement for misnomer was abolished in England by the procedure act of 3 and 4 William IV, chapter 42, and a defendant was enabled only to compel the plaintiff to amend his declaration by stating the real name: 1 Chitty on Pleading, 266; Bliss on Code Pleading, 427.

We have no statute specifically defining the method of taking advantage of misnomer. But the provision authorizing amendments permits a mistake in a name of a party either in a pleading or process to be corrected before or after judgment: Rev. Stats., sec. 3588. It would seem, therefore, that the only effect of a motion, if that practice be adopted in reaching the question, would be to cause an amendment by correcting the name to agree with the facts, if the allegations of the motion should be found to be true. Pomeroy states that, under the reformed procedure, there is no difference in the methods of pleading in abatement and in bar, or of adjudicating upon them; and that the only difference is in respect to the conclusive effects of the judgments rendered upon them: Pomeroy's Code Remedies, sec. 697. In Ohio it was said that misnomer may be taken advantage of by plea in abatement: *State v. Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 283. And in that case it is held that the defect is not fatal to jurisdiction. It is probable ¹⁹⁷ that the learned court referred not to a technical common-law plea in abatement, which it is generally conceded has been abolished by the codes, but that it was intended to state that advantage

should be taken of the alleged defect by way of abatement of the action in such method as might be deemed proper.

.Whatever may be the better or the more proper method of attacking a suit or proceeding for a misnomer of a party, we think it clear that an appearance for that purpose is to be construed as a waiver of defective service of process. That would be the result by analogy to the common-law order of pleading, and the common-law method of reaching the objection. It is not to be doubted that pleading misnomer in abatement would at common law operate as a waiver of any irregularity in the service of process which might have been set up by plea to the jurisdiction. In the case at bar the right party was sued. He had a right to require the suit to be conducted against him by his true name; and when he moved to dismiss for the reason that he was sued by a name other than his true name, an amendment would necessarily have followed; and it is not perceived how he could then have been permitted to complain of the service of the summons on the grounds specified in the motion. We think that objection was waived. Indeed, the right to enter special appearance to object to misnomer is seriously to be doubted; and it is even to be questioned, we think, whether under the code advantage of misnomer can be taken in any other way than by answer: See Moak's Van Santvoord's Pleading, 385, 386; Pomeroy's Code Remedies, sec. 697.

The authorities are not harmonious as to the effect of a misnomer when the defendant does not appear. Some cases hold a judgment to be void when rendered in the absence of the defendant under such circumstances, while in others it is held that where the party intended to be sued is served with process in which he is incorrectly named, he must appear and object to the misnomer, or he will be bound by ¹⁹⁸ the judgment. Although where the service has been substituted or constructive, it is generally held that, in the absence of appearance, a defendant so sued would not be bound: 14 Ency. of Pl. & Pr. 300-302. But if the defendant in any case appears by his true name, or answers to the merits without raising the objection, he is clearly bound: 14 Ency. of Pl. & Pr. 298.

In the case at bar the plaintiff below introduced evidence to show that the defendant was known and called by the name in which he was sued; and that issue was tried by the court. It is sufficient generally to designate a person in civil or criminal proceedings in the name by which he is usually known: 14 Ency. of Pl. & Pr. 277, 288.

Our conclusion, therefore, is that the defendant's acts amounted to a voluntary appearance to the action, and gave the court jurisdiction of his person, notwithstanding the defective service. The judgment will be affirmed.

Corn, C. J., and Knight, J., concur.

Substituted or Constructive Service of Process upon a defendant temporarily within the state is discussed in *Thomas v. Thomas*, 96 Me. 223, 90 Am. St. Rep. 342; *Hambel v. Davis*, 89 Tex. 256, 59 Am. St. Rep. 46.

A Party Who Makes a General Appearance usually cannot thereafter question the jurisdiction of the court on the ground of improper service of process: *Willman v. Friedman*, 4 Idaho, 209, 95 Am. St. Rep. 59; *Baisley v. Baisley*, 113 Mo. 544, 35 Am. St. Rep. 726. If a defendant claims that no jurisdiction has been acquired over him for want of a valid service of process, his remedy is by special appearance and objection to the jurisdiction; in case he goes further and enters a general appearance, or invokes the powers of the court for any purpose other than quashing the pretended service, the defects are waived: *Baker v. Union Stockyards Nat. Bank*, 63 Neb. 801, 93 Am. St. Rep. 484. An agreement for a continuance is held equivalent to a general appearance: *Baisley v. Baisley*, 113 Mo. 544, 35 Am. St. Rep. 727.

YOUNGER v. HEHN.

[12 Wyo. 289, 75 Pac. 443.]

STATUTES—Enactment—Signing.—If an enrolled act shows that it was in fact signed by the presiding officers of the Senate and the House and approved by the governor, and the House journal shows that while the House was in session the speaker thereof announced that he was about to sign such act, and the Senate journal shows that such act, after being correctly enrolled, was signed in the presence of the Senate by the presiding officer thereof, while a subsequent entry in both the Senate and House journals shows a communication from the governor announcing that he had approved such act, such entries are sufficient to show that such act was in fact signed by the speaker of the House in its presence and that the fact of signing was at once entered upon the journal, as required by a constitutional provision. (p. 990.)

HABEAS CORPUS—Attack on Regularity of Proceedings for Obtaining Jury.—A petitioner for a writ of habeas corpus cannot thereunder question the regularity of the method adopted by the court in drawing and summoning the jury convicting him, when the statute provides that on habeas corpus “it is not permissible to question the correctness of the action of the grand jury in finding a bill or indictment, or a petit jury in the trial of a cause.” (p. 990.)

WRIT OF HABEAS CORPUS is not in the nature of, nor can it be used as a substitute for, proceedings in error. (p. 990.)

HABEAS CORPUS—Collateral Attack.—A finding or decision of an inferior court, no matter how erroneous, not affecting its jurisdiction, cannot be attacked collaterally by habeas corpus. (p. 990.)

HABEAS CORPUS.—Office of the writ of habeas corpus is to determine the legality of the particular imprisonment, and the facts to be considered thereon are jurisdictional facts only. (p. 990.)

HABEAS CORPUS—Collateral Attack.—An attack on a judgment by habeas corpus is collateral, and the judgment cannot be thus impeached for any error or irregularity that does not affect the power of the court to act in the case. (p. 992.)

E. E. Enterline, for the petitioner.

J. A. Van Orsdel, attorney general, for the respondent.

298 **POTTER, J.** This is a habeas corpus proceeding instituted in this court by Ed Younger, who alleges that he is unlawfully restrained of his liberty by the warden of the state penitentiary at Rawlins, in this state. The writ was issued, and the cause was heard upon the petition and the return of respondent to the writ.

It is admitted that the petitioner is confined in said penitentiary, and that the cause of his restraint is a mittimus issued out of the district court in and for Big Horn county upon a judgment entered in said court on the second day of **294** November, 1901, at a term of said court begun and held in said county on the twenty-first day of October, 1901, in and by which said judgment the petitioner was sentenced to be confined in the penitentiary for the period of three and one-half years.

It appears by the allegations of the petition, which are admitted by the return to be true, that on October 18, 1901, an information was filed in the office of the clerk of the district court in and for Big Horn county, charging the plaintiff Younger with the crime of grand larceny; that on October 21, 1901, the judge of said court convened the same under and pursuant to an act of the sixth legislature as amendatory of section 3299 of the Revised Statutes of 1899, said act having been known in the proceedings of said legislature as Senate File No. 12, and being chapter 6 of the Session

Laws of 1901; that on said last-mentioned date the plaintiff was brought before said court, and an order was made assigning counsel to defend him; that on the following day the plaintiff was again brought before said court and he entered a plea of not guilty to the information aforesaid; that he was thereafter, during said term of court, tried before a jury impaneled from a trial jury drawn and selected as hereinafter stated, and a verdict of guilty was returned by said jury.

It is further alleged and admitted that prior to October 21, 1901, the judge of said court, by an order entered in vacation, directed a jury to be drawn and summoned by the sheriff, county treasurer and the clerk of said court, under the provisions of an act of said sixth legislature, amending section 3350 of the Revised Statutes of 1899, said act being chapter 109 of the published laws of 1901, and having been known as House Bill No. 60.

It is further alleged in the petition that said legislative acts under which said term of court was held, and the jury therefor drawn and summoned, are unconstitutional and void, and that the said court, in consequence thereof, had no jurisdiction to try and sentence the plaintiff. Those allegations are denied.

²⁹⁵ The validity of said statutes is challenged on two grounds, viz.: 1. That the presiding officer of the House of Representatives did not, in the presence of the House, sign the said act; and 2. That the fact of signing was not entered upon the journal of said House.

It is admitted by the return that as to chapter 109, which was known as House Bill No. 60, and was amendatory of the law respecting the drawing of juries, no notation of the signing by the speaker of the House appears upon the journal. But it is alleged in and by said return that all the proceedings in the convening of said court, and in drawing, summoning and impaneling the jury, were and are constitutional and valid; and that the statutes authorizing such procedure were in full force and effect.

Chapter 6 of the Laws of 1901 provides for the holding of two regular terms of the district court each year in the county of Big Horn, viz., one beginning on the third Monday in April, and one beginning on the third Monday in October. Under the statute previously in force, but one term each year was provided for, which was authorized to be held beginning

the third Monday in July. The provision of chapter 109, under which the court acted in drawing the jury for the term, expressly authorizes the judge, in vacation, prior to the convening of a term of court, to make an order directing a trial jury to be drawn and summoned to attend on the first day of the ensuing term. The section of the Revised Statutes sought to be amended by that act did not contain that express authority; but it was provided that "whenever the business of the district court requires the attendance of a trial jury, . . . and no jury is in attendance, the court may make an order directing a trial jury to be drawn and summoned to attend before said court": Rev. Stats., sec. 3350. Hence, the contention that if the amendatory statutes are invalid, the term of court at which plaintiff was tried was not held by authority of law, and the jury was drawn and summoned at a time and in a manner not authorized by the statute then in force.

²⁹⁶ The act known as chapter 6, aforesaid, providing for the holding of the terms of court, was introduced in the Senate of the sixth state legislature, and designated as Senate File No. 12, and was entitled, "A bill for an act to amend and re-enact section 3299 of the Revised Statutes of Wyoming, relating to terms of court in the fourth judicial district." The act is challenged because, as alleged, the House journal does not show the fact of signing by the speaker, as required by section 28 of article 3 of the constitution. The enrolled act in the office of the Secretary of State shows that it was in fact signed by the presiding officers of the Senate and House, and approved by the governor. The journal is not entirely silent respecting its signing in the House. At page 217 of the published House journal appears the following entry: "Signing of Senate File. The Honorable Speaker then announced that he was about to sign Senate Enrolled Act No. 1, entitled: S. F. No. 12, by Mr. Thomas, 'A bill for an act to amend and re-enact Section 3299 of the Revised Statutes of Wyoming, relating to terms of court in the Fourth Judicial District.'" It clearly appears from the preceding and succeeding entries that the House was at the time in session. The entry appears in the session held February 4, 1901. In the Senate journal, among the proceedings of that day, it appears that the Senate committee on enrollment reported said bill as correctly enrolled; and that the same was signed in the presence of the Senate by the presiding officer of that body. And in the journal of each body

a subsequent entry shows a communication from the governor announcing that he had approved said act.

The sufficiency of an entry in the same language as the one in question to show the fact of signing was considered in the case of *State v. Cahill*, 12 Wyo. 225, 75 Pac. 433, this day decided; and it was held that the entry amounted to a substantial compliance with the constitutional provision invoked, and that the entry did show the fact of signing as required. The question is fully discussed in the opinion in that case, and we refer thereto for a more thorough ²⁹⁷ statement of our views, and the reasons therefor. We are of the opinion that the House journal shows the fact of signing, and, therefore, so far as anything has been brought to our attention, there is no ground for holding the act invalid or unconstitutional. The act being a valid enactment of the legislature, the term of court at which the prisoner was tried, convicted and sentenced was held at a time authorized by law.

It is neither essential nor proper in this case for the court to consider whether the entire failure of the journal to note the fact of signing by the speaker of the House will invalidate chapter 109 of the Laws of 1901, relating to the selection of a trial jury. It is not the right of the plaintiff, in this proceeding to question the regularity of the method adopted by the court in the drawing and summoning of the jury. The statute provides that on habeas corpus "it is not permissible to question the correctness of the action of a grand jury in finding a bill of indictment, or a petit jury in the trial of a cause, nor of a court or judge when acting within their legitimate province, and in a lawful manner": Rev. Stats., sec. 5498.

"The writ of habeas corpus is not in the nature of, nor is it to be used as a substitute for, proceedings in error. A finding or decision of the inferior court, no matter how erroneous, if it does not affect its jurisdiction, is not subject to attack in this collateral proceeding. The office of the writ is to determine the legality of the particular imprisonment, and the facts to be considered in determining that question are jurisdictional facts": *Miskimmins v. Shaver*, 8 Wyo. 392.

In the case of *In re Wilson*, 140 U. S. 575, 11 Sup. Ct. Rep. 870, 35 L. ed. 513, it was held in response to the contention of the prisoner that he was indicted by an illegal grand jury, in that it was composed of only fifteen persons when seventeen

was the smallest number allowed by law, that the defect did not vitiate the entire proceedings, so that they could be challenged collaterally on habeas corpus, but that it was only a matter of error, to be corrected by proceedings in error.

²⁹⁸ In *McFarland v. Donaldson*, 115 Ga. 567, 41 S. E. 1000, it was said that, even if certain questions raised as to procedure and practice were meritorious, the judgment was not void; but they should have been presented before or during the trial, and the petitioner could have had any adverse rulings thereon reviewed by certiorari. "The writ of habeas corpus does not operate as a writ of certiorari, and after trial and conviction, petitioner cannot complain, in a petition for habeas corpus, of matters to which he could have excepted on the trial."

It is so well settled that the attack on a judgment by habeas corpus being a collateral one, the judgment cannot be impeached for any error or irregularity that does not affect the power of the court to act in the case, it seems unnecessary to cite or review the abundant authorities on the question. Various errors and irregularities which have been held not reviewable in such a proceeding are set forth in *Church on Habeas Corpus*, at section 364. Among them is the matter of error in the selection of the grand jury, or whether the indictment was ever in fact found by a grand jury: See *Church on Habeas Corpus*, secs. 362, 364.

In a case where on appeal it was contended that a grand jury had been selected under an unconstitutional law, the supreme court of the United States say: "Some importance is attached to the fact that the court followed an unconstitutional law, or one assumed to be such. We do not see that this is in any wise different from the case in which the court misconstrues the law. The result is the same: certain persons, under a misconception of the court, are excluded from the grand jury who are qualified to serve on it; but the jury, as actually constituted, is unexceptionable in every other respect. In either case, whether the court is mistaken as to the validity of a law or as to its interpretation, the objection relates so little to the merits of the case that it ought to be taken in the regular order and due course of proceeding": *United States v. Gale*, 109 U. S. 65, 3 Sup. Ct. Rep. 1, 27 L. ed. 857.

Suppose that the district court had construed the statute as it appears in the Revised Statutes, so as to permit an

~~299~~ order for a jury for the term to be made prior to the convening of the term; and assume such a construction to be erroneous. In relation to the right of plaintiff to here raise the question, would the case be any different under such a state of facts than under the claim now presented that an alleged invalid law was consulted in making the order? In either event the action of the court might be erroneous, and upon proper objections the prisoner could have preserved his exceptions and had the matter reviewed on error.

The judgment here complained of has already been before this court on appeal, and no complaint as to the jury, or the method or time of its drawing or selection was made, nor did it appear that any such objection was interposed before or at the trial. It is clear that the objection does not affect the jurisdiction of the court pronouncing the judgment.

For the reasons aforesaid, we think the prisoner is not entitled to be discharged from custody.

Corn, C. J., and Knight, J., concur.

The Right of a Prisoner to be Released on habeas corpus after judgment and sentence is discussed at length in the monographic note to Koepke v. Hill, 87 Am. St. Rep. 167-203; and his right to a discharge after commitment and before trial is discussed in the subsequent note to State v. Smith, 100 Am. St. Rep. 29-39.

SUMMERS v. MUTUAL LIFE INSURANCE COMPANY.

[12 Wyo. 369, 75 Pac. 937.]

INSURANCE, LIFE—Pleading.—The fact that a complaint against an insurance company demands damages for its refusal to issue a policy on which the first premium has been paid does not affect the right of the plaintiff to recover the amount paid as money had and received. (pp. 997, 998.)

INSURANCE, LIFE.—Oral contracts of life insurance may be valid, and if completed by a meeting of the minds of the parties, the insurer will be liable for a loss occurring before the issuance and delivery of the policy, but where delivery and acceptance of the policy is necessary to put the insurance into effect, there can be no risk until the things precedent agreed upon shall happen. (p. 999.)

INSURANCE, LIFE—Pleadings.—A complaint against a life insurance company to recover a premium paid alleging that the company's agents were authorized to solicit contracts of insurance, to make contracts for policies and to receive and receipt for premiums thereon, and that they were authorized generally to transact the

company's business within the state, will not be construed to allege that such agents were themselves to write and issue the policies, as under the statute pleadings are to be most liberally construed, and the common-law rule that they are to be construed most strongly against the pleader is not applicable. (pp. 1000, 1001.)

INSURANCE, LIFE—Specific Performance.—Parol agreements for life insurance may be specifically enforced by requiring the issuance of the policy as agreed, either before or after loss, and in such case the court, having acquired jurisdiction, will afford full relief by awarding proper damages in case of loss. (pp. 1003, 1004.)

INSURANCE, LIFE—Refusal to Accept Premium—Forfeiture. If an insurer wrongfully refuses to accept a premium when it is tendered or wrongfully declares a life policy forfeited, and refuses further to recognize it as an existing contract, such insurer is liable to the insured or the policy holder for the full amount of premiums paid, although the insurance may have been in effect for some time. (p. 1005.)

INSURANCE, LIFE—Refusal to Issue Policy—Recovery of Premium.—If a person executes and delivers a note to an insurance company's general agent in consideration that it will issue and deliver to him a life insurance policy within a stated time, and the company receives and appropriates the proceeds of the note, but fails and neglects to issue and deliver the policy, without fault on the part of the applicant for insurance, he is entitled to consider the contract as rescinded by the insurer, and to recover from him the sum advanced as money had and received. (pp. 1006, 1007.)

CONTRACTS—When Consummated.—If the parties to a contract intend that it shall be closed and consummated prior to the formal signing of a written draft, the terms having been mutually understood and agreed upon, the parties will be bound by the contract actually made, although it is not reduced to writing, but if the parties do not intend to close the contract until it shall be fully expressed in writing, then there is no completed contract until the agreement is reduced to writing and signed. (p. 1007.)

INSURANCE, LIFE—When Contract Takes Effect.—If on an application for a life insurance policy there is no agreement as to when the insurance is to take effect, and the policy is to be issued after the applicant has taken a medical examination, and it is agreed that a note taken in payment of the first premium shall not be negotiated until the delivery of the policy, the insurance does not take effect until the issuance and delivery of the policy. (p. 1007.)

INSURANCE, LIFE—When Insurance Takes Effect.—A life insurance company has an absolute right to insist that it shall accept an application and issue a policy before it shall be bound as an insurer, and the applicant for insurance has the same right to require a delivery to and acceptance by him of the policy, before he will be bound. (p. 1009.)

J. H. Ryckman, for the plaintiff in error.

T. S. Taliaferro, Jr., and J. W. Lacey, for the defendant in error.

377 POTTER, J. To the amended petition filed in this action, containing seven causes of action, a general demurrer

was sustained, and thereupon, the plaintiff declining to plead further, a judgment was rendered in favor of defendant for costs. Of that judgment the plaintiff complains, and assigns as error the order sustaining the demurrer, and the rendition of judgment for defendant. If no error was committed in sustaining the demurrer, there is no error in the judgment. The demurrer being general to the entire petition, it follows that if any one of the several causes of action is sufficient, the demurrer should have been overruled.

The first cause of action sets out that in the months of February, March, April and May, 1896, the defendant was engaged in the general life insurance business as a life insurance company, and that A. B. Ragsdale and H. H. Wright were the authorized general agents of the defendant to solicit contracts of insurance in this state, to make contracts for policies of insurance, and to receive and receipt for money and premiums thereon, and generally to transact defendant's business in Wyoming. That on or about February 27, 1896, the defendant and said Ragsdale and Wright, as its agents, at Uinta county, in this state, solicited the plaintiff to contract for a policy of insurance on his life with said defendant company in the sum of ten thousand dollars; said defendant and said Ragsdale and Wright representing to plaintiff that defendant greatly desired to have the plaintiff to become a patron of defendant company, and to take out a policy on his life in said company; and further representing that defendant intended making a general canvass among plaintiff's neighbors and friends, to secure contracts of life insurance, and it would ⁸⁷⁸ aid and facilitate defendant in securing such contracts to have the name of plaintiff as one of its patrons.

"That in consideration that the plaintiff would contract with the defendant and with the said Ragsdale and Wright, as the agents of the said defendant, for a policy of insurance with the defendant company in the sum of ten thousand dollars, and would then and there make, execute and deliver to the defendant and the said Ragsdale and Wright, as the agents of the said defendant, the plaintiff's promissory note in the sum of four hundred and fifty-four dollars, payable in sixty-five days thereafter, in payment of the first annual premium on such policy of insurance, then and thereupon the defendant would issue to the plaintiff, as soon as said plaintiff should pass the necessary medical examination,

and within sixty-five days from and after the said twenty-seventh day of February, 1896, and before said promissory note should become due and payable, a specially favorable life insurance policy in the sum of ten thousand dollars, which said policy of insurance, the defendant and the said Ragsdale and Wright, as the agents of the defendants, in consideration of the premises, then and there stated, promised and represented to the plaintiff should contain, among other stipulations, promises and agreements on the part of the said defendant company, the following provisions, to wit:

“a. That if the plaintiff should live ten years, and should pay to the defendant each year the sum of four hundred and fifty-four dollars, plaintiff should, at the end of the ten year period, have the right and option to demand of the defendant, and the defendant would pay him the full sum of ten thousand dollars in cash, or, if the plaintiff preferred, he should have the right to leave said sum of ten thousand dollars with the defendant and receive from the defendant annually the legal interest thereon until such time as plaintiff wished to draw the same from defendant in cash.

“b. That if plaintiff should not live ten years, but should each year until his death pay the said annual premium of four hundred and fifty-four dollars to the defendant, then and in that event the said sum ³⁷⁹ of ten thousand dollars should be paid to the surviving wife of plaintiff in installments of five hundred dollars per year.

“c. That if plaintiff should pay to the defendant the annual premium of four hundred and fifty-four dollars for three years and should be unable to pay further or become dissatisfied, plaintiff should then have the right to demand and would receive from the defendant the premiums paid by him to the defendant company in full without interest.”

That said Ragsdale and Wright represented themselves as agents, to have authority to make such specially favorable contract for said policy of insurance, on behalf of the defendant; and the plaintiff, relying upon said representations and promises, and on the integrity and honesty of defendant and said agents, made, executed and delivered to said Ragsdale and Wright, as the agents of defendant, his promissory note for four hundred and fifty-four dollars, payable to plaintiff's order in sixty-five days thereafter; and, at the request of said agents, indorsed the same in blank, and delivered it to Ragsdale and Wright as defendant's agents, in full pay-

was sustained, and thereupon, the plaintiff declining to plead further, a judgment was rendered in favor of defendant for costs. Of that judgment the plaintiff complains, and assigns as error the order sustaining the demurrer, and the rendition of judgment for defendant. If no error was committed in sustaining the demurrer, there is no error in the judgment. The demurrer being general to the entire petition, it follows that if any one of the several causes of action is sufficient, the demurrer should have been overruled.

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“That in consideration that the plaintiff would contract with the defendant and with the said Ragsdale and Wright, as the agents of the said defendant, for a policy of insurance with the defendant company in the sum of ten thousand dollars, and would then and there make, execute and deliver to the defendant and the said Ragsdale and Wright, as the agents of the said defendant, the plaintiff's promissory note in the sum of four hundred and fifty-four dollars, payable in sixty-five days thereafter, in payment of the first annual premium on such policy of insurance, then and thereupon the defendant would issue to the plaintiff, as soon as said plaintiff should pass the necessary medical examination.

and within sixty-five days from and after the said twenty-seventh day of February, 1896, and before said promissory note should become due and payable, a specially favorable life insurance policy in the sum of ten thousand dollars, which said policy of insurance, the defendant and the said Ragsdale and Wright, as the agents of the defendants, in consideration of the premises, then and there stated, promised and represented to the plaintiff should contain, among other stipulations, promises and agreements on the part of the said defendant company, the following provisions, to wit:

“a. That if the plaintiff should live ten years, and should pay to the defendant each year the sum of four hundred and fifty-four dollars, plaintiff should, at the end of the ten year period, have the right and option to demand of the defendant, and the defendant would pay him the full sum of ten thousand dollars in cash, or, if the plaintiff preferred, he should have the right to leave said sum of ten thousand dollars with the defendant and receive from the defendant annually the legal interest thereon until such time as plaintiff wished to draw the same from defendant in cash.

“b. That if plaintiff should not live ten years, but should each year until his death pay the said annual premium of four hundred and fifty-four dollars to the defendant, then and in that event the said sum ³⁷⁹ of ten thousand dollars should be paid to the surviving wife of plaintiff in installments of five hundred dollars per year.

“c. That if plaintiff should pay to the defendant the annual premium of four hundred and fifty-four dollars for three years and should be unable to pay further or become dissatisfied, plaintiff should then have the right to demand and would receive from the defendant the premiums paid by him to the defendant company in full without interest.”

That said Ragsdale and Wright represented themselves as agents, to have authority to make such specially favorable contract for said policy of insurance, on behalf of the defendant; and the plaintiff, relying upon said representations and promises, and on the integrity and honesty of defendant and said agents, made, executed and delivered to said Ragsdale and Wright, as the agents of defendant, his promissory note for four hundred and fifty-four dollars, payable to plaintiff's order in sixty-five days thereafter; and, at the request of said agents, indorsed the same in blank, and delivered it to Ragsdale and Wright as defendant's agents, in full pay-

ment and satisfaction of the first annual premium upon said policy of insurance. "And said defendant and said agents, on the part of the defendant, then and there represented and promised to the plaintiff that said promissory note should not be sold, transferred or negotiated by the defendant or the said agents before maturity, but should be held by and kept in the possession of said defendant until said special policy of insurance should be written and delivered by the defendant to the plaintiff, and should be by him found in all respects satisfactory to him, and in conformity to the said parol promises made by the defendant and its said agents, and should be by the plaintiff approved and accepted."

"That in the execution and delivery of the foregoing promissory note said contract for said policy of insurance between the plaintiff and the defendant was, upon the part of plaintiff, completed, and plaintiff thereby and in all other respects fulfilled his obligations, promises and agreements ³⁸⁰ as to said policy of insurance, . . . and passed said medical examination; but that the defendant, in disregard of its promises and agreements by it made as aforesaid, has failed and neglected, and still fails and neglects, to issue to the plaintiff said policy of insurance, though often requested so to do by the plaintiff."

That said Ragsdale and Wright, as agents of defendant, in disregard and violation of said premises and contract for said policy of insurance, did, on or about March 1, 1896, sell and discount said note to North & Stone, bankers at Evans-ton, Wyoming, and paid the proceeds thereof to the defendant, and that thereafter said North & Stone, claiming to be innocent purchasers of said note for value before maturity, made demand upon plaintiff for payment thereof, and plaintiff paid them the said sum of four hundred and fifty-four dollars under protest.

That plaintiff frequently made demand upon defendant that it issue to him said policy of insurance, but it has failed and neglected so to do; that thereupon plaintiff demanded the return of the said sum of four hundred and fifty-four dollars paid by him for said policy of insurance, but defendant has refused and neglected to return the same, to plaintiff's damage in the sum of four hundred and fifty-four dollars and interest thereon from February 27, 1896. A subsequent paragraph alleges, by way of special damages, that certain expenses were incurred by plaintiff for court costs and at-

torney fees, loss of time and mental annoyance; and the prayer is for the recovery of two thousand dollars and costs of suit.

The other causes of action are based upon similar claims held by other parties against the defendant company, and assigned to plaintiff. The allegations as to those causes of action are substantially the same as the first above set out. There are some slight exceptions. For instance, the second cause of action is founded upon the claim of one George Finch, whose note was for four hundred and thirty-eight dollars, given at the same time as the note of plaintiff, to mature October 1, 1896; and in his case also it is alleged that the policy was agreed to be issued before the maturity of the note, and was agreed to be held and not negotiated until the delivery and acceptance of the ³⁸¹ policy. In that cause of action the time when said Finch submitted to a medical examination is stated as having occurred in the month of March, 1896, and said examination is alleged to have been satisfactorily passed by him. If, therefore, the failure to allege in the first cause of action the date of plaintiff's medical examination is material, which we do not decide, the defect, if any, does not appear in the second cause of action; and the latter contains substantially all the averments above set out as contained in the first cause of action. In the sixth and seventh causes of action it is alleged that plaintiff's assignors therein named paid the premium in cash. We think it will be unnecessary to consider whether that fact will make any difference in regard to the right of recovery. Those causes of action are more concisely stated. It is alleged that said agents solicited plaintiff's assignor to insure his life with defendant company, and to make a parol contract for a policy of insurance, and that the agents represented that defendant was prepared to issue a policy to said assignor, specially favorable to him, which should contain a certain provision, set out in the petition, among other provisions not set out; and that the first annual premium was paid in cash, and the medical examination was passed; but that defendant has failed and neglected to issue the policy. The damage alleged in the sixth cause of action is five hundred dollars, while the premium paid was one hundred and ninety-three dollars; and in the seventh cause of action the premium paid was two hundred and eleven dollars, and damages are claimed in the sum of five hundred dollars.

The theory of the petition seems to be that defendant is liable in damages for the breach of its contract to issue the policy of insurance. But if the measure of damages, assuming that the right of recovery is shown, should be held limited to the amount of the premium paid, or even a proportionate part of it, that would not warrant the sustaining of a demurrer, provided sufficient facts are set out to constitute a cause of action for the recovery of some amount. Notwithstanding the evident theory of the ³⁸² pleader, the petition would seem sufficient to support a judgment for money had and received, if sufficient for any purpose. Therefore, we do not deem it very material, upon the demurrer, to consider whether the amount sued for is recoverable, if at all, as damages for breach of contract, or as money had and received. Nor is it necessary to consider the measure of damages, or the amount recoverable, unless, indeed, it should appear, as contended by counsel for defendant in error, that the only right shown, if any, is to recover nominal damages merely; in which event, it is insisted the judgment ought not to be reversed. In plaintiff's brief it seems to be admitted that the measure of damages is the premium paid.

Plaintiff's counsel maintain that whether the petition sets up a parol contract of insurance, or a contract to issue a certain kind of policy, is immaterial, but that a suit for specific performance or for damages was open to the plaintiff. He contends that parol contracts of insurance are valid, and that a policy is only evidence of the contract, which may exist in parol; citing *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Newark Mach. Co. v. Kenton Ins. Co.*, 50 Ohio St. 549, 35 N. E. 1060, 22 L. R. A. 768; *Ruggles v. American Cent. Ins. Co.*, 114 N. Y. 415, 11 Am. St. Rep. 674, 21 N. E. 1000; *Relief Ins. Co. v. Shaw*, 94 U. S. 574, 24 L. ed. 291; *Security Fire Ins. Co. v. Kentucky M. & F. Ins. Co.*, 7 Bush, 81, 3 Am. Rep. 301; *Angell v. Hartford Fire Ins. Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Humphrey v. Hartford Fire Ins. Co.*, 15 Blatchf. 35, 12 Fed. Cas. No. 6874.

Counsel for defendant do not dispute the principle laid down by those authorities, but rely thereon, contending that, as in the cases cited, the insurance was held to be in force notwithstanding the policy had not issued, and the insured entitled to recover upon such parol contract for the loss which had been insured against and had occurred; so, in this case, the contract was in force, and had the death of the

insured occurred while so in force, recovery might have been had regardless of the nonissuance or nondelivery of the policy. Hence, it is argued that, upon the allegations of the petition, the plaintiff and his assignors ³⁸³ were insured, the company had carried the risk of their deaths respectively, and no recovery is permissible for a return of the premium paid in the absence of a rescission of the contract, or a showing of absolute abandonment on the part of defendant; and that such rescission, or abandonment, and demand for return of the premium must have occurred before the premium had been earned. It is insisted that the petition, failing to show that the premium paid entitled the plaintiff or his assignors to insurance beyond the year for which it was paid, and to show a rescission or abandonment and demand within such year, does not present any right of recovery, since for all that appears the company fully earned the premium by carrying the risk agreed on for the full period required under the contract by the amount of premium paid. Defendant's counsel, therefore, treat the action as an action upon the contract to the same effect as if the policy had issued, and as no loss was sustained against which the contract insured, it is urged that no damages can be recovered; and that it would be impossible to aver a damage from a failure to have the evidence of his contract, because no loss covered by the contract was sustained, and the policy was never needed to enforce his contract.

Counsel further argue that had demand been made shortly after the consummation of the oral agreement, and if, upon such demand, the defendant failed and refused to deliver the policy, then, under the present averments, no loss having occurred, the damages would be merely nominal.

The argument presents a question of considerable nicety. The great weight of authority sustains the proposition upon which counsel are agreed, that an oral contract of insurance may be valid, and if completed by a meeting of the minds of the parties, the company will be liable for a loss occurring before the issuance and delivery of the policy. That result follows in case it is understood that the insurance is to date from the oral agreement. But it is not ³⁸⁴ unusual for applications for insurance, particularly life insurance, to provide that the insurance shall not take effect until the delivery of the policy; and in such cases it is reasonably held that no risk is assumed until such delivery. Quite frequently it is

provided in the application for life insurance, and occasionally for insurance against loss of property by fire, that the insurance shall not become effective until the application shall be accepted by the home office or a principal officer of the company, or the application is made subject to a provision for such acceptance, and sometimes the agent has authority, and exercises it, to provide that, pending acceptance or rejection, the applicant shall be considered insured. Where acceptance or delivery is necessary to put the insurance into effect there will, of course, be no risk until the things precedent agreed upon shall happen. Instances are to be found where the payment of premium is made a condition precedent to the consummation of the insurance contract, or to the delivery of the policy.

The rule is not, therefore, that every contract for insurance will authorize recovery in case of loss in the absence of a policy, independent of other agreements or conditions. The agreement itself, or the application, may show that the contract was not one for present insurance, but for insurance to take effect in the future, depending upon some condition, such as the acceptance of the application, or delivery of the policy, or upon the performance of some act, such as the payment of premium.

Again, it is often a nice question whether the negotiations of the parties have resulted in a complete contract—whether there has been such a meeting of minds as to render nothing else necessary to completion of the agreement. And the difficulty usually encountered, in attempting to recover for a loss occurring in the absence of a policy of insurance, has been to establish the making of a complete and binding contract, as to which the policy would be but a mere memorial covering an agreement already ³⁸⁵ fully and completely entered into. This has generally been an easier matter, in cases of fire insurance, than in insurance upon life, on account of the usual larger authority of fire insurance agents, the custom of such agents to issue policies already in their possession, and the greater facility with which such business is ordinarily conducted.

It is probably safe to say that it is a matter of common knowledge that policies of life insurance are generally written at the home office, or at least by some principal officer, which also usually has the right of acceptance or rejection of the risk; and there is nothing in the petition in this case to show

a different custom as to defendant. Indeed, the business is shown to have been transacted with agents, and the policy was thereafter to be written, and it is not to be assumed from any averment of the petition, we think, that the agents themselves were to write and issue the policies. Under the code, pleadings are to be liberally construed, and the common-law rule that they are to be construed most strongly against the pleader is not applicable: *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933. Moreover, the petition does not charge any such authority in the agents, but, if anything, rather negatives it. It is alleged that the agents were authorized to solicit contracts of insurance, to make contracts for policies of insurance, and to receive and receipt for money and premiums thereon, on behalf of defendant. The added averment that they were authorized generally to transact defendant's business in Wyoming might mean much or little under different circumstances. We think, in its connection, it is not to be construed as averring their authority to write and issue policies.

It is not entirely clear that, because an action may be brought upon an oral contract for insurance for a loss occurring before the issuance of the policy, an action may not be maintainable to recover the premium, or at least a proportionate part of it, if no such loss has occurred, upon the failure or refusal of the company to write and deliver ³⁸⁹ the policy as agreed, or that in every such case the damage can be only nominal. That such is the law has been denied in a few cases where the direct question has been to some extent involved.

In *Lawrence v. Griswold*, 30 Mich. 410, suit was brought upon a premium note for life insurance. The note provided that the policy should be void unless the note was paid at maturity. It was given for three months to the superintendent of agencies of the company. Defendant testified that he had never received any policy, and had received no consideration for the note. It seems that he endeavored to show that, as a part of the consideration of the note, he was to receive an appointment as agent for the company. That defense was ruled out. The plaintiff's testimony was to the effect that the policy had been sent to the company's agent, the payee of the note, and he had sent it, with the note, to another party to be delivered on payment of the note. With reference to the point here made by defendant in error, Mr.

Justice Christiancy, in delivering the unanimous opinion of the court, said: "If [under the agreement stated in the receipt] the payment of the premium by defendant below would have rendered the company liable for the amount insured, in case of death, as assumed by the court, but which we do not think entirely clear, in an action at law, at least, still, if the evidence shows, as we think it tended to show here, that what the defendant contracted for was a policy of insurance, instead of any such resulting liability, he was entitled to have what he contracted for, and was not bound to accept any such resulting liability as a substitute for the policy. A policy might be much better and more available to him than any such liability, to be shown only by evidence of all the circumstances. He might be able to assign a policy as security for a loan, but such doubtful or resulting liability would not be worth as much for this purpose, if for any other, as the policy itself; and the court erred in treating it as of equal value to the defendant, and denying ³⁸⁷ to him the right of insisting upon what he had contracted for." A judgment for the plaintiff on the note was reversed. The receipt referred to in the opinion acknowledged the receipt of the premium. There was a balance over and above the note and some cash paid, which balance, the receipt stated, was to be paid on delivery of the policy; and it was also recited therein that the policy was to be binding when the application is accepted by the company and policy issued, and if no policy is written said note and money to be returned.

In *Collier v. Bedell*, 39 Hun, 238, suit was brought to recover an insurance premium paid to the defendant as agent of an insurance company. Plaintiff contended that he had never received the policy or renewal receipt. Defendant insisted, among other things, that, as he was the agent of the company, his receipt of the money and the parol agreement to insure, bound the company, and, therefore, that the plaintiff was, in fact, insured, although he never received any policy or renewal receipt; and hence he could not recover; citing *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402. The court said: "Now, it may be true that, if a fire had occurred and the plaintiff had chosen to insist upon the facts of verbal agreement and payment, he might have recovered, even though the defendant had never delivered the policy or a renewal receipt. But he had a right to insist that the defendant should procure for him and deliver to him a pol-

icy, or it might be a renewal receipt. He was not obliged to rest on the verbal agreement when he had bargained for something more. He was left in uncertainty and insecurity, with no safe evidence on which to rely. . . . The possession of the policy or the renewal receipt was of value. And the plaintiff ought, if his story be true, to recover what he paid."

In a recent case decided by the supreme court of Iowa, the plaintiff sued to recover from a life insurance company the amount of several notes given by him and his assignors in payment of the first premium upon certain ³⁸⁸ policies of life insurance applied for by the makers of the notes respectively. In the case of the plaintiff and one of his assignors, policies had been delivered and returned, and the question was whether there had been an acceptance thereof by the insured. In the case of the other assignor of plaintiff, it was alleged that no policy was ever delivered to him. In regard to the cause of action based upon the note of that party, the discussion in the opinion is meager, so far as the question now under consideration is concerned. But it is said by the court as follows: "It will be observed that the issue tendered in the second count of the petition is predicated upon the allegation that there was an entire failure on the part of the defendant company to deliver a policy as applied for, and in payment of which the note was given. Counsel for appellant [the company] does not question the right of plaintiff to recover upon proof of the matter alleged in said count."

However, it appeared by the evidence that such a policy had in fact been issued as applied for and sent by mail, but the applicant refused to receive it from the postoffice and ordered it sent back. The court charged the jury upon this count that, if the company had not delivered the policy in a reasonable time, the applicant was not bound to receive it when it was tendered, and, if he did not accept the tendered policy, recovery could be had by the plaintiff for the amount of the note of such applicant. This instruction was held to be erroneous on the ground that it was wholly foreign to the issues presented by the pleadings; since a failure to deliver was the only matter complained of, delivery was in fact made and the subject of unreasonable delay was not suggested except by the instruction: *Armstrong v. Mutual Life Ins. Co.*, 121 Iowa, 362, 96 N. W. 954.

Now, it is true that actions to recover in case of loss are maintainable where an application for insurance has been accepted or an agreement to insure has been entered into, although no policy may have been delivered. While it is sometimes said that the action is in reality upon the contract³⁸⁹ of insurance, the same as though it had been brought upon an executed policy (*Fireman's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540), in other cases it has been held that the action is properly brought upon the agreement to insure, the damages recoverable in case of loss being the same as if based upon a loss under the policy. In other words, where loss has occurred by fire, in case of fire insurance, or where death has occurred, if it be an agreement for life insurance, the applicant for the insurance or the beneficiary may, upon showing a breach of the contract to insure by failure to deliver the policy, recover as damages the same amount that would have been recoverable upon the policy, had it been issued. And it is usually held, where the company has failed to issue a policy, that recovery does not depend upon making proofs of loss in the manner and at the time which would have been required under the policy: *Campbell v. American Fire Ins. Co.*, 73 Wis. 100, 40 N. W. 661; *Commercial Ins. Co. v. Morris*, 105 Ala. 498; *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y. 402; *Humphrey v. Hartford Fire Ins. Co.*, 15 Blatchf. 504, 12 Fed. Cas. No. 6875; 1 Joyce on Insurance, sec. 38. This general principle does not seem to be opposed by the case of *Hicks v. British-American Assur. Co.*, 162 N. Y. 284, 56 N. E. 743, 48 L. R. A. 424, cited by counsel for defendant in error. The rule laid down in that case was based entirely upon a consideration of the standard policy, which was required by statute to be used in all cases of fire insurance; and in consequence thereof, it was held that a parol contract called for such a policy, whose terms were established by law. However, three of the justices dissented, holding that, notwithstanding the legislative provisions for the standard policy, where none had been issued, and loss occurred, proofs of loss as required by such policy were not necessary as a condition precedent to recovery.

Again, it is well established that a parol agreement to insure may be specifically enforced in a court of equity by requiring the issuance of the policy as agreed, either before or after loss; and that, in such a case, the court,³⁹⁰ having acquired jurisdiction, will afford full relief by awarding

proper damages in case of loss: *Tayloe v. Merchants' Fire Ins. Co.*, 9 How. (U. S.) 390, 13 L. ed. 187; *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Commercial Mut. etc. Ins. Co. v. Union Mut. etc. Ins. Co.*, 19 How. 318, 15 L. ed. 636; *Woodby v. Old Dominion Ins. Co.*, 31 Gratt. 362, 31 Am. Rep. 732; 16 Ency. of Law, 853. It was said in *Commercial etc. Co. v. Morris*, that there would be no necessity for courts of equity to entertain jurisdiction to enforce specific performance if an agreement to insure was in legal effect the same as a contract of insurance.

It is also held that where a company delivers a policy different from that contracted for, the applicant may refuse to accept it, and sue to recover the premium paid: *La Marche v. New York Life Ins. Co.*, 126 Cal. 498, 58 Pac. 1053; *Mutual Life Ins. Co. v. Gorman* (Ky.), 40 S. W. 571; *Gentry v. Connecticut Mut. Life Ins. Co.*, 15 Mo. App. 215; *Tifft v. Phoenix Mut. Life Ins. Co.*, 6 Lans. (N. Y.) 198. And when a contract of insurance is void ab initio, or where the risk never attached, the premium paid may be recovered back as money had and received: *Waller v. Northern Assur. Co.*, 64 Iowa, 101, 19 N. W. 865, and cases cited.

There is a long line of decisions to the effect that if an insurer wrongfully refuses to accept a premium when it is tendered, or wrongfully declares a life policy forfeited and refuses further to recognize it as an existing contract, such insurer is liable to the insured or the policy-holder for the full amount of premiums paid, notwithstanding that the insurance may have been in force for some time: *American Life Ins. Co. v. McAden*, 109 Pa. St. 399, 1 Atl. 256; 3 *Sutherland on Damages*, 3d ed., sec. 838, and cases cited. But a different rule is maintained by other courts, viz., that the insured is entitled to recover, in such cases, what is known in the life insurance business as the value of his policy; thus allowing him only the amount in excess of the value of the insurance earned by the company in carrying the risk: *Lovell v. St. Louis Mut. Life Ins. Co.*, 111 U. S. 264, 4 Sup. Ct. Rep. 390, 28 L. ed. 423. The author of *Sutherland on Damages* considers this the more reasonable rule.

³⁹¹ If there is any substantial foundation for a suit in equity for specific performance to enforce the issuance and delivery of the policy before, as well as after, a loss insured against, it would seem to necessarily follow that an action at law would lie under the same circumstances for the recov-

ery of whatever damages may have accrued on account of the failure to issue and deliver the policy. And, in view of the various elements which ordinarily aid in determining the rate of annual premium upon a life insurance contract, we think it might be difficult upon the averments in this case to find justification for holding that nothing but nominal damages could be recovered. It appears that the entire premium was to be paid in the course of ten years, although plaintiff's life might be prolonged beyond that period. It is not clear, therefore, that the court ought arbitrarily to conclude that the policy would possess no value after the year for which the premium was paid.

The time of the maturity of the note is stated in the petition, and it is alleged that the policy was agreed to be delivered before such maturity; and that it was agreed that the company should not sell the note before maturity, but should hold it until the policy should be written and delivered, and approved and accepted by plaintiff. It is also alleged that they did sell the note and appropriate the proceeds, and that the policy was never issued or delivered. In such case, it is doubtful, to say the least, if a demand for the policy was necessary, the time for delivery being fixed by agreement: *Western Massachusetts Ins. Co. v. Duffey*, 2 Kan. 347. Demand, however, is alleged. It is urged that, as time of demand is not stated, it must be presumed to have occurred immediately before filing the petition; but the petition before us is an amended petition, and there is nothing in the record to show when the suit was instituted, or the original petition filed. If such a presumption attaches at all, it would refer to the commencement of suit, rather than to the time of filing an amended petition. If essential to defendant's case, it may require the petition in this respect to be made more definite and certain.

³⁹² The plaintiff having executed and delivered a note to defendant's agents in consideration of an agreement that the defendant would issue and deliver to plaintiff a life insurance policy within a stated time, and the defendant having received and appropriated the proceeds of the note, and failed and neglected to deliver the policy, the plaintiff being without fault, we think, upon reason and authority, that the plaintiff would be entitled to consider the contract as rescinded by the defendant, and recover the sum advanced as money had and received: *Chitty on Contracts*, 689; *Randlet*

v. Herren, 20 N. H. 102; Nash v. Towne, 5 Wall. 689, 18 L. ed. 587; Carter v. Carter, 14 Pick. 424; Armstrong v. Mutual L. Ins. Co., 121 Iowa, 362, 96 N. W. 954; Lawrence v. Griswold, 30 Mich. 410; Collier v. Bedell, 39 Hun, 238; Stillwell v. Covenant Mut. Life Ins. Co., 83 Mo. App. 215. Under the contract pleaded, the note was to be held until the delivery and acceptance of the policy. This event never occurred, if the averments be true. Chief Justice Shaw said, in Carter v. Carter, 14 Pick. 424, that it is well settled that where one receives money to hold upon a condition, and the condition does not happen, whether through his own default or otherwise, or for a special purpose, and that purpose is not accomplished, the party receiving cannot conscientiously retain the money, and thenceforth holds it in trust for the party who paid it, and is bound, *ex aequo et bono*, to repay it on demand.

Should there be any reason to doubt the correctness of this view of the case, there is another consideration that leads to the same result and clearly requires a reversal of the judgment. We are unable to assent to the proposition that the allegations of the petition show a completed contract of insurance, so that the defendant would have been liable, had death occurred during the period covered by the premium paid, or within any period, to pay the amount of the insurance to the beneficiary. And hence there is no showing that the plaintiff had received any benefit from the contract. In general, the principle is well settled that where the parties to a contract intend that it shall be closed and ^{and} consummated prior to the formal signing of a written draft, the terms having been mutually understood and agreed upon, the parties will be bound by the contract actually made, although it be not reduced to writing; but, on the other hand, if the parties do not intend to close the contract until it shall be fully expressed in a written instrument, properly attested, then there will be no completed contract until the agreement shall be put into writing and signed. The supreme court of Maine state the principle briefly as follows: "If the written draft is viewed by the parties merely as a convenient memorial or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed." And that court mentions some circumstances as helpful in determining which view is entertained in a particular case; such as whether

the contract is one usually put in writing; whether there are few or many details; whether the amount involved is large or small; whether it requires a formal writing for a full expression of the covenants and promises; and whether the negotiations themselves indicate that a written draft is contemplated as the final conclusion of the negotiations: *Steamship Co. v. Swift*, 86 Me. 248; 9 Cyc. 280-282; *Hodges v. Sublett*, 91 Ala. 588, 8 South. 800; *Saunders v. Pottlitzer*, 144 N. Y. 209, 43 Am. St. Rep. 747, 39 N. E. 75, 29 L. R. A. 431; *Spinney v. Downing*, 108 Cal. 666, 41 Pac. 797.

This general principle has been frequently applied to insurance contracts. From the many cases denying the consummation of such a contract, upon particular facts, in the absence of a delivery or acceptance of the policy, we cite the following, as illustrating the application of the principle, and somewhat persuasive upon the facts in this case: *Farmers' etc. Ins. Co. v. Graham*, 50 Neb. 818, 70 N. W. 386; *Dickerson's Admr. v. Provident etc. Life Assur. Soc. (Ky.)*, 52 S. W. 825; *Harnickell v. New York Life Ins. Co.*, 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150; *Mutual Life Ins. Co. v. Young*, 23 Wall. 85, 23 L. ed. 152; *McCully's Admr. v. Phoenix Mut. Life Ins. Co.*, 18 W. Va. 782; ³⁹⁴ *Commercial Fire Ins. Co. v. Morris*, 105 Ala. 498, 18 South. 34; *Rogers v. Charter Oak Life Ins. Co.*, 41 Conn. 97; *Stillwell v. Covenant Mut. Life Ins. Co.*, 83 Mo. App. 215.

What are the allegations of the petition? In the first place, it is to be observed that the petition nowhere states that there was any agreement that the insurance would be in force before the issuance of a policy; nor is there any averment showing what, if any, agreement there was as to the time when the insurance should take effect. It is hardly to be assumed that it was understood to run from the date of the oral agreement, since the applicant was required thereafter to submit to a medical examination; and it was not then known whether he would be found to be an acceptable risk.

But the controlling circumstance in this respect is the fact, as alleged, that as a part of the oral contract, it was agreed that the premium note should not be transferred or negotiated, but should remain in the possession of the defendant until the policy should be written and delivered, found to be satisfactory, and approved and accepted. Can there be anything clearer, if this averment be true, than that the plaintiff declined to rely upon the oral negotiations or

promises, and insisted that before the appropriation of the premium by the company, he should receive and accept the policy; and that he should find it to conform to the promises made by the agents. The conclusion seems irresistible that the plaintiff refused to be bound until the promises of the company's agents should be confirmed by the policy itself; and if he was not bound, the company was not: *Mutual Life Ins. Co. v. Young*, 23 Wall. 85, 23 L. ed. 152.

There can be no doubt but that a life insurance company has the absolute right to insist that it shall accept an application and issue a policy before it shall be bound as an insurer; neither can there be any doubt of the right of one desiring or applying for insurance to require a delivery to him, and acceptance by him of the policy before he will be bound.

³⁹⁵ It is true a negotiable note was executed for the first year's premium; but it was so executed and delivered upon condition that the representations of the agent would be confirmed by and expressed in a policy to be delivered to and accepted by the maker.

It is to be said that in this country parties do not customarily procure life insurance for a limited period of time. These parties were not intending to contract for an insurance upon their lives for a few months or a year; nor were they expecting that such insurance was to be based solely upon their oral negotiations with the agents. It is usual, if not universal, for a contract of life insurance to be at some time expressed in a written policy to be held by the insured or the beneficiary. A reasonable time is ordinarily required for the preparation and delivery of the policy; and it may happen in occasional instances that death occurs before the policy can be written and transmitted, and that under the stipulations of the parties the insurer will be liable.

In this case, however, a time for delivery of the policy was stipulated; and provision was made for its acceptance before the right of the company to the premium should attach. We think that, had death occurred, the proposition could not have been successfully maintained upon the present allegations that there was a completed contract of insurance so as to bind the company, notwithstanding the failure to deliver the policy; at least as to plaintiff and those of his assignors who were in the same position.

In the case of *Dickerson's Admr. v. Provident etc. Soc. (Ky.)*, 52 S. W. 825, suit was brought to compel the delivery

of a policy of life insurance on the life of the decedent, and to recover the amount thereof. It appears that when the application for insurance was made the decedent was undecided as to whether he would take it, and it was understood between himself and the agent that he could finally decide when the policy came, if his application was approved and accepted. It was accepted and a policy issued and sent to the agent, ³⁹⁶ being received by the latter before the death of the decedent. But it was never otherwise delivered. It was held that, as the decedent was under no obligation to take the policy when it came, there was no meeting of minds that is essential to the formation of every contract.

In *Harnickell v. New York Life Ins. Co.*, 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150, the agent of defendant entered into an agreement with the plaintiff by which two policies of insurance subsequently issued by defendant were to be accepted by plaintiff, only upon condition that certain other policies then delivered by plaintiff to the agent should be surrendered by him to the issuing companies, and their surrender value in cash paid to him or paid-up policies given in exchange therefor, in either case in amounts satisfactory to plaintiff. The agent failed to make satisfactory arrangements as to the surrender of the other policies; and the action was brought to have it adjudged that he had the right to return the policies issued by defendant, and to obtain the surrender to him of certain notes and a check given by him. His right was sustained. The court said that an individual may refuse to be bound by a policy of insurance until he has absolutely received and accepted it.

The demurrer should have been overruled. For the error committed in sustaining it, the judgment will be reversed, and the cause remanded with directions to the district court to overrule the demurrer.

Corn, C. J., concurs.

Knight, J., did not sit.

A Contract of Insurance may rest in parol: *Western Assur. Co. v. McAlpin*, 23 Ind. App. 220, 77 Am. St. Rep. 423; *Sanford v. Orient Ins. Co.*, 174 Mass. 416, 75 Am. St. Rep. 358. As to whether an insurance contract can exist before or without the delivery of the policy, see *Croft v. Hanover Fire Ins. Co.*, 40 W. Va. 508, 52 Am. St. Rep. 902; *New York Life Ins. Co. v. Babcock*, 104 Ga. 67, 69 Am. St. Rep. 134; *Chamberlain v. Prudential Ins. Co.*, 109 Wis. 4, 83 Am. St. Rep. 851; *Rayburn v. Pennsylvania Casualty Co.*, 138 N. C. 379, 107 Am

St. Rep. 548; and as to whether it may exist prior to the payment of the premium, see *Russell v. Prudential Ins. Co.*, 176 N. Y. 178, 98 Am. St. Rep. 656, and cases cited in the cross-reference note thereto.

Insurance Premiums may be Recovered back where the policy has been wrongfully canceled by the insurer and the risk has not attached: *Metropolitan Life Ins. Co. v. McCormick*, 19 Ind. App. 49, 65 Am. St. Rep. 392. And it may be said as a rule that if no risk has attached under a policy the premiums paid thereunder may be recovered back, but if the policy has become a binding contract they cannot: *Jones v. Insurance Co.*, 90 Tenn. 604, 25 Am. St. Rep. 706; *Mailhoit v. Metropolitan Ins. Co.*, 87 Me. 374, 47 Am. St. Rep. 336. See, too, *Hogben v. Metropolitan Life Ins. Co.*, 69 Conn. 503, 61 Am. St. Rep. 53; *McDonald v. Metropolitan Ins. Co.*, 68 N. H. 4, 73 Am. St. Rep. 548.

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latter is to be viewed as something distinct from the cause of action itself. The occurrence of the "transaction" and of the facts constituting the cause of action may be simultaneous or not. (Wis.) *Emerson v. Nash*, 944.

5. **PLEADING—Cause of Action—"Transaction."**—All causes of action, within the meaning of the statute, arise out of a circumstance denominated therein a "transaction," and the major "transaction" may occur long prior to the violation of the right constituting the last step completing any one of the various causes of action arising out of such major transaction. (Wis.) *Emerson v. Nash*, 944.

6. **PLEADING—Cause of Action—"Transaction."**—Any event in which two or more persons are actors, involving a right which may presently, or by what may proximately occur in respect thereto, be violated, creating a redressible wrong, is a "transaction" within the meaning of the statute giving a cause of action. All such wrongs which, in the regular course of events, through the rights violated, have such proximate relation to that transaction that it can be legitimately said they arise out of it, are remediable in one action, regardless of the form of the remedy required as to each, provided they affect all of the parties and do not require different places of trial. (Wis.) *Emerson v. Nash*, 944.

7. **PLEADINGS—Cause of Action—Transaction.**—If a contract between two or more on one side and two or more on the other creates a situation involving presently or proximately separate rights upon one side, each of which, with a violation thereof by the other side, would constitute a complete ground of complaint for judicial redress, the initial circumstance—namely, the making of the contract—is a "transaction" within the meaning of the statute, and such grounds of complaint, should they arise, would be separate causes of action arising out of the same transaction within the meaning of the statute. (Wis.) *Emerson v. Nash*, 944.

8. **PLEADING—Joinder of Causes of Action.**—It is no objection to the joinder of causes of action that they concern separate primary rights. If all such causes of action arise out of the same transaction, or transactions connected with the same subject of action, that is sufficient. (Wash.) *Emerson v. Nash*, 944.

ADOPTION.

ADOPTION—Inheritance by Child from Collateral Kindred.—A statute providing that an adopted child shall become the heir of the person adopting it, the same as if a child in fact, does not entitle a child to inherit, by right of representation, from the brother of its adoptive parent. (Mich.) *Van Derlyn v. Mack*, 669.

Note.

Adoption. See Children.

ADVERSE POSSESSION.

1. **ADVERSE POSSESSION—Elements of.**—The essential elements of adverse possession are that it must be hostile, under claim of right, actual, open, and notorious, exclusive and continuous. If any of these constituents is wanting, the possession will not effect a bar to the legal title. (Ala.) *Chastang v. Chastang*, 45.

2. **ADVERSE POSSESSION—Evidence to Show.**—A person claiming to hold land adversely must show by some evidence that he is holding the particular piece of land to which he claims title, and to show that, there must be some evidence of the exact boundaries of the land claimed by him. (Ala.) *Chastang v. Chastang*, 45.

3. ADVERSE POSSESSION—Evidence to Show.—If a person claims adversely under a paper color of title, he will be considered to hold in accordance with the boundaries fixed by the paper, but if he has no paper title, then he can hold only that which he has reduced to actual possession, and in allowing the clear muniments of title to be overcome by parol proof of adverse possession, the proof must be as clear and definite as to what particular tract of land is claimed to be held, as would be required by conveying it by deed. (Ala.) *Chastang v. Chastang*, 45.

4. ADVERSE POSSESSION—Evidence of Cutting Timber.—Without paper title or some other evidence to define the boundaries of land claimed, evidence as to indiscriminate cutting of timber, without designating the particular place, or how often cut at that place, or how much land was cut over, and without proof of the continuous exercise of such right, is insufficient to constitute adverse possession. (Ala.) *Chastang v. Chastang*, 45.

5. ADVERSE POSSESSION.—Payment of Taxes is not evidence of possession, but in connection with evidence of actual possession is admissible to show claim of ownership and the extent of the possession. (Ala.) *Chastang v. Chastang*, 45.

6. ADVERSE POSSESSION—Constructive Possession.—If a person holding the legal title to land obtains constructive possession thereof, no subsequent constructive possession thereof by another, even under color of title, can overlap the possession of the former. (Ala.) *Chastang v. Chastang*, 45.

7. ADVERSE POSSESSION—Constructive Possession.—Nothing short of actual, open, notorious and exclusive possession by another can interrupt the constructive possession which has attached to the legal title. (Ala.) *Chastang v. Chastang*, 45.

8. ADVERSE POSSESSION—Interruption.—If the holder of the legal title to land enters under a claim of right and holds such possession, even jointly, with another person, it is nevertheless an interruption of the continuous adverse possession of the latter. (Ala.) *Chastang v. Chastang*, 45.

9. ADVERSE POSSESSION, When does not Extend to the Whole of the Land Described in a Deed.—If a conveyance purports to convey two parcels of land, to one of which the grantor has title and to the other he has none, the grantee does not, by taking and holding possession of the former, acquire adverse possession of the latter, though the two parcels join and he claims title to both. (Me.) *Proctor v. Maine Cent. R. R. Co.*, 474.

See Remaindermen, 2; Tenancy in Common, 3-7.

Note.

Adverse Possession. See Cotenancy.

ANIMALS.

1. CONSTITUTIONAL LAW—Stock Law.—A statute entitled an act to prevent stock from running at large in a certain county, and providing that whenever ten freeholders in any particular part of such county shall petition the probate judge thereof for an election therein to determine whether stock shall be prohibited from running at large, he shall order such an election, is not unconstitutional as a delegation of legislative powers. Under such statute and petition all of the qualified voters in the proposed district have a right to vote at the election, and they may either approve or defeat the recommendation of the petitioners. (Ala.) *Davis v. State*, 19.

2. **STOCK LAWS—Indictment for Violation.**—An indictment for the violation of a district stock law prohibiting animals from running at large within a designated territory need not allege the various proceedings required by the statute to be had in establishing a stock law in such district. (Ala.) *Davis v. State*, 19.

3. **STOCK LAWS.**—Indictment for Violation of a local or district livestock law conferring jurisdiction upon a justice of the peace within such district of prosecutions for a violation of such law, is not subject to the objection that the crime is a misdemeanor, triable only by a justice of the peace when the jurisdiction conferred by the statute upon the justice is not exclusive and all misdemeanors, are indictable offenses. (Ala.) *Davis v. State*, 19.

4. **STOCK LAWS—Violation—Evidence.**—If a person is charged with the violation of a stock law prohibiting animals from running at large in a certain district, the minute entry in the proper court of the result of an election for, and the establishment thereby of, such district, is admissible in evidence. (Ala.) *Davis v. State*, 19.

APPEAL AND ERROR.

1. **APPELLATE PRACTICE.**—Release of Errors, though presented in writing, and signed by the parties in whose name a writ of error is sued out, cannot be properly brought to the notice of the appellate court, except by being pleaded. (Ill.) *Compher v. Browning*, 346.

2. **APPEAL AND ERROR—Partition.**—Though No Final Judgment has been Entered in a suit for partition, exceptions to the rulings of the trial judge may be heard upon appeal. (Mass.) *Joyce v. Dyer*, 603.

3. **APPEAL AND ERROR—Supersedeas, When does not Extend to Injunctions.**—If an order is entered restraining as a nuisance the continuance of the use and operation of a shooting-gallery, telephone and orchestrion until the final determination of an action, an appeal from such order does not suspend its effect, because the injunction is not mandatory, but preventive. (Wash.) *State v. Superior Court*, 862.

See Damages, 6.

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Appeal, setoff of judgments, whether affected by right of, 149.

APPEARANCE.

1. **APPEARANCE.**—Acceptance of Service by Defendant's Attorney of a motion for an order to sell attached property in a suit against the defendant does not constitute a general appearance on his part when he is not properly served with summons, so as to confer jurisdiction. (Wyo.) *Honeycutt v. Nyquist, Petersen & Co.*, 975.

2. **APPEARANCE—Waiver of Defective Service of Summons.**—If a person upon whom service of summons is defective voluntarily appears in court in person and by attorney, and agrees to the continuance of the hearing of a motion for an order to sell his attached property, he thereby submits himself to the jurisdiction of the court and waives the defective service of summons. (Wyo.) *Honeycutt v. Nyquist, Peterson & Co.*, 975.

3. **JUDGMENT OF FORECLOSURE—Parties, When Bound by and by the Appearance of an Attorney.**—If, in a suit to foreclose a mortgage, a corporation appears and answers the complaint by an attorney, it cannot avoid the effect of the judgment by showing

that it did not employ such attorney, if the suit was prosecuted in its name and with its knowledge, and the decree therein was rendered after such knowledge and without objection on its part. (Ill.) *Thompson v. Hemenway*, 239.

ARREST.

See Homicide, 6-8.

ASSAULT.

ASSAULT.—Opprobrious Words or insulting epithets are not such a provocation as will justify a felonious assault. (Mo.) *State v. Gordon*, 790.

ATTACHMENT.

1. **ATTACHMENT LIEN.**—The lien of an attachment is not displaced by the execution of a forthcoming bond on attachment. (Miss.) *Smith v. Lacy*, 707.

2. **ATTACHMENT—Purchaser Pendente Lite.**—A purchaser of land with knowledge or notice of an attachment lien thereon takes the land subject to the lien with no better right to contest the validity of the lien than his grantor. (Kan.) *Stillman v. Hamer*, 465.

3. **ATTACHMENT—Lien.**—Duration of an attachment lien is the duration of the judgment in which it was perfected. (Kan.) *Stillman v. Hamer*, 465.

4. **ATTACHMENT—Lien—Abandonment.**—Before an attachment lien will be deemed to have been abandoned there must be some affirmative act or conduct of the creditor inconsistent with the continuance of the lien. (Kan.) *Stillman v. Hamer*, 465.

5. **ATTACHMENT—Return of Writ—Collateral Attack.**—The failure of a return of an order of attachment to state whether a copy thereof was left with the occupant of the attached premises is a mere irregularity and not a fatal defect and therefore not open to collateral attack. (Kan.) *Stillman v. Hamer*, 465.

6. **ATTACHMENT—Lien of—Forthcoming Bond.**—If property has been levied upon by writ of attachment and a forthcoming bond given, the surrender of such property by the attachment defendant voluntarily, to a third person having no valid prior right thereto, does not defeat the attachment lien nor release the surety on the forthcoming bond. (Miss.) *Fidelity etc. Co. v. Sturtevant Co.*, 716.

See Garnishment.

ATTORNEY AND CLIENT.

See Appearance; Criminal Law, 6; Trial.

AUTOMOBILES.

See Highway; Municipal Corporations, 1.

BAILMENTS.

See Warehousemen.

BANKRUPTCY.

BANKRUPTCY—Judgment to Enforce Attachment Lien.—A discharge in bankruptcy does not prevent an attaching creditor from taking judgment against the debtor in such limited form as may enable him to reap the benefit of his attachment, and such creditor

may enter such a qualified judgment against the bankrupt as will charge his sureties on the forthcoming bond in attachment. (Miss.) *Smith v. Lacey*, 707.

BANKS AND BANKING.

1. **BANKS AND BANKING—Deposit of Indorsed Check.**—If a check upon another bank is indorsed by the payee and deposited in the bank where he keeps an account, and the latter accepts it and credits the amount as cash to the depositor's account, to be checked against, with nothing to qualify the effect of such acts, the bank accepting the check, *prima facie*, becomes the owner, as distinguished from a mere agent to collect. (Wis.) *Aebi v. Bank of Evansville*, 925.

2. **BANKS AND BANKING—Checks—Indorsement.**—In Order to charge an indorser upon a check or inland bill of exchange payable on demand, presentment must be made by the holder within a reasonable time after it comes into his possession, and such reasonable time, in the absence of special circumstances, is limited to the next business day, or if the payee bank is in another place, the check must be forwarded to the place of payment on the next business day, and presented at latest upon the day following its receipt at the place of payment otherwise, the indorser is discharged. (Wis.) *Aebi v. Bank of Evansville*, 925.

See Garnishment, 1.

BASTARDS.

1. **BASTARDY.**—Dismissal of a bastardy action without prejudice is not a bar to a subsequent action upon the same cause. (Miss.) *Johnson v. Walker*, 733.

2. **BASTARDY—Jurisdiction—Venue.**—A justice of the peace within the county has authority to issue a warrant and jurisdiction to try a bastardy case, even though the affidavit for the warrant was made before a justice of the peace for another district, and the defendant was a householder and resident in neither of their districts. (Miss.) *Johnson v. Walker*, 733.

3. **BASTARDY—Jurisdiction—Complaint.**—It is no ground for objection to a complaint in a bastardy case that it was sworn to before a justice of the peace other than the one before whom the action was commenced. (Miss.) *Johnson v. Walker*, 733.

4. **BASTARDY—Practice—Waiver of Error.**—If the statute provides that the court shall, in bastardy proceedings, cause an issue to be made up as to whether the reputed father is the real father, it is no ground for setting aside a finding that he is, that such formal issue was not made up, if the parties waive that question by proceeding to trial upon the complaint and defendant's affidavit denying that he is the real father. (Miss.) *Johnson v. Walker*, 733.

5. **BASTARDY—Presence of Child in Court.**—In a bastardy proceeding the mere presence of the child in court is not prejudicial error to the defendant, when no profert of such child is made, or offered to be made to the jury, and no reference to it, or its presence, is made by counsel to the jury. (Miss.) *Johnson v. Walker*, 733.

6. **BASTARDY—Mother's Denials of Pregnancy.**—In bastardy proceedings the exclusion of evidence that the plaintiff denied up to the time of her confinement that she was pregnant, or that she had ever had carnal connection with any man, is not prejudicial error. (Miss.) *Johnson v. Walker*, 733.

7. BASTARDY—Evidence of Prior Arrest.—In bastardy proceedings, the defendant cannot complain of testimony by plaintiff that she had caused him to be arrested on a former charge of seduction, especially when such testimony is brought out under cross-examination, after the court has ruled that such testimony is not admissible. (Miss.) *Johnson v. Walker*, 733.

Note.

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declarations of woman in travail, whether necessary as a foundation for, 741.

declarations of woman in travail, who may prove, 744.

travail, time of, what is, 745.

BIGAMY.

See Witnesses.

BILLS AND NOTES.

1. BANKS AND BANKING—Checks—Presentment.—The holder of a check upon learning that an attempted presentation by mail has failed, and that the check is lost at least for the purpose of immediate presentment, owes the duty to the payee of the check to at once make substituted presentment and demand by means of a copy or sufficient description of the check, and, in case of nonpayment, to give notice to the payee. (Wis.) *Aebi v. Bank of Evansville*, 925.

2. BANKS AND BANKING—Check—Failure to Present—Discharge of Indorser.—Failure to present a check for payment, and to give notice of dishonor within a reasonable time, absolutely discharges the indorser without proof of damage or injury to him. (Wis.) *Aebi v. Bank of Evansville*, 925.

3. BANKS AND BANKING—Checks—Failure to Present—Discharge of Indorser.—If an indorser of a check is absolutely discharged by failure to present it for payment, any renewal of his liability must be by a new contract, and his subsequent act in connection with the indorsee in obtaining and indorsing a duplicate check at the request of the latter to enable him to obtain payment, does not constitute a waiver of his previous omissions in failing to make due presentment of the check for payment, nor does it constitute a new contract. (Wis.) *Aebi v. Bank of Evansville*, 925.

4. BANKS AND BANKING—Checks—Discharge of Indorser—New Contract.—Only when an indorser of a check is informed of all the material facts resulting in his discharge from liability, will a new promise of liability be implied from acts which otherwise justify it. (Wis.) *Aebi v. Bank of Evansville*, 925.

BONDS.

See Principal and Surety.

BOYCOTTING.

See Conspiracy.

BUILDING AND LOAN ASSOCIATIONS.

1. **BUILDING AND LOAN ASSOCIATIONS—Mistakes in Favor of Holders of One Series of Stock of.**—The stockholders in one series of stock of a building and loan association cannot profit by the mistakes of its officers in giving them preference over other stockholders. (Ark.) Pine Bluff etc. Assn. v. Thalheimer, 63.

2. **BUILDING AND LOAN ASSOCIATIONS.—The Mistaken Action of Officers of a Building and Loan Association in Prematurely Canceling the Stock and Satisfying a Mortgage of a stockholder does not relieve him from the further obligation of maturing his stock and paying his mortgage indebtedness.** (Ark.) Pine Bluff etc. Assn. v. Thalheimer, 63.

3. **BUILDING AND LOAN ASSOCIATIONS—Laches in Seeking the Cancellation of the Release of a Mortgage.**—Where, by mistake on the part of the officers of a building and loan association, a mortgage is satisfied and the stock of the borrowing member canceled prematurely and before the value equals the amount of the mortgage indebtedness, the fact that the association did not seek to have the release canceled for five years does not preclude it from obtaining that relief where it demanded payment as soon as it discovered the situation and brought suit to recover the balance due within five years thereafter. (Ark.) Pine Bluff etc. Assn. v. Thalheimer, 63.

4. **BUILDING AND LOAN ASSOCIATIONS—Remedy where Series is Prematurely Closed and Stock Canceled and the Mortgage Satisfied.**—If, by mistake on the part of officers of a building and loan association, the stock of one member is prematurely canceled and mortgages given by him released, the holders of such stock are not responsible for subsequent losses and expenses. The amount short of full payment to mature the stock is the amount for which the stockholders remain liable, together with legal interest from such cancellation to the entry of judgment. (Ark.) Pine Bluff etc. Assn. v. Thalheimer, 63.

See Usury.

BUILDING RESTRICTIONS.

See Deeds, 2.

CARRIERS.*Of Goods.*

1. **CARRIERS—Contract with Notice of Special Circumstances.**—If a common carrier receives an article for transportation with notice of special circumstances under which it is sent, he is conclusively presumed to have contracted with reference to enlarged liability in case of a breach of the contract. (Miss.) American Express Co. v. Jennings, 710.

2. **CARRIERS—Negligence in Transportation of Goods.—Damages arising from merely negligent delay in the transportation of freight by a common carrier are generally and correctly treated as arising ex contractu, and cannot be increased by bringing the action in form ex delicto.** (Miss.) American Express Co. v. Jennings, 710.

3. **CARRIERS—Delay in Transportation of Goods—Damages.**—If machinery necessary to the operation of a cotton-gin is sent by

the owner by means of a common carrier for repairs, and after being repaired is redelivered to the carrier without, in either event, giving him notice of any special circumstances in the case, his failure to deliver the machinery to the owner does not render him liable for special damages arising from the enforced idleness of the gin, nor for the time lost by its owner in making inquiry about the machinery. (Miss.) *American Express Co. v. Jennings*, 710.

Of Livestock.

4. **RAILROADS—Carriage of Livestock—Contract Accepting Car.**—A stipulation in a shipper's contract for the carriage of livestock, that the shipper accepts the cars furnished by the carrier and acknowledges that they are sufficient and suitable in every respect for the shipment of livestock, does not relieve the carrier from liability for negligence in supplying unsuitable cars. (Wis.) *Nevins v. Chicago etc. Ry. Co.*, 935.

Of Passengers.

5. **CARRIER—Duty of to Protect Passengers from the Former's Servant.**—A common carrier of passengers impliedly agrees to exercise the utmost care and diligence, consistent with the proper management of its business, to protect its passengers from injury through the misconduct of other persons while it is performing its contract for their transportation. In the application of this rule to injuries caused by a servant of the carrier while engaged in the performance of the contract of carriage, it is liable absolutely for their misconduct. (Mass.) *Hayne v. Union St. Ry. Co.*, 655.

6. **STREET RAILWAYS, Liability of to Passengers for Injuries Caused by an Employé.**—If the conductor of a street railway car, in sport, throws the body of a dead hen at the motorman of another, and, missing him, breaks a window and causes injury to a passenger in his car, the corporation is liable therefor, though the conductor was not acting within the scope of his employment and was not employed on the car in which the injured passenger was riding. (Mass.) *Hayne v. Union St. Ry. Co.*, 655.

7. **CARRIERS—Continuous Journey, Necessity of Pursuing.**—Where a passenger purchases a ticket from Fresno, California, to Philadelphia and return, which requires him to pursue a continuous journey in going, and also in returning as far as St. Louis, but does not expressly require a continuous passage throughout the return trip, as appears from the dates limited for leaving Philadelphia and reaching Fresno, nor contemplate such a passage, he does not forfeit his right to carriage from St. Louis to Fresno by stopping off in Kentucky and thereby forfeiting his rights under his ticket from there to St. Louis and necessitating the purchase of other transportation for that portion of his journey. (Mo.) *Cherry v. Chicago etc. R. R. Co.*, 830.

8. **CARRIERS—Unreasonable Conditions in Tickets.**—No provision contained in a railway ticket, whether expressly or impliedly accepted by a passenger, is binding upon him, unless it is a just and reasonable one in the eyes of the law. (Mo.) *Cherry v. Chicago etc. R. R. Co.*, 830.

9. **CARRIERS—Unreasonable Condition in Ticket—Expulsion of Passenger.**—A provision in a railway ticket requiring passengers, in case of doubt between them and a conductor as to the right of transportation, to pay him what he demands, take his receipt therefor, and report the matter to the general passenger agent, is unreasonable and unenforceable; and if a passenger holding such a ticket, which entitles him to transportation, refuses to pay a cash

fare demanded by a conductor, and the conductor thereupon forcibly expels him from the train, the carrier is answerable in damages. (Mo.) *Cherry v. Chicago etc. R. R. Co.*, 830.

10. **CARRIERS OF PASSENGERS—Free Pass—Contract Against Liability for Negligence.**—A common carrier cannot contract against liability for damages arising in consequence of its own negligence, even in the case of a passenger riding on a free pass, and who has released the carrier from liability for the negligence of its servants. (Miss.) *Yazoo etc. R. R. Co. v. Grant*, 723.

11. **CONNECTING CARRIERS—Sale of Ticket—Authority of Agent.**—If an agent of an initial carrier, in accordance with a custom previously observed by connecting lines, sells a special-rate through ticket, good for return within a time therein limited, he is deemed to have authority to represent each of such lines in so limiting the ticket, whether he is a special or general agent. (Mo.) *Cherry v. Chicago etc. R. R. Co.*, 830.

12. **CONNECTING CARRIERS—Through Ticket—Acceptance of Terms.**—If a connecting carrier has agreed to a proposition for the issuance of sixty-day return limit tickets, it cannot decline to honor such tickets merely because it has not filed its acceptance with the interstate commerce commission as the law requires. (Mo.) *Cherry v. Chicago etc. R. R. Co.*, 830.

13. **CARRIERS OF PASSENGERS, Limiting Liability of by Conditions Printed on Ticket.**—A passenger who purchases a through ticket without knowledge of a condition printed on the back thereof limiting the liability of the initial carrier to its own line is not bound by such conditions. (Ark.) *Little Rock etc. R. R. Co. v. Record*, 67.

Baggage.

14. **CARRIERS OF PASSENGERS—Liability for Baggage on Connecting Lines.**—In the absence of an agreement to the contrary, an initial carrier is liable to a passenger for baggage on connecting lines, where such carrier sells him a through ticket and checks his baggage through to the point of destination. (Ark.) *Little Rock etc. R. R. Co. v. Record*, 67.

15. **CARRIERS OF PASSENGERS.—Baggage is Whatever a passenger takes with him for his personal use and convenience according to the habits and wants of the particular class to which he belongs with reference either to the immediate necessities or to the purposes of the journey.** (Ark.) *Little Rock etc. R. R. Co. v. Record*, 67.

16. **CARRIERS OF PASSENGERS.—Whether Two Shotguns are Baggage** when they are taken by a passenger on a journey, to be used in hunting, is a question for the jury. (Ark.) *Little Rock etc. R. R. Co. v. Record*, 67.

17. **CARRIERS, Liability of Initial for Baggage.**—A carrier who sells a through ticket and receives baggage for transportation over its own and connecting lines is liable for its loss by a connecting carrier, in the absence of an express contract to the contrary. (Ark.) *Kansas City etc. R. R. Co. v. Washington*, 61.

CHATTEL MORTGAGES.

1. **MORTGAGE—Voluntary Delivery of the Property to the Mortgagee, What Equivalent to.**—The taking possession of mortgaged chattels by the mortgagee, in the exercise of an authority expressly granted by the mortgage, is equivalent to its voluntary delivery to him by the mortgagor. (Me.) *Burrill v. Whitcomb*, 498.

2. MORTGAGE on After-acquired Chattels, When Takes Precedence Over an Attachment.—If a mortgage includes an existing stock of merchandise and all such stock to be acquired, and authorizes the mortgagee to take possession of the mortgaged property and all additions which may be made thereto whenever he shall deem it to his interest to do so, and, acting under this authority, he takes possession of subsequently acquired parts of such stock, though not acquired by the proceeds of the property owned by the mortgagor at the date of the mortgage, his rights as mortgagee become perfect and are superior to those of a creditor attaching after possession was taken. (Me.) *Burrell v. Whitcomb*, 498.

3. MORTGAGES OF CHATTELS—After-acquired Property—Description.—A mortgagor who has an actual interest in praesenti in certain personal property may mortgage not only that property, but also such other property as the mortgagor may thereafter acquire, provided such future acquisitions are to be used in and about the business, or are attached or appurtenant to, and necessary for, such business, or are the natural products arising from the operation of such business, and also provided that the mortgage definitely and specifically describes the property to be acquired. (Miss.) *Fidelity etc. Co. v. Sturtevant Co.*, 716.

4. MORTGAGES OF CHATTELS—After-acquired Property—Description.—A chattel mortgage covering all of the mortgagor's property and franchises of every nature and description, whether then owned or thereafter to be acquired, including all equipments, machinery, etc., in a certain town and elsewhere, together with the factories, tenements and appurtenances belonging to the property, and the reversion, remainders, tolls, rents and profits, and all the estate, title and interest in law or in equity, which the mortgagor "now owns or may hereafter acquire," in the property, is not sufficiently definite in its description to convey, as against third persons, the after-acquired property of the mortgagor. (Miss.) *Fidelity etc. Co. v. Sturtevant Co.*, 716.

5. CHATTEL MORTGAGES—Sale of Mortgaged Property by Commission Merchant—Notice.—A commission merchant, who receives mortgaged personal property sent to him for sale, without the knowledge or consent of the mortgagee, and in violation of the terms of the mortgage, and who sells it and pays the proceeds, less his commission, to the consignor without actual notice of the mortgage, does not receive such a benefit from the transaction as to authorize the mortgagee to waive the tort and recover in an action upon an implied contract. (Kan.) *Greer v. Newland*, 424.

6. CHATTEL MORTGAGES—Record of as Notice.—The recording of a chattel mortgage does not impart constructive notice to a commission merchant to whom the mortgaged property is sent for sale, and who sells it, and pays the proceeds, less his commission, to the consignor. (Kan.) *Greer v. Newland*, 424.

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CIVIL DEATH.

See Convicts.

COMMERCE.

1. **POLICE POWER—Production of Articles of Commerce.**—The control of the state, in the exercise of its police power, over the production of the articles of commerce, is as absolute and unqualified as the control of Congress over their interstate distribution. (Miss.) *Ex parte Fritz*, 700.
2. **INTERSTATE COMMERCE.**—The right to import a lawful article of commerce from one state to another continues until a sale in the original package in which the article was introduced into the state. (Wis.) *Greek-American Sponge Co. v. Richardson Drug Co.*, 961.
3. **INTERSTATE COMMERCE** carried on by corporations organized within different states stands upon the same footing, and is entitled to the same protection as if conducted by individuals. (Wis.) *Greek-American Sponge Co. v. Richardson Drug Co.*, 961.
4. **INTERSTATE COMMERCE—Foreign Corporations.**—A contract for the sale of a lawful article of commerce while it is an article of interstate commerce, is not governed by a state statute prescribing conditions upon which foreign corporations may do business within the state and deprive them of the right in certain cases to recover on a contract made without compliance with its provisions. (Wis.) *Greek-American Sponge Co. v. Richardson Drug Co.*, 961.
5. **INTERSTATE COMMERCE—Foreign Corporations—Constitutional Law.**—A state statute which imposes conditions restricting foreign corporations in their right to make contracts pertaining to commerce between the states is an invasion of their constitutional right, under the provision of the national constitution, which confers upon Congress the power to regulate such commerce and hence such statute is void. (Wis.) *Greek-American Sponge Co. v. Richardson Drug Co.*, 961.

CONSPIRACY.

1. **CONSPIRACY—Boycotting—Damages.**—Any person or combination of persons, who unlawfully, by direct or indirect means, obstructs or interferes with another in the conduct of his lawful business, is liable for any loss willfully caused by such interference. (Ill.) *Purington v. Hinchliff*, 322.
2. **CONSPIRACY—Boycotting—Liability of Co-conspirators.**—All parties to a conspiracy to ruin the business of another, because of his refusal to do some act against his will or judgment, are liable for all overt acts illegally done pursuant to such conspiracy, and for the subsequent loss, whether they were active participants or not. (Ill.) *Purington v. Hinchliff*, 322.
3. **CONSPIRACY to Boycott—Liability.**—An agreement between persons not to purchase, use or lay brick made by any person who does not subscribe to the rules of a builders' association, made for

the purpose of injuring the business of such person is unlawful, and the parties thereto are liable in damages for all acts done in pursuance thereof, to the damage of the boycotted person. (Ill.) *Purington v. Hinchliff*, 322.

CONSTITUTIONAL LAW.

1. **CONSTITUTIONAL LAW—Police Power, Limitation upon.**—The legislature, under the guise of police regulation, cannot enact laws which do not pertain to the public health, welfare, or morals, and which impose onerous and unnecessary burdens upon business and property. (Cal.) *Ex parte Hayden*, 183.

2. **CONSTITUTIONAL LAW—Police Power, Duty of the Courts to Determine What is a Valid Exercise of.**—When, in an assumed exercise of the police power, attempts are made to regulate a business or occupation which is in itself recognized as innocent and useful to the community, it is always a judicial question whether such regulation is a valid exercise of the police power. (Cal.) *Ex parte Hayden*, 183.

3. **CONSTITUTIONAL LAW—Labor Contracts.**—A statute making it a misdemeanor for anyone under contract in writing to labor, or work land for any given time, to break his contract and enter into another one with a different person without the consent of his employer, and without sufficient excuse, and without giving notice of his old contract to the person with whom he makes the new one, is unconstitutional and void as violative of the constitutional guaranty of life, liberty and property, and as abridging the privileges and immunities of citizens. (Ala.) *Toney v. State*, 23.

4. **CONSTITUTIONAL LAW.—Forbidding Women to Enter Saloons.**—While a city may forbid females to enter, for immoral purposes, places where intoxicating liquors are sold, it may not forbid any person keeping such a place to permit females to enter therein regardless of their motive or purpose. (Idaho.) *State v. Nelson*, 226.

5. **CONSTITUTIONAL LAW—Limitation of the Right to the Use of One's Real Property.**—While the use to which a man may put his property may be restricted or regulated by the state in the exercise of its police power so far as may be necessary to protect others from injury from such use, the enjoyment of one's property by him cannot be interfered with or limited arbitrarily. The next thing to depriving him of his property is to circumscribe him in its use. (Cal.) *In re Kelso*, 178.

6. **CONSTITUTIONAL LAW.—The Liberty and Pursuit of Happiness in Which an Individual is Protected by the constitution of the United States and of the state applies as fully to his right to contract, and his right to follow a legitimate vocation, untrammelled by unnecessary regulations, as it does to the freedom from arrest or restraint of his person.** (Cal.) *Ex parte Hayden*, 183.

7. **CONSTITUTIONAL LAW.—The Right to Run a Sawmill on the Bank of a Brook or River is, like all other rights of property, subject to be regulated by the state when the unrestrained exercise of it conflicts with other rights, private or public.** (Mass.) *Commonwealth v. Sisson*, 630.

8. **CONSTITUTIONAL LAW—Insane Person Acquitted of Crime, Statute Authorizing Imprisonment of.**—A statute declaring that when any person indicted or informed against for an offense shall be acquitted by reason of insanity, the jury giving their verdict of not guilty shall state that it was given for such cause, and thereupon

if the discharge or going at large of such person is manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison, is not forbidden by the constitution of the United States or the constitution of Washington. (Wash.) *In re Brown*, 868.

9. **CONSTITUTIONAL LAW—Estates of Decedents, Imposition of Fees Regulated by the Value of the Estate.**—A statute imposing on estates in probate graduated fees regulated by the value of the estate, cannot be sustained under a constitution providing for the taxation of property in proportion to its value, and that all of the taxes shall be uniform in respect to persons and property within the jurisdiction of the body levying the same. (Wash.) *State v. Case*, 874.

10. **CONSTITUTIONAL LAW.**—A statute providing that all fruit, green and dried, contained in boxes, barrels, or packages, which shall be shipped or offered for shipment in the state, shall have stamped, branded, stenciled, or labeled in a conspicuous place on the outside thereof, in clear, legible letters, a statement truly designating the county and immediate locality in which the fruit was grown, is not an exercise of the police power, and is void as an unconstitutional invasion of liberty. (Cal.) *Ex parte Hayden*, 183.

11. **CONSTITUTIONAL LAW—Regulation of Sale of Milk.**—It is competent for the city of St. Louis to fix, by ordinance, the standard of quality of milk sold within the municipality, and to prohibit the sale of milk of a quality inferior to that standard. (Mo.) *St. Louis v. Liessing*, 774.

12. **CONSTITUTIONAL LAW—Regulation of Sale of Milk.**—An ordinance which fixes the standard of quality of milk sold in the city, prescribes the method by which the milk is to be tested, and charges the city chemist with the duty of analyzing milk submitted to him by inspectors, which analysis is not conclusive, is not unconstitutional as committing to a single officer absolute power in controlling a necessary article of food. (Mo.) *St. Louis v. Liessing*, 774.

13. **CONSTITUTIONAL LAW—Regulation of Sale of Milk.**—An ordinance exacting a registration fee of one dollar per annum from milk venders, and an occupation tax of two dollars and a half for each six months of the year, and twenty-five dollars from wholesalers, is not oppressive. (Mo.) *St. Louis v. Liessing*, 774.

14. **CONSTITUTIONAL LAW—Ordinance Invalid in Part.**—The provision of an ordinance making it a crime to sell milk below a specified standard, if severable from and not dependent upon other invalid provisions of the enactment, may be susceptible of enforcement. (Mo.) *St. Louis v. Liessing*, 774.

See Animals; Eminent Domain; Fish.

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CONTRACTS.

In General.

1. **CONTRACTS—When Consummated.**—If the parties to a contract intend that it shall be closed and consummated prior to the formal signing of a written draft, the terms having been mutually understood and agreed upon, the parties will be bound by the contract actually made, although it is not reduced to writing, but if the parties do not intend to close the contract until it shall be fully expressed in writing, then there is no completed contract until the agreement is reduced to writing and signed. (Wyo.) *Summers v. Mutual Life Ins. Co.*, 992.

2. **CONTRACTS.—The Meeting of Minds**, which is essential to the formation of a contract, is not determined by the secret intentions of the parties, but by their expressed intentions, which may be wholly at variance with the former. (Mich.) *Hudson v. Columbian Transfer Co.*, 679.

3. **WRITINGS, When to be Construed Together.**—Two written agreements between the same parties and the checks given by the one to the other pursuant to such agreements form substantial parts of the same contract, and should be construed together. (Cal.) *Getz Bros. & Co. v. Federal Salt Co.*, 114.

4. **CONTRACTS—Contradictory Provisions—Evidence to Explain.** If a contract contains two inconsistent and contradictory descriptions of time for its operation, each of which is perfectly clear in

itself, parol evidence is admissible not to vary the contract or make one for the parties, but to make clear what the contract really is. (Miss.) *Traders' Ins. Co. v. Edwards* Post No. 22, *Grand Army of the Republic*, 699.

5. **CONTRACTS.—The Mere Fact that a Contract is not Specifically Enforceable** does not render it either void or voidable. (Cal.) *Norris v. Lilly*, 188.

6. **CONTRACTS Based upon Considerations Partly Illegal.—If** some of the covenants of an agreement import a base or illegal consideration and the terms of the contract are not severable, it is wholly void. (Cal.) *Getz Bros. & Co. v. Federal Salt Co.*, 114.

Restraint of Trade.

7. **TRADE, Contracts in Restraint of and in Violation of the Sherman Anti-trust Act.—A** contract by which one of the parties sells to the other all the salt which the latter has on hand and all contracts or options which he may secure within two years, and by which the seller further stipulates that he will, for the period of two years, make no purchases of salt except from his vendee, nor import any to the Pacific Coast, and will discourage all such importation, and that if he violates the contract, such seller will pay five thousand dollars as liquidated damages, is in violation of the statutes of California against the restraint of trade and also of the Sherman anti-trust act, and checks given as part of the consideration for the making of such contract are not enforceable. (Cal.) *Getz Bros. & Co. v. Federal Salt Co.*, 114.

See Damages, 3-5.

CONTRIBUTION.

1. **CONTRIBUTION, General Right of.—When** several are equally liable for the same act, and one is compelled to pay the whole, he may have contribution against the others to obtain from them the payment of their respective shares. (Mass.) *Putnam v. Misochi*, 648.

2. **CORPORATION—Stockholders, Right of One Against Another to Contribution.—A** stockholder who has been compelled to pay more than his share of the debts of the corporation may maintain an action against his costockholders for contribution. This rule is applicable, though the corporation is organized under the laws of another state under whose statutes the liability which was enforced against the plaintiff was created, and he, after satisfying the judgment against him in that state, made no demand of the corporation and took no action against it. (Mass.) *Putnam v. Misochi*, 648.

CONVEYANCES.

See Deeds.

CONVICTS.

1. **CONVIOT'S ESTATE—Status of Convicted Murderer.—A** convicted murderer who has been sentenced to death under a statute providing that the death penalty shall be inflicted at a time to be appointed by the governor after the expiration of one year from the time of conviction is not, during the time of his detention in the penitentiary after conviction, legally dead, nor rendered incapable of managing his own estate. Such a sentence is not one of imprisonment for life, or for a term less than natural life. (Kan.) *Gray v. Stewart*, 461.

2. JUDGMENTS Against Convicts—Dormancy.—If, while a convicted murderer sentenced to death is in prison, his land is sold under a judgment rendered before his imprisonment, and the sale is confirmed and a deed issued, the judgment is not dormant by reason of such imprisonment, and the proceedings and deed are valid. (Kan.) *Gray v. Stewart*, 461.

CORPORATIONS.

In General.

1. CORPORATION, Increase of Capital Stock of—Notice Required by the Constitution and Statute cannot be Waived.—If the constitution and statutes of a state provide that the capital stock of a corporation cannot be increased without the consent of the persons holding the larger amount in value of the stock at a meeting called for that purpose, giving sixty days' public notice as may be provided by law, a meeting without such notice at which all the stockholders and the subscribers for stock are present and sign a written consent to such increase is entirely inadequate. (Cal.) *Navajo Mining etc. Co. v. Curry*, 176.

2. CORPORATIONS, Directors of, Liability of for Committing Management to Its President.—The directors of a corporation are not excused from liability resulting from their committing the management of the corporation to its president on the ground that they believed him to be honest, faithful, and competent, and had reason for such belief, and no reasonable ground to believe that he was misappropriating funds to his own use or to the loss and detriment of the stockholders. (Ark.) *Fletcher v. Eagle*, 100.

3. CORPORATIONS—Contracts—Presumption.—If an executed contract is under the seal and bears the signature of the corporation and its officers, it will be presumed not only that the contract was in fact made and executed by the corporation, but also that its officers had power to make it. (Iowa.) *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 387.

4. CORPORATIONS—Estoppel.—A corporation cannot accept and ratify contracts in so far as they are beneficial to it, and repudiate them in so far as they impose any liability on it, on the ground of want of authority in its officers to make such contracts. (Iowa.) *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 387.

5. CORPORATIONS—Power to Repurchase Stock.—A corporation has power, in the absence of charter restrictions, to make valid contracts for the repurchase of its own stock. (Iowa.) *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 387.

6. CORPORATIONS—Contracts—Ultra Vires.—A contract between a corporation and certain of its stockholders to pay dividends in passes, and in case of sale of its franchise to repurchase their stock is not ultra vires and void as against public policy, where the corporation is not insolvent and no fraud is shown. (Iowa.) *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 387.

7. CORPORATIONS—Ultra Vires Contracts.—The plea of ultra vires is not favored, and when a corporation has received the benefits growing out of a contract, it will be enforced against the corporation unless entered into through fraud, or there are persuasive considerations of public policy involved. (Iowa.) *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 387.

Religious Corporations—Dissolution and Reorganisation.

8. CORPORATIONS, RELIGIOUS—Dissolution and Reorganization.—The members of an insolvent and dormant church corpora-

tion may, in the absence of fraud, incorporate a new organization for the promotion of the same purposes to which the old one was dedicated, without becoming chargeable with its debts and obligations, provided there is a bona fide intention to make a new and independent organization, and not to take over, absorb, or convert to its use the property or assets of the old corporation to the prejudice of its creditors. (Iowa.) *Allen v. North Des Moines M. E. Church*, 366.

9. CORPORATIONS—Dissolution and Reorganization—Liability. If a new corporation takes over the property of its insolvent predecessor, it is not, generally speaking, liable to the creditors of the latter, as a debtor, but only as a trustee. (Iowa.) *Allen v. North Des Moines M. E. Church*, 366.

10. CORPORATIONS, RELIGIOUS—Liability of Members.—A creditor of a religious corporation is not a creditor of its individual members, and has no right of action against them as such. (Iowa.) *Allen v. North Des Moines M. E. Church*, 366.

See Commerce, 3-4; Contribution, 2; Francaise.

Note.

Corporations, Religious. See Religious Associations.

COSTS.

COSTS.—When an Executor Brings a Suit to determine the rights of a person who claims a share in the estate, but who in fact has no interest therein, costs should not be imposed on the estate. (Mich.) *Van Derlyn v. Mack*, 669.

See Garnishment, 5; States, 2.

COTENANCY.

See Tenancy in Common.

Note.

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- ouster of cotenant does not result from the mere acceptance of a conveyance in severalty, 616.
- ouster of cotenant under conveyances in severalty, at what time deemed to take place, 616.
- ouster of cotenant, whether depends on ignorance of the true state of the title, 616.
- ouster of one cotenant by another, acts essential to, 618.
- ouster of one cotenant by another by refusal of the latter to let the former in possession, 621.
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- ouster of one cotenant by another may be of part only of the common property, 610.
- ouster of one cotenant by another, notoriety essential to, 618, 619.
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- ouster of one cotenant by another, various acts as evidence of, 622.
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- possession, rights of the several cotenants in, 609.
- rents and profits, the exclusive taking of by one cotenant is not necessarily an ouster of the others, 621.

COUNTERCLAIM.

See Setoff and Counterclaim.

CRIMINAL LAW.*Corpus Delicti.*

1. **CRIMINAL LAW—Corpus Delicti.**—The corpus delicti consists of two essential elements, which are, the fact of death, and the criminal agency of some person as to the cause of death. (Ill.) Hoch v. People, 327.

2. **CRIMINAL LAW.**—The Corpus Delicti must be clearly established, but it may be proved by circumstantial evidence alone. (Ill.) Hoch v. People, 327.

Evidence.

3. **CRIMINAL LAW—Other Crimes, Evidence of Conspiracy to Commit.**—Where, on a trial for murder, there is evidence to show that the decedent, while acting as a policeman, but not wearing any uniform, was shot and killed by the defendant, evidence is properly admitted to the effect that the defendant and others were a party of burglars on their return from the scene of a proposed, but abandoned, burglary, having burglars' tools in their possession, because such evidence justifies the inference that the defendant did not act in self-defense against one who is not in uniform and did not announce himself as an officer, and that the officer in what he did, including the firing off of his own pistol, did nothing more than his duty under the circumstances. (Cal.) People v. Woods, 151.

4. **CRIMINAL LAW, Evidence of Other Attempted Crimes.**—In a trial for murder in the shooting and killing of a policeman, evidence is properly admitted that just prior to such shooting the defendant and two others attempted to rob a third person, whose outcry and the consequent flight of the trio attracted the attention of the policeman and brought on the encounter resulting in his death. These facts, immediately preceding and leading up to the commission of the crime, are a part of the res gestae. (Cal.) People v. Woods, 151.

5. **CRIMINAL LAW—Statements Made by Accused as Evidence.** Admitting in evidence statements made by an accused, in explanation of certain of his acts, after being warned that whatever he said might be used against him is not error. (Ill.) Hoch v. People, 327.

Misconduct of Counsel.

6. **CRIMINAL TRIAL—Alleged Misconduct of Prosecuting Attorney.**—Where the defendant on trial for murder was designated in the indictment F. W. alias S. L. F., and his motion to strike the alias from the indictment being denied the court instructed the clerk not to read the words "alias S. L. F." to the jury, the fact that the prosecuting attorney in his opening statement spoke of the defendant F. W. alias S. L. F., but on objection, asked pardon, does not constitute such misconduct as to entitle the defendant to a new trial. (Cal.) People v. Woods, 151.

Sentence.

7. **CRIMINAL LAW—Sentence—Sufficiency of as Judgment.**—If the verdict determines the character of the crime and the penalty, the sentence by the court upon the verdict is a judicial determination of the fact of the defendant's conviction, and is sufficient as a judgment. (Ill.) Higgins v. Higgins, 327.

See Insane Persons; Jurors.

Not

Crops. See Growing Crops.

DAMAGES.*In General.*

1. **DAMAGES FOR PERSONAL INJURY—Size of Family.**—In action for personal injuries claimed to have been suffered from the defendant's negligence, it is error to permit the plaintiff to prove the size of his family, and thereby show that it consists of ten or twelve persons. It will be presumed that this evidence aroused the sympathy of the jury and enhanced the damages beyond the amount which the law permits. (Ark.) *St. Louis etc. Ry. Co. v. Adams*, 85.

2. **DAMAGES—Measure of Discretion of Jury.**—The amount of damages to be awarded in a case involving the consideration of both physical and mental pain and suffering is peculiarly a matter for the jury, and its verdict must stand unless grossly excessive. (Miss.) *Yazoo etc. R. R. Co. v. Grant*, 723.

3. **CONTRACTS—Breach—Damages.**—Upon the breach of a contract the damages recoverable are such as may fairly and reasonably be considered either as arising naturally from such breach, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of a breach of it. (Miss.) *American Express Co. v. Jennings*, 710.

4. **CONTRACTS—Breach—Special Circumstances—Measure of Damages.**—If the special circumstances under which a contract is made are known to both parties, the damages resulting from its breach, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach under the special circumstances so known, but if such special circumstances are unknown to the party breaking the contract, he can only be supposed to have had in contemplation the amount of injury which would arise generally from such breach, not affected by the special circumstances. (Miss.) *American Express Co. v. Jennings*, 710.

5. **CONTRACTS—Breach—Damages—Notice of Special Circumstances.**—To hold one of the parties to a contract to extraordinary damages for its breach, it is necessary that at the time or before the contract was made, he should have had notice of the exceptional circumstances that may warrant them and under which the contract is made. (Miss.) *American Express Co. v. Jennings*, 710.

Remitting Amount by Appellate Court.

6. **DAMAGES, Allowing Plaintiff to Remit and then Affirm the Judgment.**—Where evidence has been erroneously admitted tending to enhance the amount of plaintiff's damages, but there is no doubt of his right of recovery, the appellate court may, in its discretion, name a sum which is clearly not excessive, and, as a matter of grace to the plaintiff, allow him to accept judgment for that sum, instead of a new trial. (Ark.) *St. Louis etc. Ry. Co. v. Adams*, 85.

See Sales, 3-5.

Note.

Damages. See Constitutional Law.

DECLARATIONS.

See Evidence, 6-10.

DEEDS.*In General.*

1. **A CONVEYANCE, the Consideration of Which is the Promise of the Grantee to Support the Grantor,** though such promise cannot be specifically enforced, is valid and cannot be rescinded at the instance of the former if the latter has performed, or is in good faith engaged in the performance of the promise. [Overruling *Grimmer v. Carlton*, 93 Cal. 189, 27 Am. St. Rep. 171, 28 Pac. 1043.] (Cal.) *Norris v. Lilly*, 188.

2. **CONVEYANCE by One Disseised.**—Prior to the statute of 1891 a conveyance by a disseised person, unless delivered upon the premises, was inoperative to pass his interest. (Mass.) *Joyce v. Dyer*, 603.

3. **DEEDS—Building Restrictions.**—A restriction in a deed that the premises shall not be occupied "except for one dwelling-house to each lot," is violated by the erection of a two-story building designed for two dwellings, one to occupy the ground floor and one the second floor, and each to have a separate entrance. (Mich.) *Harris v. Roraback*, 681.

Delivery—Registration.

4. **DEED.**—The Delivery of a Deed may be by acts or words or both, or by one without the other; but what is said or done must clearly manifest the intention of the grantor and the grantee that the deed shall at once become operative to pass the title to the land conveyed and that the grantor shall lose all control of it. (Ill.) *Creighton v. Roe*, 310.

5. **DEED, Delivery of.**—In the Case of a Voluntary Settlement the law makes a stronger presumption in favor of delivery than in the ordinary case of bargain and sale, for the reason that it is an attempt on the part of the grantor to make a settlement. (Ill.) *Creighton v. Roe*, 310.

6. **DEEDS, Delivery of.**—The Placing of Record by a Grantor of a Voluntary Conveyance to his daughter raises a presumption of its delivery, though he retained possession of the property as his own. (Ill.) *Creighton v. Roe*, 310.

Grant of Timber.

7. **TIMBER, Effect of Grant of with a Provision for Removal Within a Time Specified.**—A grant of all the timber standing, lying, or being on a specified tract of land, providing that the grantor will remove it within ten years, and if he does not do so, that he will pay a designated yearly rental for the privilege of removal, is an absolute contract for the sale of such timber, and the failure to remove it within the time stipulated does not divest the purchaser of his title, though he has not paid rent for the subsequent period. (Cal.) *Peterson v. Gibbs*, 107.

8. **TIMBER, Contract to Remove, When not Affected by the Prior Intention of the Parties.**—A grant of the timber on a specified tract of land containing an agreement to remove it within a time specified, and if not so removed, to pay rent, is not controlled or affected by proof that it was the intention of the parties that the vendees should commence the removal within three years from the date of the instrument. (Cal.) *Peterson v. Gibbs*, 107.

See Acknowledgments.

Note.

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DIVORCE.

1. **DIVORCE.**—Whether the Plaintiff had an Alleged Cause for Divorce or whether the allegations of his bill and the proofs to sustain them were true or not does not affect the validity of the decree of divorce, if the court had jurisdiction to enter it. (Ill.) *Forrest v. Fey*, 249.

2. **DIVORCE, Decree of, Presumption of Jurisdiction.**—Where a court of general jurisdiction proceeds to adjudicate a cause, there is a presumption of jurisdiction, but this presumption applies only when the record is silent on the question, and if there is an affirmative showing in the record that there is no jurisdiction, the judgment or decree is void. (Ill.) *Forrest v. Fey*, 249.

3. **DIVORCE Granted in Another State.**—Where a transcript of a decree entered in another state, duly certified, is offered in evidence in this state, no questions are open to inquiry except those of jurisdiction. (Ill.) *Forrest v. Fey*, 249.

4. **DIVORCE in Another State, Conclusiveness of.**—A decree of divorce entered in another state, if the court has jurisdiction, has the same effect in every other state as in the state where rendered, and is conclusive of the merits of the controversy, no matter what fraud may have intervened. (Ill.) *Forrest v. Fey*, 249.

5. **DIVORCE, Decree of in a Sister State, When Void.**—If a decree of divorce is granted in another state against a nonresident defendant, and it appears that service of process was by publication, and the statute of the state, to authorize such publication, required an affidavit of such nonresidence, and the draft of affidavit found among the papers is neither signed by the proper deponent nor by any officer purporting to administer an oath, the court was without jurisdiction, and the decree is void. (Ill.) *Forrest v. Fey*, 249.

Note.

Divorce, decree of, effect which must be given to in another state, 255.

DOWER.

See Husband and Wife, 1-7.

EASEMENT.

EASEMENT.—An Easement is an Interest in land; it is an estate—a dominant estate imposed upon a servient tenement. (Md.) *Consolidated Gas Co. v. Mayor etc. of Baltimore*, 584.

See Trespass.

EAVES.

See Trespass.

EMINENT DOMAIN.

In General.

1. **EMINENT DOMAIN**—Power of the Legislature and the Courts. It is for the legislature, and not for the courts, to say whether there is any such demand or exigency in a locality for electric lights as will justify the exercise of the right of eminent domain. (Me.) *Brown v. Gerald*, 526.

2. **EMINENT DOMAIN.**—When a corporation is authorized by the legislature to exercise the right of eminent domain for several purposes, some of which are constitutional and others not, with a

discretion in the grantee to exercise the right when and where it chooses within a large territory, it must use its discretion in good faith. Its actual purpose is open to inquiry, and if it is not one of the constitutional purposes, the exercise of the right by it must be denied by the courts. (Me.) *Brown v. Gerald*, 526.

3. **EMINENT DOMAIN and Governmental Regulation.**—When the legislature grants to a corporation the right of eminent domain, and the corporation accepts and exercises the grant, it thereby impliedly comes under obligation to the public to perform all those duties in which the public are interested and to aid in the performance of which the right of eminent domain was granted. It can be compelled to perform them and at reasonable rates, and subjects itself to public regulation and control, and to the forfeiture of its charter for the failure to perform. (Me.) *Brown v. Gerald*, 526.

Public Use.

4. **EMINENT DOMAIN, Purpose for Which the Exercise of the Right of is Sought—Power of the Courts to Inquire into.**—When a corporation seeks to exercise the right of eminent domain, it is within the power of the courts to inquire the purpose for which the right is actually sought, and to determine from evidence aliunde the actual business proposed to be conducted, and to deny the right if such business is not found to be one for which the power of eminent domain may be exercised. (Me.) *Brown v. Gerald*, 526.

5. **EMINENT DOMAIN, Exercise of Power of, When not Sought for Lighting Purposes.**—A corporation which, though willing to furnish electricity for lighting purposes, has but one customer, and few or none in prospect, and which has contracted to deliver, to be used for power purposes, all the other electricity generated by its plant, must be held to be engaged in generating and distributing electricity for power purposes, and not for lighting, and hence is not entitled to exercise the power of eminent domain for lighting purposes. (Me.) *Brown v. Gerald*, 526.

6. **EMINENT DOMAIN, Public Use, What is not.**—A public use such as justifies the taking of private property against the will of the owner may not rest merely on public benefit, or public interest, or great public utility. (Me.) *Brown v. Gerald*, 526.

7. **EMINENT DOMAIN.**—A Use is not Public Unless everyone who has occasion has the right to use. (Me.) *Brown v. Gerald*, 526.

8. **EMINENT DOMAIN—A Use is not Necessarily Made a Public Use by Multiplying the Number of Persons Who may Have Occasion to Use.**—Thus, if the business of generating, conducting, and selling electricity is carried on to promote manufacturing or mechanical purposes, it cannot be regarded as a public use because a large number of persons may desire to use such electricity for such purposes. (Me.) *Brown v. Gerald*, 526.

9. **EMINENT DOMAIN—Public Use—Manufacturing Purposes.**—There is nothing in the creation and distribution of power for manufacturing purposes, no matter how great their general utility, which makes it alike proper, useful, and needful for the government to provide it, and hence it does not justify the exercise of the power of eminent domain. (Me.) *Brown v. Gerald*, 526.

10. **EMINENT DOMAIN.**—Electric Lighting for the Public is a public use, and a corporation engaged in that business may properly be granted the right of eminent domain for that use. (Me.) *Brown v. Gerald*, 526.

11. **EMINENT DOMAIN—Corporation for Generating Electricity, When not Entitled to Exercise Power of.**—A corporation authorized

by its charter to manufacture, generate, sell, distribute, and supply electricity for lighting, heat, railway, manufacturing, or mechanical purposes in specified towns, but which in fact is only engaged in the business specified in so far as it relates to manufacturing and mechanical purposes is not entitled to exercise the right of eminent domain, though the statute purports to grant it that right, and it has by its vote recognized itself as a quasi public corporation and pledged itself to the performance of its duties as such in furnishing the public with electric light and power and to make all extensions necessary to meet the public demand for light and power. (Me.) *Brown v. Gerald*, 526.

Damage to Property.

12. **CONSTITUTIONAL LAW—Damaging Property, What is.**—The word ‘‘damaged’’ as used in the provision of the constitution providing that private property shall not be taken or damaged for public or private use without just compensation having been first made or paid into court does not give a right of action in a case where the injury would have been, in the absence of such word, *damnum absque injuria* in an action against a natural person or a private corporation. (Wash.) *Smith v. St. Paul etc. Ry. Co.*, 889.

13. **RAILWAYS, When do not Damage Property Within the Meaning of the Constitution.**—A railway, the operation of which on its own land by the ringing of bells, the sounding of whistles, and other noises incident to the running of trains, together with the smoke, soot, fumes and cinders from its locomotives, and the jarring of the earth by passing trains, lessens the value of real property, does not damage such property, where the road does not pass through nor immediately adjoining it, within the meaning of the constitution declaring that no property shall be taken or damaged for public or private use without just compensation being first made or paid into court. (Wash.) *Smith v. St. Paul etc. Ry. Co.*, 889.

14. **RAILWAYS, Damage by Excavating Through Cross-streets.**—Excavations by a railway company through cross-streets affecting accessibility to other streets do not constitute damage to property therein within the meaning of the constitution, for which the property owner may recover, though he uses such streets more than anyone else. (Wash.) *Smith v. St. Paul etc. Ry. Co.*, 889.

Note.

Eminent Domain, mortgagee’s right to compensation awarded in proceedings for, 437.

See Constitutional Law.

EMPLOYER’S LIABILITY.

See Master and Servant.

ENTIRETIES.

See Husband and Wife, 1-7.

EQUITY.

1. **EQUITY JURISDICTION—Relief from Probate Decree—Guardianship Settlement.**—A court of equity having jurisdiction to compel the settlement of a guardianship may and will under a bill for that purpose, and under the general prayer, set aside a decree of the probate court discharging such guardian when it is shown that such decree was obtained by him through fraud or other improper conduct. (Ala.) *Willis v. Rice*, 26.

2. PROBATE COURT, Jurisdiction of, When not Destroyed by Suit in Chancery.—The assumption by a court of equity of jurisdiction in a suit to correct a fraud and mistake in an account of administrators and guardians does not lift the estate out of the probate court, where it is still open and where the exclusive jurisdiction of administering it is lodged by the constitution. The estate remains open in the probate court for all purposes, subject only to the jurisdiction of the court of equity to purge the account of fraud and mistake. (Ark.) *Wallace v. Swepston*, 94.

3. LACHES in Proceeding Against a Surety and His Heirs.—A delay of twenty-four years and nearly ten years after the death of a surety and after the closing of the estate in bringing suit by a creditor against the heirs of such surety, who have received their ancestor's estate, for the satisfaction of their claims against him as such surety, is fatal on the ground of laches, though the suit has been brought within the period of limitations against the principal and another surety. (Ark.) *Wallace v. Swepston*, 94.

Note.

Equity, jurisdiction of to set off one judgment against another, 137, 138.

ESTATE OF DECEDENT.

See Constitutional Law, 9; Executors and Administrators.

ESTOPPEL.

ESTOPPEL Against Claim of Widowhood.—A woman may raise an estoppel against the assertion of her own interest and the claim of widowhood as readily as she may estop herself from asserting any other alleged right. (Cal.) *Estate of Harrington*, 118.

EVIDENCE.

In General.

1. TAX RECEIPTS, Unless Ancient Documents, are not self-proving, and must be proved the same as any other receipts. (Ala.) *Chastang v. Chastang*, 45.

2. EVIDENCE—Contents of Letter—Conclusion of Court.—The question of fact as to whether a certain letter has been destroyed is for the court, in passing upon the admissibility of secondary evidence of its contents, and he may, therefore, properly state his conclusion as to whether or not the letter has been destroyed. (Ill.) *Hoch v. People*, 327.

3. EVIDENCE—Pleading and Practice.—Under a statute providing that all affirmative defenses must be specially pleaded or notice of them given under the general issue, evidence on the part of the defendant railroad company, when it is sought to recover against it for personal injury, is inadmissible to show that the plaintiff was traveling on a free pass containing a stipulation not to hold such company liable for an injury, when the company has not pleaded such facts nor given notice thereof under the general issue. (Miss.) *Yazoo etc. R. R. Co. v. Grant*, 723.

Judicial Notice.

4. EVIDENCE.—Judicial Notice of Municipal Ordinances will not be taken by the courts of Missouri. (Mo.) *St. Louis v. Liessing*, 774.

5. EVIDENCE—Judicial Notice of Local Laws.—If a statute, local in its nature, extends to all persons who may come within the territory described, the courts will take judicial knowledge thereof. (Ala.) *Davis v. State*, 19.

Declarations and Res Gestae.

6. **EVIDENCE—Res Gestae.**—If the Cashier of a Bank, who has drawn drafts on its correspondents, states, when questioned by the bank's officers, that the drafts were drawn to cover proper charges against an association, of which he is finance keeper, and that a draft from it will be deposited to cover the same, such statements are admissible as part of the *res gestae* in an action by the association to recover from the bank the proceeds of a draft so deposited, on the ground that they have been misappropriated by the cashier. (Mich.) Supreme Tent K. of M. v. Port Huron Sav. Bank, 690.

7. **EVIDENCE—Declaration by Agent in His Own Interest.**—If the cashier of a bank, who has drawn drafts on its correspondents, states, when questioned by the bank's officers, that the drafts were drawn to cover proper charges against an association, of which he is finance keeper, and that a draft from it will be deposited to cover the same, such statements are not admissible to establish a claim by the bank against the association in an action by the association to recover from the bank the proceeds of a draft so deposited, on the ground that they have been misappropriated by the cashier, if the cashier was using the draft to cover up a deficit in his accounts and his statements were thus made in his own interest. (Mich.) Supreme Tent K. of M. v. Port Huron Savings Bank, 690.

8. **EVIDENCE—Declaration of Woman made in Travail.**—Declarations of a mother made during travail relative to the paternity of her child are admissible in bastardy proceedings. (Miss.) Johnson v. Walker, 733.

Expert Testimony.

9. **EVIDENCE OF EXPERTS, When Inadmissible.**—It is error to refuse to receive the evidence of an expert witness as to whether it was as safe to have the doorway of an elevator constructed in the place charged as in a different place, and whether the plaintiff would have been injured if a different construction of the elevator had been pursued, or whether the construction of the doorway inflicted the injury was the usual and customary one as to such place, when the question of construction is not so intricate that the jury could not understand the situation, and it was their province to say whether the defendant was at fault in maintaining the arrangement by him. (Ill.) Siegel-Cooper & Co. v. Treka, 302.

See Criminal Law.

Note.

Evidence, declarations of woman in travail. See Bastardy Proceedings.

EXECUTIONS.

EXECUTIONS—Proceedings in Aid of.—The service on a judgment debtor of a notice requiring him to appear and answer regarding his assets, in a proceeding supplementary to and in aid of execution, without any order being made forbidding the transfer or other disposition of his property by him, does not give the judgment creditor any lien on his funds, nor prevent him from purchasing and paying for a homestead with them, which cannot be sold for the satisfaction of the judgment. (Kan.) McConnell v. Wolcott, 454.

Note.

Execution sales of property subject to mortgage, right of purchasers at, 451.

EXECUTORS AND ADMINISTRATORS.

1. **PROBATE SALE.**—The Fee of the Homestead of a Widow may, subject to her right, be sold by order of the probate court for the payment of the debts of the deceased husband. (Mo.) *Robbins v. Boulware*, 746.

2. **PROBATE COURT.**—The Judgments and Proceedings of the probate courts of Missouri are entitled to the same credit and presumptions accorded to courts of general jurisdiction. (Mo.) *Robbins v. Boulware*, 746.

3. **PROBATE SALE—Unverified Petition.**—Although the statutes require that a petition for the sale of lands of a decedent be verified by affidavit, the absence of such an affidavit is a mere irregularity which does not deprive the court of jurisdiction and render the proceedings void or subject to collateral attack, the parties interested being in court by due process. (Mo.) *Robbins v. Boulware*, 746.

4. **PROBATE SALE—Time of Publication of Notice.**—The statute of Missouri requiring notice of the sale of lands of a decedent to be published for four weeks before the term of court at which the order of sale is to be made, does not require that the publication shall be for the four weeks immediately preceding the term. (Mo.) *Robbins v. Boulware*, 746.

5. **PROBATE SALE—Insufficient Notice—Collateral Attack.**—Where a probate court finds and adjudges that a notice of the sale of a decedent's land was published for four weeks, which is the time prescribed by statute, the judgment cannot be assailed collaterally on the ground that only twenty-two days' notice was given. (Mo.) *Robbins v. Boulware*, 746.

6. **PROBATE SALE—Publication of Notice—Defective Proof.**—Where a probate court, in its order for the sale of a decedent's land, expressly recites that notice of the sale was duly published, the order is not subject to collateral attack because the proof of publication was made by the publishers as a firm. (Mo.) *Robbins v. Boulware*, 746.

See Costs; Remaindermen.

EXEMPTIONS.

1. **EXEMPTIONS—Person on Indian Reservation.**—The creditors of a person who resides on an Indian reservation cannot seize his exempt property on the theory that he is not a resident of the state. (Idaho.) *Coey v. Cleghorn*, 199.

1a. **EXEMPTIONS—Waiver by Disclaimer of Ownership.**—Where a debtor disclaims ownership in exempt property seized in attachment, and the attachment is dissolved, he may nevertheless claim his exemptions when a second writ is levied on the property. (Idaho.) *Coey v. Cleghorn*, 199.

2. **EXEMPTIONS—Bowling-alley.**—A bowling-alley including the pins and balls used in the game of bowling, is not exempt from seizure and sale on execution as the tools or implements of the trade or business of the keeper of the alley. (Kan.) *Williams v. Vincent*, 469.

See Homesteads

EXPERT TESTIMONY.

See Evidence, 9.

FALSE IMPRISONMENT.

FALSE IMPRISONMENT—Justice's Liability.—Where a city charter authorizes justices of the peace to try and punish persons who violate the city ordinances, and an ordinance declares that vagrants shall be deemed disorderly persons and punished as provided, a justice is not liable for false imprisonment, because of irregularities in the proceedings, in convicting and sentencing a person for vagrancy. (Mich.) *Gardner v. Couch*, 684.

FELLOW-SERVANTS.

See Master and Servant, 16, 17.

FERRIES.

1. **FERRIES.**—The Only Proprietorship in a Ferry in Maine is a franchise conferred by statute, and the party holding it has no common-law remedy against those who, without right, interfere with his profits, but the remedy is by statute. (Me.) *Inhabitants of Peru v. Barrett*, 494.

2. **FERRIES, Rights of Towns in.**—When towns in Maine provide a person to keep the ferry, they are entitled to the tolls and profits of the ferry, and have a right of action against those interfering with them. (Me.) *Inhabitants of Peru v. Barrett*, 494.

3. **FERRIES—Towns, Presumption in Favor of.**—It is unnecessary, in an action by a town, to allege its acts in providing a ferry-keeper, or that he was licensed and gave bond, as required by law. It is presumed that all things have been done correctly by the towns to entitle them to a right of action. If anything has been omitted, the defendant may raise the question in his defense. (Me.) *Inhabitants of Peru v. Barrett*, 494.

4. **FERRIES—Rights Which May be Exercised Against.**—Private persons have the right to keep and use boats on a river for their own accommodation in passing over it and transporting their families, servants, and goods, and to occasionally carry across a customer and his purchases. (Me.) *Inhabitants of Peru v. Barrett*, 494.

5. **FERRIES, What is an Unlawful Interference with Rights and Profits of.**—If a merchant controls both sides of a river, having a store on one side and a warehouse on the other, and keeps two row-boats in which he transports his customers and their purchases, without charge, as an encouragement to increase his trade, and it has that effect, and diminishes the profits of an established ferry, this is, in effect, a transportation of property and persons for hire, and renders him liable to the holder of the ferry franchise for interference with his profits. (Me.) *Inhabitants of Peru v. Barrett*, 494.

FISH.

1. **JUDICIAL ACTION, What is not.**—The Order of the Fish and Game Commission determining that the discharge of sawdust from a mill into a stream would materially injure the fish therein, directing the erection of a blower, and forbidding the making of a pile of sawdust in connection with the mill, while not a general regulation, is not judicial action. (Mass.) *Commonwealth v. Sisson*, 630.

2. **CONSTITUTIONAL LAW—Forbidding the Discharge of Sawdust into a Stream.**—It is within the power of the legislature to protect and preserve the edible fish in the rivers and brooks of the state, and for that purpose to forbid any sawdust being discharged

into any brook containing such fish. (Mass.) *Commonwealth v. Sisson*, 630.

3. **CONSTITUTIONAL LAW.**—The Legislature may Delegate to the Fish and Game Commission the power to determine which of the brooks and rivers of the state have in them fish of sufficient value to warrant the prohibition or regulation of the discharge of sawdust therein. (Mass.) *Commonwealth v. Sisson*, 630.

4. **FISH AND GAME COMMISSION**, Powers Exercised by are not Judicial.—The power delegated to the fish and game commission to fit the details of regulation to the circumstances of each case is of a character long exercised by such commission and their predecessors, and is legislative and not judicial. The fish commission need not act on sworn evidence, nor grant hearings to parties interested, and its action is as final as is the action of the legislature in enacting a statute. Hence, the questions of fact passed on by the commissioners in adopting the provisions enacted by them cannot be tried over in any court. (Mass.) *Commonwealth v. Sisson*, 630.

5. **FISH**—State's Control of Taking.—The state has a right to regulate the time, manner, and extent of the taking of fish in all running streams and large or small lakes with outlets into other waters. (Miss.) *Ex parte Fritz*, 700.

6. **FISH**—Property in.—By reason of the migratory habits of fish, their ownership is in the public, and no individual has any absolute property right in them until they have been subjected to his control. (Miss.) *Ex parte Fritz*, 700.

7. **FISH**—Preservation by State.—It is not only the right of the state, but also its duty, to preserve for the benefit of the general public the fish in its waters, in their migrations and in their breeding-places, from destruction or undue reduction in numbers through the caprice, improvidence, or greed of the riparian proprietors, as well as trespassers. (Miss.) *Ex parte Fritz*, 700.

8. **FISH AND GAME LAWS**—Interstate Commerce.—The state has ample authority to protect its fish and game, by adequate police regulation, although in doing so interstate commerce may be remotely affected. (Miss.) *Ex parte Fritz*, 700.

9. **FISH**—Delegation of Power to Regulate Taking of.—The state has a right to delegate to the boards of supervisors of the several counties its power to regulate the taking of fish. (Miss.) *Ex parte Fritz*, 700.

10. **FISH**—Ordinance Regulating Taking of.—Special Legislation.—An ordinance of a board of supervisors of a county regulating the taking of fish therein, which is general in its terms, and applies alike to all lakes and streams in such county, is valid and not objectionable as being a special legislation. (Miss.) *Ex parte Fritz*, 700.

11. **CONSTITUTIONAL LAW**—Jurisdiction—Game Laws.—A statute committing the judicial administration of the game laws to mayors and justices of the peace, whether the offenses against such laws are committed in their districts or not, is unconstitutional and void. (Miss.) *Ex parte Fritz*, 700.

FIXTURES.

1. **THE CRITERION** of a Fixture is the united application of these requisites: 1. Actual annexation to the realty, or something appurtenant thereto; 2. Application to the use or purpose to which that part of the realty with which it is connected is appurtenant; and 3. The intention of the party making the annexation to make a permanent accession to the freehold. (Wash.) *Filley v. Christopher*, 853.

2. FIXTURES.—A Furnace and Boiler, Together with the Radiators and Pipes Connected Therewith, located in the basement of a theater, resting on a foundation built up from the floor, encased in brickwork and not capable of being taken away without removing masonry, and the pipes extending to various parts of the building for the purpose of heating it, are fixtures and constitute part of the realty. (Wash.) *Filley v. Christopher*, 853.

3. FIXTURES.—Opera Chairs in a Theater, screwed to the floor and being such as are in common use in such places, are fixtures. (Wash.) *Filley v. Christopher*, 853.

4. FIXTURES.—Drop Curtains in a Theater, Scenery and Appliances Used for Raising and Lowering the Same, and an Electric Switch-board, are fixtures. (Wash.) *Filley v. Christopher*, 853.

5. FIXTURES.—The Billboard and Money Drawer of a Theater, the former being nailed to the sidewalk, and the latter running in a groove next to and beneath the window are fixtures. (Wash.) *Filley v. Christopher*, 853.

6. FIXTURES.—Evidence to Show Views of Persons Erecting.—The fact that the person who places articles in a theater building, on the sale of the realty, surrenders them to the purchaser, is admissible in evidence in a controversy between third persons as indicative of his view of their annexation to and connection with the building. (Wash.) *Filley v. Christopher*, 853.

7. FIXTURES.—The Injury to the Freehold that Will Result from the Removal of an Article and the Value of the Article After Removal are circumstances to be taken into consideration in determining whether it is a fixture, but they are not controlling. (Wash.) *Filley v. Christopher*, 853.

Note.

Fixtures. See Mortgages.

FRANCHISE.

1. FRANCHISE.—Nature and Definition.—A franchise is a special privilege conferred by the government on individuals; it is not real estate nor an interest in land. (Md.) *Consolidated Gas Co. v. Mayor etc. of Baltimore*, 584.

2. FRANCHISE.—Easement.—The Right of a Gas Company to occupy the public streets with its pipes and mains is a franchise; the actual occupation of the thoroughfare in that manner, pursuant to the franchise, is the acquisition of an easement. (Md.) *Consolidated Gas Co. v. Mayor etc. of Baltimore*, 584.

See Taxation.

FRAUD.

1. FRAUD.—The Question of Fraud Should be Submitted to the Jury when there is a substantial conflict of evidence in respect thereto. (Mich.) *McMillan v. Reaume*, 666.

2. FRAUD.—Measure of Damages.—In an action for fraudulently inducing a person to convey her interest in her father's estate for less than its value, an instruction declaring the measure of damages to be the difference between what she actually received and what her interest was worth, is correct, in the absence of peculiar circumstances to the attention of the court. (Mich.) *McMillan v. Reaume*, 666.

FRAUDS, STATUTE OF.

1. **STATUTE OF FRAUDS.**—Verbal Acceptance of a written request of another to pay his debt, where the person accepting is not indebted to such other and has none of his funds in his hands, and payment of part of the amount by check, together with a verbal agreement to pay the balance and the retention of the written request in his possession, is nevertheless within the statute of frauds as a verbal promise to pay the debt of another, and cannot be enforced. (Ill.) *Chicago Heights Lumber Co. v. Miller*, 314.

2. **STATUTE OF FRAUDS.**—Verbal Acceptance by the drawee of a bill of exchange, who holds no funds of the drawer, is no more than a parol promise to answer for the debt of another, and therefore within the statute of frauds. (Ill.) *Chicago Heights Lumber Co. v. Miller*, 314.

3. **STATUTE OF FRAUDS**—Acceptance of Sample.—A verbal sale is not removed from the operation of the statute of frauds by the purchaser receiving and taking away a sample which is not a part or portion of goods sold. (Md.) *Richardson v. Smith*, 552.

4. **FRAUDS, STATUTE OF.**—If a Conveyance is Executed in Consideration of the Oral Promise of the Grantee to Support, and do other acts for the benefit of, the grantor, the performance of the contract by the former is a sufficient execution to take it out of the statute of frauds. (Cal.) *Norris v. Lilly*, 188.

FRAUDULENT CONVEYANCES.*In General.*

1. **FRAUDULENT CONVEYANCES, Effect of.**—A conveyance made with intent, and for the purpose, of cheating or hindering creditors of the grantor, though good between the parties, is void as to such creditors. The grantee holds the legal title in trust for them, and, at their instance, equity will set aside the conveyance and subject the land to the payment of their debts. (Ark.) *Baldwin v. Williams*, 81.

2. **VOLUNTARY CONVEYANCES** are Valid as between the parties thereto, and fraudulent and voidable only as to existing creditors of the grantor. The only infirmity in the title of such a grantee is its liability to be impeached by such creditors, and as to all others it is perfect, and when it has passed into the hands of an innocent holder, even such infirmity is cured, and the title becomes indefeasible. (Ala.) *Chastang v. Chastang*, 45.

3. **VOLUNTARY CONVEYANCES**—Presumption—Notice to Subsequent Purchaser.—The law sanctions a conveyance based upon a good, as distinguished from a valuable, consideration, and it is presumed that such a conveyance is valid, and not a fraud upon the rights of anyone. The mere fact that a purchaser from the holder of such a title has notice that it was not founded upon a pecuniary consideration, is not sufficient to make it his duty, at his peril, to inquire whether the title of his grantor was not fraudulent, but he has a right to act on the legal presumption that such voluntary conveyance was honestly made until some other fact is brought to his knowledge to raise a suspicion in his mind that such conveyance is fraudulent. (Ala.) *Chastang v. Chastang*, 45.

Suit to Set Aside—Limitation of Actions.

4. **FRAUDULENT CONVEYANCE.**—A Creditor cannot maintain a suit in equity to set aside a conveyance of his debtor until he has exhausted his legal remedies. (Mo.) *State v. Goggin*, 826.

5. LIMITATION OF ACTIONS to Avoid Conveyances Made to Defraud Creditors.—If a grantee under a deed made to defraud creditors of the grantor takes possession of the property and holds it adversely to all claimants for the period of limitation, the creditors are barred of their right to subject it to the payment of their debts; but so long as the grantee allows the grantor to hold possession, or so long as he holds possession for the benefit of the grantor and not adversely, the statute does not begin to run against creditors. (Ark.) *Baldwin v. Williams*, 81.

See Husband and Wife, 1-7.

GAME LAWS.

See Fish.

GARNISHMENT.

1. GARNISHMENT—Fraudulent Transfers—Bank for Collection.—A bank with which a note and mortgage assigned by a husband to his wife in fraud of creditors is by her placed for collection, and which receives a check for the amount of the note and mortgage payable to its order, and after notice of such fraudulent transfer, is subject to garnishment for the amount of the check by a creditor of the husband. (Wis.) *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 966.

2. GARNISHMENT is an Effectual Remedy in Reaching Nonleviable Assets, things in action, evidences of debt, credits and effects, or any property held by any sort of conveyance or title void as to creditors of the principal defendant. (Wis.) *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 966.

3. GARNISHMENT—Interpleader.—If a note and mortgage are assigned by the husband, who is mortgagee, to his wife, and placed with a bank for collection, and afterward garnishment process is served on both the bank and the wife in a suit against the husband, there is no necessity for an interpleader in order to adjudicate the rights of the parties. (Wis.) *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 966.

4. GARNISHMENT—Interest.—A garnishee is liable for interest on the amount found in his possession only from the date of the judgment in favor of the plaintiff in the original action. (Wis.) *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 966.

5. GARNISHMENT—Costs.—A garnishee who denies all liability is liable for costs. (Wis.) *Eau Claire Nat. Bank v. Chippewa Valley Bank*, 966.

Note.

Growing Crops, mortgagees of, when may maintain actions for their conversion, 446.

unplanted, validity and operation of mortgages of, 520-522.

GUARDIAN AND WARD.

In General.

1. GUARDIAN—Jurisdiction to Appoint.—The probate court, in the county of a minor's domicile, is the only court having jurisdiction to appoint a guardian of the person or estate of such minor. (Kan.) *Connell v. Moore*, 408.

2. GUARDIANSHIP, Void Order Setting Aside Revocation of Letters of.—If an order of court revokes the letters of a guardian, *Am. St. Rep.*, Vol. 109—67

it terminates the guardianship, and an order made at a succeeding term attempting to reinstate him is ineffectual so far as the sureties on his bond are concerned. (Ark.) *Wallace v. Swepston*, 94.

3. GUARDIANSHIP — Accounting — Sufficiency of Bill.—A bill in equity by wards against their guardian to compel an accounting and settlement of his guardianship which alleges that such guardian took advantage of the youth and inexperience of such wards, who are young women, and upon their attaining their majority, induced them, by reason of his influence over them, to sign a paper reciting that he had made a full settlement of his account with them, which paper is untrue in its statements, is sufficient. (Ala.) *Willis v. Rice*, 26.

Sale by Guardian.

4. GUARDIANS' SALE—Want of Jurisdiction.—If the probate court of one county appoints a guardian of the person and estate of a minor domiciled in another county, and directs a sale of his land situated in the former county, such proceedings and sale are without jurisdiction and void. (Kan.) *Connell v. Moore*, 408.

Limitation of Action on Bond of Guardian.

5. LIMITATION OF ACTIONS on Guardians' Bonds.—A cause of action against a surety on the bond of a guardian does not accrue, nor does the statute of limitations commence to run, until the amount of the liability is established by the order of the probate court and an order is made by that court directing the amount to be paid over. (Ark.) *Wallace v. Swepston*, 94.

6. LIMITATION OF ACTIONS on Guardians' Bonds.—Where the Guardianship Relation is Closed by the death of the guardian, or the revocation of his letters, or by the coming of age of his ward, and the probate court adjusts the accounts and establishes the amount due from the guardian, a cause of action accrues at once without any further order of court, though there is no one capable of suing. If there is then no one who can lawfully receive the amount or sue for its recovery, the cause of action is postponed, and limitations does not begin to run until there is some one capable of suing. (Ark.) *Wallace v. Swepston*, 94.

7. GUARDIAN'S BOND, Limitation of Actions upon Where His Ward Remains a Minor.—Where a cause of action accrues on a guardian's bond in favor of a minor by the settlement of accounts, and no other guardian is appointed to receive the amount due the ward, the statute of limitations does not begin to run against such ward until he reaches his full age. (Ark.) *Wallace v. Swepston*, 94.

8. LIMITATION OF ACTIONS on Guardian's Bond and Against Surety not Sued.—Where the statute of limitations commences to run in favor of a guardian and his sureties, its operation is not suspended, as to a surety not sued, by the commencement of an action against the guardian and another surety. (Ark.) *Wallace v. Swepston*, 94.

See Equity.

HABEAS CORPUS.

1. WRIT OF HABEAS CORPUS is not in the nature of, nor can it be used as, a substitute for proceedings in error. (Wyo.) *Younger v. Hehn*, 986.

2. HABEAS CORPUS—Collateral Attack.—A finding or decision of an inferior court, no matter how erroneous, not affecting its jurisdiction, cannot be attacked collaterally by habeas corpus. (Wyo.) *Younger v. Hehn*, 986.

3. HABEAS CORPUS.—Office of the writ of habeas corpus is to determine the legality of the particular imprisonment, and the facts to be considered thereon are jurisdictional facts only. (Wyo.) *Younger v. Hehn*, 986.

4. HABEAS CORPUS—Collateral Attack.—An attack on a judgment by habeas corpus is collateral, and the judgment cannot be thus impeached for any error or irregularity that does not affect the power of the court to act in the case. (Wyo.) *Younger v. Hehn*, 986.

5. HABEAS CORPUS—Attack on Regularity of Proceedings for Obtaining Jury.—A petitioner for a writ of habeas corpus cannot thereunder question the regularity of the method adopted by the court in drawing and summoning the jury convicting him, when the statute provides that on habeas corpus "it is not permissible to question the correctness of the action of the grand jury in finding a bill or indictment, or a petit jury in the trial of a cause." (Wyo.) *Younger v. Hehn*, 986.

6. ON HABEAS CORPUS to Obtain Release from Imprisonment under a conviction for violating a municipal ordinance, evidence given at the trial cannot be considered for the purpose of determining whether it justified the conviction. (Cal.) *In re Kelso*, 178.

HIGHWAYS.

AUTOMOBILES—Ordinances Prohibiting Use of at Night.—An ordinance of a board of supervisors prohibiting the running of an automobile on certain parts of the public highways of the county between the hours of sunset of any day and of sunrise on the day following is not, on its face, void for unreasonableness. (Cal.) *In re Berry*, 160.

HOMESTEADS.

Conveyances.

1. HOMESTEAD — Conveyance — Statutory Regulation.—Sections 3040 and 3041 of the Revised Statutes of Idaho, prescribing the manner of conveying homesteads by married persons, are in the nature of rules of evidence, and conveyances thereunder are subject to the same legal principles as are conveyances falling under the statute of frauds and the rules of equitable estoppel and waiver. (Idaho.) *Grice v. Woodworth*, 214.

2. HOMESTEAD — Conveyance — Statutory Regulation.—Statutes prescribing the manner of conveying homesteads by married persons are intended to protect their rights, especially those of the wife, and not to relieve them against fraudulent transactions. (Idaho.) *Grice v. Woodworth*, 214.

3. HOMESTEAD—Conveyance—Estoppel Against Wife.—Where a husband and wife orally agree to sell their homestead, and the vendee pays the purchase price, enters into possession, and makes improvements, with the knowledge and consent of the wife, she cannot successfully defend his suit for specific performance. (Idaho.) *Grice v. Woodworth*, 214.

Exemptions.

4. HOMESTEADS Purchased with Pension Money.—Land purchased with pension money of the husband, but conveyed to his wife, and subsequently occupied by them as a homestead, is not exempt from execution for a debt of the wife, contracted prior to its acquisition, or occupation as a homestead. (Iowa.) *Whinery v. McLeod*, 364.

5. HOMESTEADS — Purchase by Insolvent — Exemptions.—The homestead exemption may be asserted even as to property purchased by an insolvent debtor with the proceeds of nonexempt property, in the absence of any special equity existing in favor of a creditor, and the fact that the purchase is made for the very purpose of acquiring a homestead exempt from execution does not alter the rule. (Kan.) *McConnell v. Wolcott*, 454.

6. HOMESTEAD — Sale of — Purchase of Another Homestead with Other Funds—Exemptions.—If the owners of a homestead sell it and receive and use the purchase money and subsequently purchase another homestead with other funds, the latter is not subject to sale under execution to satisfy a judgment which existed against them prior to the sale of the first homestead. (Kan.) *McConnell v. Wolcott*, 454.

See Executors and Administrators; Taxation, 9-11.

HOMICIDE.

In General.

1. HOMICIDE—Condition of Defendant's Mind.—If a homicide is admitted to have been premeditated, and the defense of insanity is not set up, evidence of the defendant's feelings and condition of mind on the day of the killing is not admissible in evidence on his trial for murder. (Md.) *Handy v. State*, 558.

2. HOMICIDE.—Words of Reproach, however grievous, do not constitute a provocation sufficient to free a person committing a homicide from the guilt of murder. (Mo.) *State v. Gordon*, 790.

3. MURDER in the First Degree, Evidence Sufficient to Sustain Conviction for.—Evidence showing that the defendant and others armed themselves and made preparations to kill in connection with a projected burglary, and while still together and having burglars' tools in their possession, but after the proposed burglary had been abandoned, on being approached by a policeman under circumstances indicating that he would arrest or search them, one of them shot and killed such officer, is sufficient to sustain a conviction, against such shooter, of murder in the first degree. (Cal.) *People v. Woods*, 151.

4. MURDER—Instructions.—It is not error to read to the jury the whole of a section of the Penal Code defining murder in the first degree, which includes, among other things, all murders committed in the perpetration, or attempt to perpetrate arson, rape, robbery, burglary or mayhem. Such reading is not objectionable as implying that under the evidence the jury would be warranted in finding that the decedent was killed by the defendant while the latter was attempting to commit one of those crimes. (Cal.) *People v. Woods*, 151.

5. CRIMINAL LAW—Question of the Degree of Murder, When not Taken from the Jury.—Where the court correctly instructs the jury respecting the two degrees of murder, and that a conviction of murder in the first degree requires a sentence of death unless they by their verdict fix the penalty at life imprisonment, and states what the form of the verdict shall be as they desire the infliction of the one penalty or the other, but omits to give a form of verdict of murder in the second degree, this is not an intimation that such verdict is out of the question, nor an interfering with the right of the jury to fix the degree of murder, if any. (Cal.) *People v. Woods*, 151.

By Officer in Course of Arrest.

6. **MURDER—Arrest—Preventing Escape from Arrest.**—An officer is not justified in killing a mere misdemeanant, to effectuate his arrest, or to prevent his escape after arrest. (Iowa.) *State v. Smith*, 402.

7. **MURDER—Arrest of Felon.**—An officer in seeking to arrest a felon may oppose force to force, and if there is no other reasonably apparent method for effecting the arrest or preventing the escape of the felon, the officer may, if he has performed his duty in other respects, take the life of the offender. This rule applies not only to the felon himself, but also to those who are seeking to rescue the prisoner. (Iowa.) *State v. Smith*, 402.

8. **MURDER—Arrest—Aiding Escape.**—It being a felony to aid the escape of a prisoner in the custody of an officer, the officer is justified in killing the person aiding in such escape, if that is the only reasonable apparent method of preventing such escape. (Iowa.) *State v. Smith*, 402.

Self-defense.

9. **SELF-DEFENSE.—A Person Who Applies Opprobrious Language** or insulting epithets to another, thereby provoking an attack which he voluntarily resists, has a right of self-defense. (Mo.) *State v. Gordon*, 790.

10. **SELF-DEFENSE—Voluntarily Engaging in Difficulty.**—One does not forfeit the right of self-defense merely because he voluntarily engages in a difficulty. (Mo.) *State v. Gordon*, 790.

11. **SELF-DEFENSE.—Mere Words of Reproach** or opprobrious epithets do not constitute such a provocation as will put the speaker in the wrong, if it becomes necessary for him in his own defense to kill the person to whom they are addressed when he makes an attack. (Mo.) *State v. Gordon*, 790.

12. **SELF-DEFENSE—Apprehension of Danger.**—It is not necessary, in order to acquit on the ground of self-defense, that the danger should have been real or actual, or that danger should have been impending and about to fall upon the defendant; it is necessary only that the jury believe that the accused had reasonable cause to apprehend that there was immediate danger of a design to commit a felony or to do great bodily harm to the defendant about to be accomplished. (Mo.) *State v. Gordon*, 790.

Note.

Homicides. See Self-defense.

HUSBAND AND WIFE.*Conveyance in Fraud of Wife.*

1. **HUSBAND AND WIFE.**—The wife is within the protection of the statute against conveyances made with intent to defraud; and if the conveyance made by the husband is purely voluntary, it is not necessary that the grantee participate in the intent of the grantor. (Ill.) *Higgins v. Higgins*, 316.

2. **HUSBAND AND WIFE—Conveyance in Fraud of Wife—Laches.**—A wife may, during her husband's lifetime, sue to set aside a deed by him in fraud of her marital rights. (Ill.) *Higgins v. Higgins*, 316.

3. **HUSBAND AND WIFE—Conveyance in Fraud of Intended Wife.**—If a conveyance is voluntary and without consideration, and the intention of the grantor is to defraud any person whom he should marry of her marital rights, it makes no difference, as affecting the

validity of the transaction, that he has not yet selected any particular person as his wife. To render the conveyance void for fraudulent intent, it need not be directed against any particular person. (Ill.) *Higgins v. Higgins*, 316.

4. **HUSBAND AND WIFE—Conveyance in Fraud of Wife.**—With respect to her marital rights the law affords the same protection to a wife as to a creditor of the husband, and a voluntary disposition of property made with specific intent to defraud a future wife of her marital rights is void. (Ill.) *Higgins v. Higgins*, 316.

5. **HUSBAND AND WIFE—Conveyance in Fraud of Intended Wife.**—It is as much a fraud for a man, on the eve of his marriage, unknown to his wife, to make a voluntary conveyance of property to defeat the interests which she would acquire in the property by virtue of her marriage, as it is for a debtor who contemplates contracting a debt, to voluntarily dispose of his property in order to defeat the interests of future creditors. (Ill.) *Higgins v. Higgins*, 316.

6. **HUSBAND AND WIFE—Conveyance in Fraud of Wife—Laches.**—As soon as a wife learns the facts, she may, even though her husband is still living, bring suit to set aside a deed executed by him in fraud of her marital rights, and may therefore lose her right by long delay after she knows the material facts. (Ill.) *Higgins v. Higgins*, 316.

7. **DEED to Defraud Wife of Her Right of Dower—Relief Against in Equity.**—A grantor cannot maintain a suit in equity to cancel a voluntary conveyance from himself to his daughter, on the ground that, though he placed it of record, he never delivered it, and his object was to deprive his wife of her right to dower in the premises conveyed. (Ill.) *Creighton v. Roe*, 310.

Tenancy by Entireties.

8. **TENANCY BY ENTIRETY, Mortgage, When Held by.**—A mortgage in favor of a husband and wife, to secure a note payable to them, vests in them as tenants by the entirety, and, on his death, she is entitled to collect the whole debt, and his executor has no interest therein. This rule remains applicable notwithstanding the statutes of Massachusetts relating to conveyances and to the separate property and rights of married women. (Mass.) *Boland v. McKowen*, 663.

Personal Injury to Wife.

9. **HUSBAND AND WIFE—Personal Injury to Wife—Recovery by Husband.**—Although a statute provides that "the earnings of the wife are her separate property," it does not of itself emancipate her from any services, which before its passage she owed her husband as head of the family and as her husband, and for any wrongful act of a stranger which deprives him of them he is entitled to recover for the consequent loss and injury. (Ala.) *Birmingham Southern Ry. Co. v. Lintner*, 40.

10. **HUSBAND AND WIFE—Personal Injury to Wife—Right of Husband to Recover.**—If a wife is injured in her person by the wrongful act of a stranger, a proximate, legal consequence of such injury is the expense to which the husband is put in the alleviation of her sufferings and the cure of her hurts, and such expense is a loss to the husband, for which the wrongdoer is answerable to him in damages. (Ala.) *Birmingham Southern Ry. Co. v. Lintner*, 40.

11. **HUSBAND AND WIFE—Wrongful Injury to Wife by Stranger.**—If personal injury inflicted upon a wife by the wrongful act of a stranger is such as to deprive her husband of her society.

aid and comfort, and of his right of consortium, he is entitled to recover therefor. (Ala.) Birmingham Southern Ry. Co. v. Lintner, 40.

12. NEGLIGENCE INJURY OF WIFE—Recovery by Husband—Evidence.—If a husband suffers the loss and impairment of his wife's services and society in consequence of personal injuries inflicted upon her, the extent and duration of her injuries have direct bearing on the measure of damages, and evidence is admissible that she is still suffering from such injuries at the time of the trial. (Ala.) Birmingham Southern Ry. Co. v. Lintner, 40.

13. NEGLIGENCE INJURY OF WIFE—Recovery by Husband.—If a husband sues to recover damages for the loss of the services and society of his wife caused by negligent injury inflicted upon her by a stranger, he cannot recover in that suit for any loss of services or society of his wife which may occur after the time of the trial in the absence of evidence of the value thereof. (Ala.) Birmingham Southern Ry. Co. v. Lintner, 40.

See Homesteads; Marriage; Witnesses.

INDEPENDENT CONTRACTOR.

See Master and Servant, 18-24.

INDICTMENT.

1. INDICTMENT Need not Set Up the Proof in the case, and need only charge the commission of the offense in the language of the statute. (Ala.) Davis v. State, 19.

2. INDICTMENT—Whether Indefinite.—An information for selling milk below the standard fixed by ordinance, which specifically advises the defendant of the time, place, and particular in which he has violated the ordinance, is sufficiently definite. (Mo.) St. Louis v. Liessing, 774.

INDORSEMENT.

See Bills and Notes.

INJUNCTION.

Against Injunction.

1. INJUNCTION Against Injunction.—A court of equity will not grant an injunction for the purpose of preventing a defendant in that injunction suit from bringing an action for injunction against the complainant therein, on the ground that the latter will suffer irreparable injury from erroneous and improper judicial action. (Ala.) Robertson v. Montgomery Baseball Assn., 30.

Against Execution of Tax Deed.

2. AN INJUNCTION WILL NOT ISSUE to Prevent the Execution of a Deed for taxes on the ground of defects in the description of the property in the assessment. (Cal.) Grant v. Cornell, 173.

3. AN INJUNCTION WILL NOT ISSUE to Prevent the Execution of a Tax Deed on the ground that some parts of the tax for which the property was assessed are invalid, unless the complainant has paid, or offered to pay, the part which was valid. (Cal.) Grant v. Cornell, 173.

4. An Injunction Against the Execution of a Tax Deed Will not Issue, in favor of a purchaser of the property subsequent to the tax sale, on account of defects in the assessment, where the original

owner could not have maintained suit for such relief. (Cal.) *Grant v. Cornell*, 173.

5. **TAXATION.**—An Injunction Against the Assertion of a Tax or the Making of a Tax Deed because of vital defects in the description of the property will not issue where the plaintiff has not offered to do equity by paying the amount for which the property was equitably taxable. (Cal.) *Couts v. Cornell*, 168.

Note.

Injunction in favor of mortgagee to prevent injury to or removal of mortgaged property, 434, 435.

in favor of mortgagee to prevent removal of timber, 448.

in favor of mortgagee to prevent sales of mortgaged property under execution, 436, 437.

See Appeal and Error, 3.

INSANE PERSONS.

1. **INSANITY**—Burden of Proof.—General Insanity Being Once Shown to Exist, it is presumed to continue, and the burden of showing a lucid interval rests upon him who asserts it. (Wash.) *In re Brown*, 868.

2. **INSANITY**, Presumption of Continuance of.—If one is acquitted of murder on the ground of his insanity when he committed the act, his condition is presumed to continue after his acquittal, and the burden is on him to show the contrary. (Wash.) *In re Brown*, 868.

3. **INSANE PERSON**, to What Prison may be Committed on Acquittal of Crime.—If a statute declares that on the acquittal of a person charged with crime by reason of his insanity, the court may commit him to prison, it may select any prison coming within its committing jurisdiction, such as the county jail of the proper county. (Wash.) *In re Brown*, 868.

4. **INSANE PERSONS**, Order Requiring the Imprisonment of, When not Void for Uncertainty.—An order of court that a person acquitted of murder on account of his insanity be confined in the county jail until the further order of the court is not void for uncertainty. (Wash.) *In re Brown*, 868.

5. **INSANE PERSONS**, Constitutionality of Statute Requiring Imprisonment of.—The state may classify insane persons and require those whose dangerous tendencies have been manifested by the perpetration of acts impairing the safety of the community after a full hearing has established the fact of insanity, to be confined in prison while the condition continues. (Wash.) *In re Brown*, 868.

See Constitutional Law, 8.

INSURANCE.

Ultra Vires Contracts.

1. **INSURANCE CORPORATIONS**, *Ultra Vires Contracts of.*—Where a foreign insurance corporation complies with the laws entitling it to do business within the state, citizens thereof dealing with it in that state are not guilty of negligence in failing to ascertain its charter powers, and it cannot escape liability on its contracts with such citizens on the ground that it was not authorized to enter into them. (Ark.) *Minneapolis Fire etc. Ins. Co. v. Norman*, 74.

2. INSURANCE CORPORATIONS—Ultra Vires.—Where a contract of insurance has been fully performed on the part of a policyholder and the insuring corporation has received all the benefits of the contract, it cannot escape liability on the plea of ultra vires. (Ark.) *Minneapolis Fire etc. Ins. Co. v. Norman*, 74.

3. CORPORATIONS, Ultra Vires, Sureties of, Whether may Plead. Where a foreign insurance corporation has given a bond as prescribed by the laws of the state into which it enters for the purpose of doing business, its sureties on such bond cannot escape liability on the ground that a policy issued by it was ultra vires, where such defense could not be maintained by the corporation. (Ark.) *Minneapolis Fire etc. Ins. Co. v. Norman*, 74.

Fire Insurance.

4. INSURANCE, FIRE.—Conditions Against Alienation of the property insured, contained in fire insurance policies, are ordinarily intended to provide only against changes in ownership which might supply a motive to destroy the property, or which might weaken the interest of the insured in protecting it. Hence dealings with the property not calculated to produce any such effect do not, by reason of such conditions, avoid the policy. (Ala.) *Schloss v. Westchester Fire Ins. Co.*, 58.

5. INSURANCE, FIRE—Condition Against Alienation.—A sale by, and resale to, the owner of property insured against fire, all being one transaction and without change of possession, do not violate a condition in the policy, that any change in either the title or possession of the subject matter of the insurance shall render the policy void. (Ala.) *Schloss v. Westchester Fire Ins. Co.*, 58.

6. INSURANCE, FIRE—Vacancy—Waiver by Agent.—If a policy of fire insurance contains a clause making the policy void if the building insured be or become vacant or unoccupied and so remain for a period of ten days, unless otherwise provided by agreement indorsed thereon, and such policy is issued by an agent having authority to issue policies and consummate contracts of insurance, and he has knowledge at the time of issuing the policy that the building is vacant and unoccupied, and within ten days therefrom, agrees to indorse a vacancy permit on the policy, but fails to do so, the insurance company must be deemed to have waived the condition, and is liable for a loss occurring while the building remained vacant and unoccupied. (Kan.) *Queen Ins. Co. v. Straughan*, 421.

7. INSURANCE, FIRE.—Waiver of Notice and Proof of Loss.—An insurance company may waive its right to notice and proof of loss, and such waiver may be made by its agent. (Kan.) *Queen Ins. Co. v. Straughan*, 421.

8. INSURANCE, FIRE—Proof of Loss—Authority of Agent.—Local insurance agents who issue the fire policy sued on and furnish blank forms for proof of loss under direction of the insurance adjuster, and who have written authority to "receive proposals for, and make insurance policies to be countersigned by them, to renew policies, to consent to assignments and transfers, and to perform all lawful acts and business of such agency, subject to the rules, regulations and instructions of the insurance company, prima facie have authority to receive proof of loss required by the policy as a condition precedent to recovery thereon. (Ala.) *Schloss v. Westchester Fire Ins. Co.*, 58.

Marine Insurance.

9. **INSURANCE, MARINE—Construction of Policy.**—Policies against “the risk of collision sustained” or against “loss sustained by collision with another vessel” mean the same thing, namely, collision with another vessel. (Mass.) *Burnham v. China Mut. Ins. Co.*, 627.

10. **INSURANCE, MARINE—Collision—Vessel Aground.**—If a vessel is temporarily aground, or at anchor, or at her dock, and is run into by another vessel, this is a collision with another vessel within the meaning of marine insurance. (Mass.) *Burnham v. China Mut. Ins. Co.*, 627.

11. **INSURANCE, MARINE—Striking Sunken Wreck.**—The injury of a vessel from striking some portion of the masts, spars, sails, or rigging of a vessel wrecked several hours before, and which is never raised, and the cost of raising which would have exceeded her value, is not from collision with another vessel within the meaning of marine insurance. (Mass.) *Burnham v. China Mut. Ins. Co.*, 627.

Life Insurance.

12. **INSURANCE, LIFE—Effect of Statutory Provisions.**—The provisions of a statute of a state where a life insurance policy is issued becomes a part thereof as if embodied in the policy itself. (Ill.) *Freund v. Freund*, 283.

13. **INSURANCE—Incontestable Clause, Applicability of to Fraud.**—Though a policy of life insurance purports to be incontestable after date of issue for any cause except nonpayment of premium, an action thereon is subject to the defense that the assured made material false and fraudulent representations before the issuing of the policy, sufficient to avoid it for fraud. (Mass.) *Reagan v. Union Mut. Life Ins. Co.*, 659.

14. **INSURANCE, LIFE—When Contract Takes Effect.**—If on an application for a life insurance policy there is no agreement as to when the insurance is to take effect, and the policy is to be issued after the applicant has taken a medical examination, and it is agreed that a note taken in payment of the first premium shall not be negotiated until the delivery of the policy, the insurance does not take effect until the issuance and delivery of the policy. (Wyo.) *Summers v. Mutual Life Ins. Co.*, 992.

15. **INSURANCE, LIFE—When Insurance Takes Effect.**—A life insurance company has an absolute right to insist that it shall accept an application and issue a policy before it shall be bound as an insurer, and the applicant for insurance has the same right to require a delivery to and acceptance by him of the policy, before he will be bound. (Wyo.) *Summers v. Mutual Life Ins. Co.*, 992.

16. **INSURANCE, LIFE.**—Oral contracts of life insurance may be valid, and if completed by a meeting of the minds of the parties, the insurer will be liable for a loss occurring before the issuance and delivery of the policy, but where delivery and acceptance of the policy is necessary to put the insurance into effect, there can be no risk until the things precedent agreed upon shall happen. (Wyo.) *Summers v. Mutual Life Ins. Co.*, 992.

17. **INSURANCE, LIFE—Specific Performance.**—Parol agreements for life insurance may be specifically enforced by requiring the issuance of the policy as agreed, either before or after loss, and in such case the court, having acquired jurisdiction, will afford full re-

lied by awarding proper damages in case of loss. (Wyo.) *Summers v. Mutual Life Ins. Co.*, 992.

18. INSURANCE, LIFE—Refusal to Accept Premium—Forfeiture. If an insurer wrongfully refuses to accept a premium when it is tendered or wrongfully declares a life policy forfeited, and refuses further to recognize it as an existing contract, such insurer is liable to the insured or the policy-holder for the full amount of premiums paid, although the insurance may have been in effect for some time. (Wyo.) *Summers v. Mutual Life Ins. Co.*, 992.

19. INSURANCE, LIFE—Refusal to Issue Policy—Recovery of Premium.—If a person executes and delivers a note to an insurance company's general agent in consideration that it will issue and deliver to him a life insurance policy within a stated time, and the company receives and appropriates the proceeds of the note, but fails and neglects to issue and deliver the policy, without fault on the part of the applicant for insurance, he is entitled to consider the contract as rescinded by the insurer, and to recover from him the sum advanced as money had and received. (Wyo.) *Summers v. Mutual Life Ins. Co.*, 992.

20. INSURANCE, LIFE—Pleading.—The fact that a complaint against an insurance company demands damages for its refusal to issue a policy on which the first premium has been paid does not affect the right of the plaintiff to recover the amount paid as money had and received. (Wyo.) *Summers v. Mutual Life Ins. Co.*, 992.

21. INSURANCE, LIFE—Pleading.—A complaint against a life insurance company to recover a premium paid alleging that the company's agents were authorized to solicit contracts of insurance, to make contracts for policies and to receive and receipt for premiums thereon, and that they were authorized generally to transact the company's business within the state, will not be construed to allege that such agents were themselves to write and issue the policies, as under the statute pleadings are to be most liberally construed, and the common-law rule that they are to be construed most strongly against the pleader is not applicable. (Wyo.) *Summers v. Mutual Life Ins. Co.*, 992.

Change of Beneficiary.

22. INSURANCE, LIFE—Title of Beneficiary—Effect of Noncompliance with the Statute.—If the statutes of a state where a policy of life insurance is issued provide that the person whose life is insured has the right at any time, with the consent of the insurer, to change the beneficiary, no change of beneficiary can take place until assented to by the insurer. (Ill.) *Freund v. Freund*, 283.

23. INSURANCE, LIFE—Change of Beneficiary—Necessity for Indorsement of Consent by the Insurer.—Where a policy of life insurance provides that a change of beneficiary shall be made by indorsement in writing and shall not take effect until indorsed on the policy by the home office, no act of the assured can effect such a change in the absence of such indorsement. (Ill.) *Freund v. Freund*, 283.

24. INSURANCE, LIFE—Change of Beneficiary, When not Accomplished.—Though the person whose life is insured adopts and signs printed forms prepared by the insurer making known his intention to change the name of the beneficiary and receives a receipt from the local office of the insurer stating that the papers have been received for transmission to the home office for a change of beneficiary; still if the insurer does not, in the lifetime of the assured, indorse the requisite consent as required by the terms of

the policy no change of beneficiary is accomplished. (Ill.) *Freund v. Freund*, 283.

25. **LIFE INSURANCE and Mutual Benefit Insurance—Distinction Between as to Change of Beneficiary.**—There is a distinction between certificates issued by a mutual benefit society and an ordinary life insurance in that the right to change the beneficiary does not, as a general thing, exist in the latter, and when the right does exist by the terms of a statute or a policy, it can be exercised only by complying with the provisions of the statute or policy upon the subject. (Ill.) *Freund v. Freund*, 283.

26. **INSURANCE, LIFE—Indorsement of Consent to Change the Beneficiary, Whether a Merely Formal Act.**—Though the person whose life is insured does every act which is on his part required to be done to change the name of the beneficiary, still if the statute requires the insurer to consent to such change before it becomes effective, and the policy provides that such consent must be indorsed thereon, equity cannot treat a change as accomplished where the assured dies before such consent is given and such indorsement made. (Ill.) *Freund v. Freund*, 283.

27. **INSURANCE, LIFE—Consent to Change of Beneficiary Given After the Death of the Assured.**—When the person whose life is insured dies before the insurer has consented to a change of the beneficiary, the rights of the beneficiary become vested and cannot be taken away and conferred on another by any consent or waiver of the insurer taking place after such death. (Ill.) *Freund v. Freund*, 283.

28. **INSURANCE, LIFE—Change of Beneficiary.**—The Filing of an Interpleader and the Payment of the Money into Court where the person whose life was insured did all the acts necessary to be done by him to accomplish a change of beneficiary cannot make such change effective if the insurer did not, in the lifetime of the assured, indorse on the policy the consent to such change as therein required. (Ill.) *Freund v. Freund*, 283.

Wrongful Forfeiture of Policy.

29. **INSURANCE, LIFE—Wrongful Forfeiture—Right of Action.**—If, under the terms of an insurance policy, on a husband's life, the insurance is to go to his wife as her separate estate, if she survives him, otherwise to his heirs, neither he nor his heirs are necessary parties to an action by her against the insurer for damages for wrongfully declaring the policy forfeited. (Wis.) *Merrick v. Northwestern etc. Ins. Co.*, 931.

30. **INSURANCE, LIFE—Wrongful Forfeiture—Right of Action.**—If an insurance company has wrongfully forfeited an insurance policy on the life of a husband naming his wife as beneficiary, she has a cause of action against the insurance company, although he is still living. (Wis.) *Merrick v. Northwestern etc. Ins. Co.*, 931.

31. **INSURANCE, LIFE—Wrongful Forfeiture—Measure of Damages.**—If an insurance company has wrongfully declared forfeited a life policy, the beneficiary named therein is entitled to recover as damages the value of the policy at the time of the breach. (Wis.) *Merrick v. Northwestern etc. Ins. Co.*, 931.

See State, 1; Warehousemen, 1.

INTEREST.

See Garnishment, 4; Usury.

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUORS.

See Constitutional Law, 4.

JUDGMENT.*In General.*

1. **JUDGMENTS After End of Term.**—If a statute provides that a certain term of court shall continue “until” a specified day, the proceedings and judgment in a trial before such court on the day succeeding that named in the statute are coram non judice and void, and will not support an appeal. (Ala.) *Johnson v. State*, 17.

2. **A JUDGMENT on the Pleading** is not proper when there is an issue joined upon any proposition. (Cal.) *Norris v. Lilly*, 188.

Lien of Judgment.

3. **JUDGMENT LIEN—Enforcement of by Another Judgment.**—If the defendant in a suit to foreclose a lien claims that under a judgment rendered in a national court, he is entitled to a lien on the property paramount to the lien of the complainants, and they, for reasons specified in the pleadings, insist that such judgment is not a lien, a decree in favor of such defendant directing a sale of the property and awarding him priority out of the proceeds is a proper mode of enforcing such judgment lien and conclusive on all the parties to the foreclosure suit. (Ill.) *Thompson v. Hemenway*, 239.

4. **JUDGMENT LIEN, Creation of Where the Sale is Made in Another Suit.**—If the holder of a judgment is made a party defendant to a suit to foreclose a mortgage and by his answer sets up his judgment and lien, and the court, deciding in his favor, directs a sale of the property and awards him priority of payment out of the proceeds, such sale, when made, relates to the date of the inception of the judgment lien. It is not necessary that the judgment lien be enforced by the levy of execution. (Ill.) *Thompson v. Hemenway*, 239.

5. **JUDGMENT LIEN, When Preserved by a Decree of Foreclosure.**—If, in a suit to foreclose a mortgage, a judgment creditor is made a party defendant and pleads his judgment, and the court finds it to be paramount as a lien to the mortgage, and decrees that the land be sold free from the lien of the judgment as well as free from the lien of the mortgage, and that the lien of the judgment shall be transferred to and become a lien upon the proceeds of the sale, the sale so decreed is in execution of the judgment as well as of the mortgage, and the title resulting from the sale relates to the date of the judgment lien and cuts off all subsequently acquired titles and liens. (Ill.) *Thompson v. Hemenway*, 239.

Estoppel and Res Judicata.

6. **JUDGMENT—Estoppel—Parties and Privies.**—A judgment is conclusive, not only upon those who were parties to the action, but also upon those who are in privity with them. (Idaho.) *Schuler v. Ford*, 253.

7. **JUDGMENT—Estoppel.**—One in Possession of Land under a contract of purchase is not in privity with the vendor so as to be bound by a judgment against him affecting the property in an action commenced after the contract was made and possession taken. (Idaho.) *Schuler v. Ford*, 233.

8. **RES JUDICATA**—Judgment, What is Within the Meaning of the Law of.—The decision of an application to a court of probate for the setting aside of a homestead out of the property of a decedent is a final determination of the rights of the parties to that proceeding, and, as *res judicata*, is entitled to the same effect as a final judgment. (Cal.) Estate of Harrington, 118.

9. **RES JUDICATA**—Judgment, When Conclusive of Fact.—Where an issue of fact vital to a controversy has been tried between the parties litigant, and the judgment, depending for its sufficiency upon a finding of fact, has become final, that determination of fact is forever binding in every court between the parties to that litigation and their privies. (Cal.) Estate of Harrington, 118.

10. **RES JUDICATA**—Judgment Due to Failure to Offer Evidence. The effect of an order denying an application to set aside a homestead out of the property of a decedent, on the ground that the applicant therein is not his widow, is not diminished by proof that such order resulted from the failure of the applicant to offer evidence then available to her. (Cal.) Estate of Harrington, 118.

11. **RES JUDICATA**, Order Due to Failure to Offer in Evidence Laws of. Another State.—When a court denied an application to set aside a homestead out of the property of the decedent on the ground that the applicant was not his widow, and its decision was based on an assumption that the laws of another state were the same on the subject at issue as those of the state wherein the decision was made, its effect as *res judicata* cannot be avoided in a subsequent proceeding by proving the laws of such other state and showing that, had they been offered and received in evidence in the first proceeding, the decision must have been different. (Cal.) Estate of Harrington, 118.

12. **RES JUDICATA**.—An Order Denying an Application to Set Aside a Homestead out of the property of a decedent on the ground that the applicant is not his widow is conclusive against her when she seeks to have part of his estate distributed to her as such widow. (Cal.) Estate of Harrington, 118.

13. **RES JUDICATA**.—In a Suit to Foreclose a Mortgage to Which a Holder of a Judgment Rendered in One of the National Court is Made a Party Defendant, and answering, sets up his judgment and claims a lien thereunder paramount to the mortgage, the questions whether such judgment could be enforced by a decree in such court without a cross-bill, or whether it could be enforced by a decree in the state court in any manner, or whether the only manner in which the defendant's lien could be enforced was by execution issued on the judgment and levied on the land, were matters properly involved in the foreclosure suit, and might have been, if they were not, raised and determined by it, and as to them, the decree of foreclosure is *res judicata*. (Ill.) Thompson v. Hem-enway, 239.

Principal and Surety.

14. **JUDGMENT**—Whether Binds Estate of Deceased Surety.—If a surety on the bond of an administrator dies three years before a judgment is rendered against his principal, and no administrator is appointed for the estate of the surety, his estate is not bound by such judgment. (Mo.) State v. Goggin, 826.

15. **JUDGMENT** Against Principal—Effect on Surety.—A judgment, in an action by the holder of a secured note against the principal therein alone, that the note has not been paid is *res judicata* and binding on the surety on such note, in a subsequent action against

him by the holder thereof, in which the same defense of payment is set up as was interposed to the former action. (Iowa.) Beh v. Bay, 385.

See Appearance, 3; Criminal Law, 7; Divorce; Setoff and Counterclaim; Remaindermen.

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JUDICIAL NOTICE.

See Evidence, 4, 5.

JUDICIAL SALE.

See Executors and Administrators; Guardian and Ward, 4.

JURISDICTION.

JURISDICTION, Presumption of.—Where a decree is silent as to jurisdiction over the defendant, it will be presumed; but if the decree is silent as to service of process, and the summons shows a want of or an insufficient service, the presumption of jurisdiction is overcome. (Ill.) *Forrest v. Fey*, 249.

See Appearance.

JURY.

JURORS—Examination with View to Peremptory Challenge.—After a juror in a criminal case has been sworn on his voir dire and declared competent by the court, counsel for the defense cannot, as a matter of right, interrogate him in order to determine the expediency of making a peremptory challenge. (Md.) *Handy v. State*, 558.

See New Trial.

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LACHES.

See Equity, 3.

LICENSE.

LICENSE IN LAND—Revocation.—Mere oral permission by one to use the land to some extent of another, no consideration being paid therefor, although both parties may contemplate that the permission granted shall be permanent and although the licensee, on the faith thereof, enters upon the land and makes valuable improvements, conveys no interest in the land, and creates only a mere license, revocable at the pleasure of the licensor. (Wis.) *Huber v. Stark*, 937.

LIENS.

LIENS, When Created.—An Agreement to Give Security on Property not yet in Existence or in the Ownership of the Party Making the Contract, or property to be acquired by him in the future, constitutes an equitable lien on the property so existing, or acquired at a subsequent time, which is enforceable in the same manner and against the same persons as the lien on a specified thing existing and owned by the contracting parties at the time of the contract. (Me.) *Burrill v. Whitcomb*, 498.

LIMITATION OF ACTIONS.

1. **LIMITATIONS, Construction of Statute of.**—The provision of the code that no action for the recovery of real property or the possession thereof can be maintained unless the plaintiff or his predecessor in interest was seised or possessed of the property within five years before the commencement of the action cannot be construed as making the statute of limitations run before a cause of action has accrued, and thereby cutting off the right of remaindermen by a possession held adversely to them during the continuance of the life estate. (Cal.) *Pryor v. Winter*, 162.

2. **LIMITATION OF ACTIONS.**—Courts of Equity are Bound by the Statute of Limitations and must give effect to it when pleaded. (Ark.) *Baldwin v. Williams*, 81.

3. **LIMITATION OF ACTIONS—Bill to Impeach Decree.**—A bill in equity to impeach a probate decree for fraud, though not within the terms of the statute which bars a bill of review after a lapse of three years, must, by analogy, be governed by the same limitation. (Ala.) *Willis v. Rice*, 26.

4. **LIMITATION OF ACTIONS—Mistake in Form of Remedy.**—Under a statute providing that "if in any action the writ be abated or the action otherwise avoided or defeated, . . . or for any matter of form, or if after a verdict for the plaintiff, the judgment shall be arrested, . . . or shall be reversed on writ of error, the plaintiff may commence a new action for the same cause within one year," a plaintiff may bring a new action within a year after a

former action was dismissed because by mistake brought in *assumpsit* instead of in tort. (Mich.) *McMillan v. Reaume*, 666.

5. **LIMITATION OF ACTIONS Against Trustee.**—In the absence of a demand, the statute of limitations does not apply to an action against a trustee for an accounting. (Mass.) *Pierce v. Perry*, 637.

6. **LIMITATION OF ACTIONS—Trustee, Who is.**—A brother who acts as the financial agent of his unmarried sister, collecting, managing and dealing with her property as if it were his own, and having possession of all her securities and investments, may be found to have been a trustee for her, so that the statute of limitations will not bar a suit brought by her executors against him for an accounting. (Mass.) *Pierce v. Perry*, 637.

7. **LIMITATION OF ACTIONS—New Promise.**—The making and delivery of a second note given for unpaid interest on a prior note after the latter is barred by limitation is not such a written admission of the debt evidenced by the first note as will operate to revive the right of action thereon, and prevent the interposition of the statute of limitations. (Iowa.) *Kleis v. McGrath*, 396.

8. **LIMITATION OF ACTIONS—Pleading the Statute by Setting Out the Facts.**—Where the bill for an accounting sets out facts sufficient to avoid the statute of limitations, or to show that it was never applicable, and the defendant pleads the statute, the plaintiff need not interpose any additional replication. (Mass.) *Pierce v. Perry*, 637.

See Adverse Possession; Fraudulent Conveyances, 5; Guardian and Ward, 5-8.

LIVESTOCK.

See Animals.

MANDAMUS.

1. **MANDAMUS—Practice.**—A demurrer to the writ or affidavit in mandamus is, in effect, a motion to quash the writ, and may be entertained and in a proper case granted by sustaining the demurrer and dismissing the proceeding. (Wash.) *State v. Brewer*, 858.

2. **MANDAMUS Issues Only to Compel the Performance of a Ministerial Duty**, and cannot be used to compel the performance of a duty requiring the exercise of discretion. (Wash.) *State v. Brewer*, 858.

3. **MANDAMUS will not Lie to Compel a General Course of Official Conduct**, because it is impossible for the court to oversee the performance of such duties. Hence, this writ will not issue to compel the sheriff of a county or the marshal of a city to make complaint and prosecute the persons who violate the laws of the state against keeping saloons, cigar-stands, and other places of business open for trade on Sunday. (Wash.) *State v. Brewer*, 858.

MARK.

See Acknowledgments, 3.

MARRIAGE.

1. **MARRIAGE, When does not Create a Disability.**—Where by the laws of the state a marriage contracted by a woman already married is absolutely void, such second marriage does not create any disability against her, nor diminish, as *res judicata*, the effect:

of an adjudication against her made after the termination of the valid marriage by the death of her husband, and before the second or void marriage had been annulled. (Cal.) Estate of Harrington, 118.

2. MARRIAGE by Person Having a Husband or Wife Living, When Valid as to the Innocent Party, and Sufficient to Prevent an Action to Nullify It.—If a woman marries a man in good faith, without the knowledge of his prior marriage, and that he has a wife then living, and, after the impediment is removed by the death of the first wife, continues to live with him in good faith, the marriage becomes legal under the statutes of Massachusetts, and the wife cannot have it annulled and declared void on the ground that she was induced to enter into it by the false and fraudulent representations of the husband, and that after she had knowledge of the first marriage she had never lived with him. (Mass.) Turner v. Turner, 643.

MARRIED WOMEN.

See Acknowledgments, 4; Husband and Wife.

MASTER AND SERVANT.

Employer's Liability in General.

1. MASTER AND SERVANT, Railway Cars, Liability of the Former for Defects Therein.—A master on whose premises railway cars come with coal consigned to him at his power-house and plant to be unloaded is not under duty of inspecting them, and hence is not liable to his employé injured through defects therein. (Mass.) Dunn v. Boston etc. Ry. Co., 601.

2. MASTER AND SERVANT—Ways, Works, and Machinery.—Steam railway cars loaded with coal and consigned to a street railway company are not, while at its power-house to be unloaded, a part of its ways, works, and machinery, where they are not the property of such street railway corporation nor under its control. (Mass.) Dunn v. Boston etc. Ry. Co., 601.

3. MASTER AND SERVANT—Reasonably Safe Place in Which to Work, Master When not Liable for not Furnishing.—If a servant is in as good a position as the master for ascertaining and understanding the situation, and equally well knows and appreciates the conditions, he cannot be allowed to complain for injuries sustained by working therein. (Wash.) Miller v. Moran Bros. Co., 917.

4. NEGLIGENCE.—The Defense that the Employer Could not Have Foreseen the Condition or Circumstances Leading to the Injury of the Plaintiff Employé, and therefore must be exonerated from the charge of negligence, cannot be sustained if the resulting accident proves that the conditions were dangerous, and the jury were of the opinion, which the evidence tended to sustain, that reasonable prudence and care required a different construction of the appliance causing the injury. (Ill.) Siegel-Cooper & Co. v. Trecka, 302.

5. MASTER AND SERVANT—Inspection Duty of, When Rests on Servant.—When the nature of the work in which a servant is employed necessarily constantly changes, and a safe place one moment may become a dangerous one next by the ordinary and necessary operation of the work, and without fault on the part of anyone, a servant working under these conditions must, to a certain extent, be his own inspector, and cannot complain because his master, with less opportunity than he, fails in a given instance to detect or anticipate an unexpected occurrence. (Wash.) Miller v. Moran Bros. Co., 917.

6. **MASTER AND SERVANT.**—An employé who stands under a heavy suspended steel plate, knowing its tendency to swing, and where there is obvious possibility that the plate may fall and inflict serious injury, is guilty of contributory negligence, and cannot recover if injured by such falling. (Wash.) *Miller v. Moran Bros. Co.*, 917.

7. **MASTER AND SERVANT—Unnecessarily Placing One's Self in a Dangerous Position.**—If a servant has an opportunity of doing work in two ways, one of which is dangerous and the other not, and attempts the dangerous method, he is guilty of contributory negligence, and cannot recover, though his master is also negligent. (Wash.) *Stratton v. Nichols Lumber Co.*, 881.

8. **NEGLIGENCE. Evidence, When does not Support Charge of.**—A recovery cannot be sustained on the ground that the defendant's foreman was guilty of negligence in ordering a mill started while the person injured was tying a belt, when it appears that, before such starting, a signal was given by two blasts from a steam whistle, and that the mill had been running two or three minutes before the accident occurred. (Wash.) *Stratton v. Nichols Lumber Co.*, 881.

Minor Employés.

9. **MASTER AND SERVANT—Minor Employés, Risks not Assumed by.**—The fact that an elevator which a minor employé was expected to use was of a visibly faulty construction which might expose him to injury does not establish his assumption of the risk of injury, where he was under fourteen years of age, and there is nothing to show that his attention was ever called to the claimed defect. Obedience to those in authority should be expected and commended in a child of his immature years. (Ill.) *Siegel-Cooper & Co. v. Treka*, 302.

10. **MASTER AND SERVANT—Minor Employés, Assumption of Risks by.**—The rule in respect to the assumption of risks by employés is modified in the case of young persons of inexperience and immature judgment who are not capable of understanding and appreciating the perils to which they are exposed. They are entitled to recover for injuries resulting from such perils, unless they have been instructed how to avoid them. (Ill.) *Siegel-Cooper & Co. v. Treka*, 302.

11. **MASTER AND SERVANT—Minor Employés—Question for the Jury.**—Whether an employé fourteen years of age should have appreciated the danger to which he subjected himself by reason of the construction of an elevator which he was required to use is a question for the jury. (Ill.) *Siegel-Cooper & Co. v. Treka*, 302.

Substitute Servants.

12. **MASTER AND SERVANT—Employment of and Rights of Substitute Servant.**—If some unforeseen contingency arises rendering it necessary in the master's interest that a servant have temporary assistance, such servant has implied authority to engage such temporary service; and the substitute or assistant servant is entitled to the same measure of protection as is the servant or agent upon whose request he rendered the assistance. (Iowa.) *Aga v. Harbach*, 377.

13. **MASTER AND SERVANT—Substitute Servant—Rights of.**—A substitute servant or helper employed and paid by a regular servant with the knowledge or acquiescence of the master, is not a trespasser or mere volunteer, and, while engaged in the work of the master, the

latter is bound to exercise reasonable care for his safety. (Iowa.) *Aga v. Harbach*, 377.

14. MASTER AND SERVANT—Substitute Servants.—One who in good faith enters upon the master's work at the request of a regular servant in apparent charge thereof is not a trespasser, but assumes for the time being the relation of servant occupying the same relation and becoming subject to the same rule, including the operation of the fellow-servant rule, as do those who are directly employed by the master, even though such substitute servant may not be entitled to recover wages. (Iowa.) *Aga v. Harbach*, 377.

15. MASTER AND SERVANT—Substitute Servants—Authority to Employ.—Authority on the part of a regular servant to employ substitute servants may be implied from the nature of the work to be performed, and also from the general course of conducting the business of the master by the servant for so long a time that knowledge and consent may be inferred. It is not necessary that a formal or express employment in behalf of the master should exist, or that compensation should be paid by or expected from him. (Iowa.) *Aga v. Harbach*, 377.

Fellow-servants.

16. MASTER AND SERVANT.—If an Injury Results from the Negligence of a Master Combined with that of a Fellow-servant and the injury would not have happened had the master observed due care for the safety of the injured servant, the master is liable. (Ill.) *Siegel-Cooper & Co. v. Trcka*, 302.

17. MASTER AND SERVANT—Negligence of a Fellow-servant in Throwing a Pick Without Warning.—If the proprietor of an icehouse tells one of his employes to throw a pick over a partition into another room, the order can be interpreted only as an order to throw the pick in a proper way and place, and not as telling him to throw it regardless of the safety of those in the other room, and if the employe throws it into the other room without giving due warning, whereby one of his coemployes is injured, the negligence is that of the fellow-servant for which the proprietor is not answerable. (Mass.) *Desautels v. Cloutier*, 641.

Independent Contractor.

18. MASTER AND SERVANT—Independent Contractor, Liability of Employes of.—If one who employs an independent contractor is not under any duty to furnish him with appliances with which to work, it is the duty of such independent contractor alone, for the breach of which his employes cannot recover of the original employer though injured thereby. (Wash.) *Miller v. Moran Bros. Co.*, 917.

19. CONTRACTOR.—The Relation of an Independent Contractor Under a Person Having a Contract with the Government is not changed by the fact that general supervision over his work is exercised by the principal contractor and by the government, to both of whom the result of his work is required to be satisfactory. (Wash.) *Miller v. Moran Bros. Co.*, 917.

20. MASTER AND SERVANT—Independent Contractor.—Even if the principal contractor is under the duty of furnishing an independent contractor under him with appliances with which to work, this duty will be fulfilled by furnishing them on request, if they can be provided, where they have been so furnished. (Wash.) *Miller v. Moran Bros. Co.*, 917.

21. MASTER AND SERVANT—Liability to Employes of an Independent Contractor for not Furnishing Proper Appliances.—Con-

ceding it to be the duty of the principal contractor to furnish appliances with which an independent contractor and his employes shall work, still such principal contractor is not rendered liable to the servants of the independent contractor by the fact that his fellow-servants, instead of asking where the proper appliances could be found, went to a pile of iron and selected a bar which they used, and the defects in which caused the injury to such servant. (Wash.) *Miller v. Moran Bros. Co.*, 917.

22. MASTER AND SERVANT—Principal Contractor and Independent Contractor and Their Duties to Their Employes.—As an independent contractor owes to his employes the duty of furnishing reasonably safe appliances, the principal contractor has the right to presume that such independent contractor will observe his obligations toward his employes; and if it is the duty of the principal contractor to furnish suitable appliances to the independent contractor, the former has the right to presume that the latter will request them through some one having authority, and is not liable because, without such request, such independent contractor or his servants selected a defective appliance, the use of which caused injury to one of his servants. (Wash.) *Miller v. Moran Bros. Co.*, 917.

23. MASTER AND SERVANT—Independent Contractor, When not Liable for Acts of.—The principal contractor is not concerned with the details of the performance of the work of an independent contractor, and is not required to know whether he is using appliances which were unsafe for his employes, and is not liable to the employes of such independent contractor because he uses unsafe appliances resulting in their injury. (Wash.) *Miller v. Moran Bros. Co.*, 917.

Assault by Servant.

24. MASTER AND SERVANT, Liability of the Former for an Assault by the Latter.—If an employe in a storage warehouse sent with a customer to take him in an elevator to the room where his goods are stored, assaults him on the return trip without provocation, the master is not liable therefor, because in making the assault the employe is not engaged in the master's work, nor doing an act as a means or for the purpose of performing such work. (Mass.) *Fairbanks v. Boston Storage etc. Co.*, 646.

See Constitutional Law, 3.

MECHANICS' LIENS.

1. MECHANIC'S LIEN—Labor and Materials—Entire Contract.—Under a statute allowing a mechanic's lien for work done upon a building, but not for materials furnished, a person who does work on a building and also furnishes materials under an entire contract, the consideration being a lump sum for both, is not entitled to a lien. (Md.) *Evans Marble Co. v. International Trust Co.*, 568.

2. MECHANIC'S LIEN.—A Subcontractor Who has Work done on a building for the contractor, although he does not perform the work personally, is entitled to a mechanic's lien, under a statute providing that buildings shall be subject to liens for the payment of all debts contracted for work done on them. (Md.) *Evans Marble Co. v. International Trust Co.*, 568.

3. MECHANIC'S LIEN—Work not Done on Premises.—One who does work in his shop on materials to be used in the construction of a building, and so used, is entitled to a mechanic's lien. (Md.) *Evans Marble Co. v. International Trust Co.*, 568.

MILK.

See Constitutional Law, 11-14.

MONOPOLIES.

See Contracts, 7.

MORTGAGES.

1. **MORTGAGES—Note to Secure Interest.**—A mortgage given to secure payment of a debt secures, and may be enforced for the payment of, the interest accruing thereon under the principal note, although the debtor has given the mortgagee another note for the payment of such interest. (Iowa.) *Kleis v. McGrath*, 396.

2. **MORTGAGES—Collection of Interest—Joinder of Actions.**—A mortgagee may enforce payment of the principal mortgage note, and another given for interest thereon, in the same action. (Iowa.) *Kleis v. McGrath*, 396.

3. **MORTGAGE, Foreclosure of does not Affect Title not Acquired Under the Mortgage.**—If remaindermen are made parties defendant in an action to foreclose a mortgage executed by the tenant for life under an allegation that they claim some interest in the property which is subject to the mortgage, their title is not affected by the judgment of foreclosure and a sale and conveyance pursuant thereto. (Cal.) *Pryor v. Winter*, 162.

4. **MORTGAGE FORECLOSURE—Presentment of Claim to Executor.**—A statute which provides that no holder of a claim against the estate of a decedent shall maintain an action thereon, unless it is first presented to the executor or administrator, except that an action may be brought by the holder of a mortgage to enforce it against the encumbered property, where all recourse to any other property of the estate is waived in the complaint, does not bar the foreclosure of a mortgage, although the claim secured thereby has been presented to the administrator for allowance. (Idaho.) *First Nat. Bank v. Glenn*, 204.

5. **MORTGAGE, Senior, When Out Off by Decree of Foreclosure.** If, under a suit to foreclose a mortgage, a judgment creditor and also a prior mortgagee of the mortgagor are made parties defendant, and the judgment creditor sets up his judgment in his answer, claiming it to be paramount to both mortgages, and the court so finds and directs a sale of the property and awards priority to the judgment creditor out of the proceeds of the sale, the sale, when made, transfers title paramount to the lien of such prior mortgage, and the title of any purchaser claiming under a sale subsequently made thereunder. (Ill.) *Thompson v. Hemenway*, 239.

See Appearance, 3; Chattel Mortgage; Judgments, 5; Reformation of Instruments.

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MUNICIPAL CORPORATIONS.*Ordinances—Automobile Regulations.*

1. **MUNICIPAL ORDINANCES**—Burden of Showing Unreasonableness of.—If a person seeks relief, on habeas corpus, from a judgment convicting and sentencing him for violating a municipal ordinance prohibiting the use of automobiles on public highways, in the night-time, on the ground that the ordinance is void, because unreasonable, he must assume the burden of proving its unreasonableness. (Cal.) In re Berry, 160.

Ordinance Regulating Quarrying.

2. **MUNICIPAL ORDINANCE**, Construction of.—An ordinance declaring that no person shall maintain or operate any rock or stone quarry within designated limits cannot reasonably be construed as prohibiting the owner of land containing stone or rock from making thereon such proper and useful excavations for the purposes of construction as may be necessary. (Cal.) In re Kelso, 178.

3. **MUNICIPAL ORDINANCE** Forbidding Quarrying, Validity of. An ordinance declaring that no person shall maintain or operate any rock or stone quarry within a designated part of a city is unreasonable and void as an attempt to deprive the owner of the use of his property, though such use may not be detrimental or dangerous to the public. (Cal.) In re Kelso, 178.

Dangerous Sidewalk.

4. **MUNICIPAL CORPORATION**—Coal-hole in Sidewalks.—Where a city grants permission to an abutting property owner to maintain a coal-hole in the sidewalk, the duty immediately arises, both on the part of city and the persons constructing it, to use ordinary care to see that it is safe for public use; and if the construction is such that the cover is likely to be displaced, the city is liable to a pedestrian who falls into the hole, although it is without actual notice of the defect, for it has constructive notice from the beginning. (Mo.) Drake v. Kansas City, 759.

5. **MUNICIPAL CORPORATION**—Latent Defect in Sidewalk.—It is no part of the duty of persons passing along a sidewalk to look for latent defects therein; it is the duty of the city and its officers to look for defects. (Mo.) Drake v. Kansas City, 759.

6. **MUNICIPAL CORPORATION**—Coal-hole in Sidewalk.—Where a pedestrian falls into a coal-hole in the sidewalk, and it appears that on the morning of the accident the occupant of the adjoining property had raised and propped up the cover of the hole, but had done the same thing every day for some two months previous, the city is chargeable with notice of such continuing act, and cannot escape responsibility on the ground that the raising of the cover by such third person caused the accident. (Mo.) Drake v. Kansas City, 759.

See Constitutional Law.

MURDER.

See Homicide.

NEGLIGENCE.

1. **NEGLIGENCE**, CONCURRENT.—If the defendant is guilty of the negligence charged and without which the injury complained of would not have occurred, it makes no difference as to his liability that some act or agency of some other person also contributed

to bring about the result for which damages are claimed. (Ill.) Siegel-Cooper & Co. v. Treka, 302.

2. **NEGLIGENCE—Burden of Proof of Causing Accident.**—Though it be proved that the defendant was negligent, recovery cannot be sustained against it for personal injury resulting in the death of one of its employes, if there is no evidence tending to show that the accident was the proximate result of such negligence, as where no one saw the accident or knew how the deceased came in contact with the appliance inflicting the injury. (Wash.) Stratton v. Nichols Lumber Co., 881.

3. **NEGLIGENCE, Question of, When Eliminated by Special Verdict.**—Where a jury is instructed to state in the verdict whether alleged foreign matters in stock feed were incorporated therein by the negligence of the defendant or by accident, and finds in favor of the plaintiff, but announces the belief that such matter got into the feed by accident, such finding negatives negligence on the part of the defendant. (Ark.) National Cotton Oil Co. v. Young, 71.

4. **NEGLIGENCE—Recovery Entire—Action.**—One entitled to recover for the consequences of a wrongful or negligent act may recover all the damages that that act has proximately inflicted upon him, although the injuries may be diversified in character, and may include both personal injury and injury to property. (Ala.) Birmingham Southern Ry. Co. v. Lintner, 40.

5. **NEGLIGENCE—Complaint—Evidence.**—It is no objection to a count in a complaint to recover for personal injury and for injury to property caused by one act of negligence, that different evidence must be resorted to in proof of the respective claims. (Ala.) Birmingham Southern Ry. Co. v. Lintner, 40.

NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

NEW TRIAL.

NEW TRIAL—Incompetency of Jurors.—It would be a flagrant abuse of discretion on the part of a circuit court in refusing a new trial on the ground of the incompetency of some of the jurors in a criminal trial, to justify an interference by the supreme court. (Mo.) State v. Gordon, 790.

OFFICERS.

PUBLIC OFFICER—Manner of Appointment.—Where a municipal charter requires the city chemist to be appointed by the mayor and approved by the council, an ordinance is not invalid because it requires his appointment to be also approved by the board of health. (Mo.) St. Louis v. Liessing, 774.

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See Adoption.

PENSION MONEY.

See Homesteads, 3.

PLEADING.*In General.*

1. **PLEADING, Construction in Favor of.—The Only Test to be Applied to a Complaint** is, will it reasonably permit of a construction sustaining it. If it will satisfy such a test, it is good on demurrer, however plainly it may be open to a motion for indefiniteness and uncertainty. (Wis.) *Emerson v. Nash*, 944.

2. **PLEADING—Statute.—It is not Necessary in a Civil Action** to set out a statute or make any reference to it in the declaration, but the cause must be brought within its provisions by alleging the requisite facts. (Me.) *Inhabitants of Peru v. Barrett*, 494.

3. **DECLARATION—How Taken Advantage of When not Specific.—If a declaration**, while sufficient to sustain a judgment, should be more specific, the only course open to the defendant is to demur; he may not object to the admission of any evidence under it. (Mich.) *Thick v. Detroit, etc. Ry. Co.*, 694.

4. **PLEADING AND PRACTICE—Waiver of Error.—If a pleading** is styled a 'motion to strike,' but is treated by all parties as an amendment to a demurrer, any error in regard to the name given to the pleading is waived. (Iowa.) *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 387.

5. **PLEADINGS.—Proof and Decree must correspond**, and facts disclosed by the evidence which would warrant relief will not sustain a decree where such facts are not alleged. (Ill.) *Higgins v. Higgins*, 316.

Amendments.

6. **PLEADING AND PRACTICE.—Motion to Strike out an amended answer** is not waived by having filed a demurrer to the original answer. (Iowa.) *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 387.

7. **PLEADING AND PRACTICE.—A demurrer to an original pleading** may be amended after an amendment to the pleading. (Iowa.) *Wisconsin Lumber Co. v. Greene etc. Tel. Co.*, 387.

8. **PLEADING AND PRACTICE—Amendments.—Permission to amend a petition** by setting up a new and distinct cause of action, after the introduction of evidence, is entirely within the discretion of the trial court. (Iowa.) *Allen v. North Des Moines M. E. Church*, 366.

See Actions.

POLICE POWER.

See Constitutional Law.

POWER OF SALE.

POWERS OF SALE—Duty of Purchaser.—If, by deed or will, a life tenant is invested with power to sell land for the purpose of reinvesting the proceeds, no obligation devolves upon the purchaser to see that the reinvestment is in fact made. (Miss.) *Whitfield v. Burke*, 714.

PRESCRIPTION.

See Adverse Possession; Waters and Watercourses, 5.

PRINCIPAL AND SURETY.

PRINCIPAL AND SURETY—Variation of Contract Which Will Release Surety.—If, under a contract of employment, the employé agrees to act as salesman and report each week, upon blanks to be furnished, the full amount of all business transacted by him, a surety on his bond to the effect that he will faithfully perform his duties is released by the fact that the employer relieves the salesman from the duty of making weekly reports. (Ark.) *Singer Manufacturing Co. v. Boyette*, 104.

See Guardian and Ward, 5-8; Judgments, 14, 15.

PROBATE MATTERS.

See Equity; Executors and Administrators.

PROCESS.

1. **SUMMONS**—Substituted Service on Person Temporarily within State.—A statute providing for substituted service of summons on a person by leaving a copy thereof at his usual place of residence does not authorize such service upon one who is temporarily within the state simply for the purpose of performing a temporary employment. (Wyo.) *Honeycutt v. Nyquist, Petersen & Co.*, 975.

2. **SUMMONS**—Defective Service—Misnomer—Waiver.—An appearance in court of a person for the purpose of attacking the suit or proceeding on the ground that there is a misnomer of himself, and for that purpose giving his true name, constitutes a waiver of defective service of summons or process and confers jurisdiction upon the court. (Wyo.) *Honeycutt v. Nyquist, Petersen & Co.*, 975.

See Appearance.

PROHIBITION.

1. **PROHIBITION, When Will not Issue**.—If the existence or nonexistence of jurisdiction depends on contested facts which the inferior tribunal is competent to inquire into and determine, a writ of prohibition will not be granted, though the superior court is of the opinion that the question of jurisdiction was wrongfully determined by the inferior court and that its rightful determination would have ousted that court of jurisdiction. (Ark.) *Finley v. Moose*, 79.

2. **JURISDICTION, Prohibition Will not Issue to Determine**.—If a court has jurisdiction of the subject matter and not of the person, the remedy is by appeal and not by prohibition. (Ark.) *Finley v. Moose*, 79.

PUBLIC LANDS.

See Taxation, 9-11.

QUARRIES.

See Municipal Corporations, 2, 3.

QUIETING TITLE.

QUIETING TITLE.—The Failure of the Plaintiff to Prove His Claim as Alleged and the success of the defendant in establishing some interest in the land do not entitle the latter to a nonsuit in

an action to determine conflicting claims of title. The plaintiff, where he shows a legal interest, is entitled to a decree declaring and defining the interest of both parties to the action. (Cal.) *Peterson v. Gibbs*, 107.

RAILROADS.

RAILROADS—Contributory Negligence.—A person is not guilty of contributory negligence in failing to hear a railroad train when he stops and listens for it. (Ala.) *Birmingham Southern Ry. Co. v. Lintner*, 40.

See Carriers; Master and Servant; Street Railways.

REFORMATION OF INSTRUMENTS.

MORTGAGES—Reformation of After Foreclosure and Sale.—Judicial foreclosure extinguishes a mortgage, and the fact that property is omitted therefrom by mistake in the execution of the instrument furnishes no ground for reformation in equity of either the mortgage or the decree of foreclosure, and this although the officer selling under the decree of foreclosure included in his sale the land in controversy. (Ala.) *Stewart v. Wilson*, 33.

Note.

Reformation of Sheriffs' Deeds. See Sheriffs' Deeds.

RELIGIOUS SOCIETY.

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REMAINDERMEN.

1. **REMAINDERMEN, When not Prejudiced by a Judgment.**—An administrator is not the trustee for remaindermen, and hence they are not estopped by a judgment against him, though he sued as administrator of one under and by whose will an estate in remainder was created and vested in such remaindermen. (Cal.) *Pryor v. Winter*, 162.

2. **REMAINDERMEN, Prescriptive Title Against.**—During the continuation of an estate for life no possession can be adverse as against remaindermen, as the statute of limitations cannot operate against them until the determination of the life estate gives them a right of possession. (Cal.) *Pryor v. Winter*, 162.

3. **THE ESTATE OF A REMAINDERMAN** is Distinct from that of the Tenant of the Preceding Particular Estate, and cannot be affected by any act of the particular tenant or of his grantee. (Cal.) *Pryor v. Winter*, 162.

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See Evidence, 6-10.

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See Judgments, 6-15.

RESTRAINT OF TRADE.

See Contracts, 7.

ROCK QUARRY.

See Municipal Corporations, 2, 3.

SALES.*Right of Inspection.*

1. **SALES—Inspection—Change of Contract.**—A contract to sell ties which calls for their delivery at a time and place named, but makes no provision for inspection, is not changed by the seller requesting the buyer to send an inspector to the place where the ties are being obtained, and the buyer complying with the request, if the seller repudiates the inspection made by a person so sent, and the buyer declines to send another inspector. (Mich.) *Thick v. Detroit etc. Ry. Co.*, 694.

2. **SALES—Inspection—Sight Draft with Bill of Lading.**—Where a person sells goods not yet ascertained or in existence, and ships them to the buyer, terms cash on delivery, the buyer has a right to inspect them on their arrival before accepting and paying for them; and if a shipment is made with a sight draft attached to the bill of lading, there is no right of inspection before payment, and therefore not a sufficient tender of performance. (Mich.) *Thick v. Detroit etc. Ry. Co.*, 694.

Damages for Breach.

3. **SALES—Damages for Breach—Offer of Delivery.**—A refusal by the buyer to carry out a contract of sale justifies the seller in treating it as broken and bringing an action for damages, without any delivery or former offer of delivery. (Mich.) *Thick v. Detroit etc. Ry. Co.*, 694.

4. **SALES—Damages for Breach.**—A Seller may Show, in an action against the buyer for damages in refusing to comply with his contract to purchase ties, that, although he did not have the ties, he was able to procure them. (Mich.) *Thick v. Detroit etc. Ry. Co.*, 694.

5. **SALES—Action for Breach of Contract—Evidence.**—In an action for damages against the purchaser of ties for refusing to receive them, the seller cannot show that the purchaser subsequently bought ties of a third person, some of which were a part of the lot originally contracted for from the plaintiff. (Mich.) *Thick v. Detroit etc. Ry. Co.*, 694.

Warranty of Food Stuffs.

6. **SALES.**—The Warranty that Articles Sold Shall be Merchantable and Reasonably Fit for the Purposes for Which They Were Intended does not Exist where the purchaser has the opportunity to inspect and the defect complained of could have been discovered by him as easily as by the vendor. (Ark.) *National Cotton Oil Co. v. Young*, 71.

7. **SALE OF FOOD STUFFS** Containing Iron, Nails, and Other Foreign Substances—Warranty.—Where cotton-seed hulls and cotton-seed meal are sold to be fed to livestock, and the purchaser has

an opportunity for inspection, there is no implied warranty of fitness; and the vendor is not liable for injuries to the purchaser's cattle caused by such articles containing wire, nails, and other foreign substances, the seller not being guilty of any negligence. (Ark.) *National Cotton Oil Co. v. Young*, 71.

8. SALE OF FEED STUFFS for Cattle, Warranty of Fitness not Implied.—On the sale of feedstuffs for cattle, there is no implied warranty that they are fit for that purpose, nor that they do not contain matters injurious to cattle. (Ark.) *National Cotton Oil Co. v. Young*, 71.

See Frauds, Statute of.

SALOONS.

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withdrawal from contest, temporary suspension of hostilities is not, 810.

Setoff. See Judgments.

SETOFF AND COUNTERCLAIM.

1. THE ASSIGNMENT OF A JUDGMENT is Subject to the right of the judgment debtor to offset against the judgment assignee a judgment in the former's favor, of which the assignee had notice prior to the assignment. (Cal.) Coonan v. Loewenthal, 128.

2. THE ASSIGNMENT OF A JUDGMENT is Subject to the Right of Setoff in favor of the judgment debtor, though at the time of the assignment he had not paid the claims out of which his right to setoff arose, as where, previous to the assignment, he was liable as a surety of the judgment creditor and subsequently paid the indebtedness for which he was such surety. (Cal.) Coonan v. Loewenthal, 128.

3. JUDGMENT, Setoff of One Against Another—Rule in Equity. When a judgment creditor is insolvent, equity will allow a setoff against his judgment of a judgment in favor of his judgment debtor when a court or law would not, and in cases where, though the right to setoff had not accrued at the time of the assignment, yet the liability then existed under which the right of setoff against the insolvent debtor subsequently accrued. (Cal.) Coonan v. Loewenthal, 128.

4. JUDGMENT—Right of Setoff Based on Secured Claim.—The assignment of a judgment is subject to a right of setoff in favor of the judgment debtor, though at the time of the assignment the demand on which the offset is claimed was secured by a mortgage which, after the assignment, is foreclosed, the property sold, and a judgment for the deficiency docketed. (Cal.) Coonan v. Loewenthal, 128.

5. JUDGMENT, Setoff of One Against Another on Motion.—A court has jurisdiction of a motion to set off one judgment against another. The power to proceed by motion rests upon the general jurisdiction which courts possess over their judgments and their suitors. (Cal.) Coonan v. Loewenthal, 128.

6. SETOFF of One Judgment Against Another, Presumption in Support of.—Where a court directs, as against the assignee of a judgment, that there be set off against it a judgment in favor of the judgment debtor, it will be presumed on appeal that the court found that the assignee took his assignment with notice of the right to such setoff. (Cal.) Coonan v. Loewenthal, 128.

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SIGNATURE.

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SPECIFIC PERFORMANCE.

SPECIFIC PERFORMANCE.—An Agreement in Case the Landlord Agreed to Sell the Leased Premises, He Would Give the Lessee the First Chance to buy them, no price being suggested nor any method provided by which to determine what the price will be, will not be specifically enforced. (Ill.) *Folsom v. Harr*, 297.

See Contracts, 5; Deeds.

STATES.

1. **STATE**—Claim for Insurance—Priority.—A state's claim under fire insurance policies, sought to be enforced against an insolvent insurance company in the hands of a receiver, is not entitled to priority over the claims of other creditors. (Md.) *State v. Williams*, 579.

2. **STATE.**—Costs cannot be Awarded against a state in a civil action, in the absence of express statutory authority. (Md.) *State v. Williams*, 579.

STATUTE OF FRAUDS.

See Frauds, Statute of.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.**Enactment.**

1. **STATUTES**—Enactment—Signing.—If an enrolled act shows that it was in fact signed by the presiding officers of the Senate and the House and approved by the governor, and the House journal shows that while the House was in session the speaker thereof announced that he was about to sign such act, and the Senate journal shows that such act, after being correctly enrolled, was signed in the presence of the Senate by the presiding officer thereof, while a subsequent entry in both the Senate and House journals shows a communication from the governor announcing that he had approved such act, such entries are sufficient to show that such act was in fact signed by the speaker of the House in its presence and that the fact of signing was at once entered upon the journal, as required by a constitutional provision. (Wyo.) *Younger v. Hehn*, 986.

Title of Statutes.

2. **CONSTITUTIONAL LAW**—Title of Statutes, When does not Include the Subject.—A statute, the title to which declares that it is in relation to the fees of state and county officers, and imposes

on estates in probate a fee or charge regulated by their value, and therefore amounts to taxation, is invalid, because it includes a subject not mentioned in the title. (Wash.) *State v. Case*, 874.

3. **CONSTITUTIONAL LAW—Title of Ordinance.**—The generality of the title to an ordinance is no objection, so long as it is not made to cover legislation incongruous in itself. (Mo.) *St. Louis v. Liessing*, 774.

4. **CONSTITUTIONAL LAW—Title of Ordinance.**—Sound policy and legislative convenience dictate a liberal construction of the title and subject matter of enactments to maintain their validity. (Mo.) *St. Louis v. Liessing*, 774.

Construction.

5. **CODE, Construction of.**—All the statutory provisions on any subject are to be construed together, in view of the presumption that the legislators are acquainted with the well-settled principles of law and legislate with reference thereto. (Cal.) *Pryor v. Winter*, 162.

6. **STATUTES in Derogation of Natural Rights** of a person to hold and manage his own property must be strictly construed. (Kan.) *Gray v. Stewart*, 461.

7. **CONSTITUTIONAL AND STATUTORY LAW, Interpretation of.**—In Considering a Word or Expression of a Statute or Constitution Susceptible of Two or More Meanings, the court will give that interpretation most in accord with the manifest purpose of the statute or constitutional provision. Where the word or expression constitutes an amendment, the court will consider the late law, the mischief sought to be corrected, and the remedy. With all this in mind, the court will give the new language such construction as will effectuate the evident intention and purpose of the makers. (Wash.) *Smith v. St. Paul etc. Ry. Co.*, 889.

STOCK LAWS.

See Animals.

STREET RAILWAYS.

1. **STREET RAILWAYS.**—A Person About to Cross a Track of an electric street railway is not under a duty to observe the same degree of watchfulness and care as when attempting to cross a steam railroad, and he cannot, therefore, be adjudged guilty of contributory negligence because he did not stop, look and listen. (Me.) *Marden v. Portsmouth etc. Ry.*, 476.

2. **STREET RAILWAYS, Care Which Must Use.**—Electric street railways in using the public streets are not vested with the same rights as steam railways. Instead of running at a rapid rate of speed, regardless of the rights of others in the streets, they are required to make reasonable use of such streets consistent with the rights of other persons and of vehicles which may occupy the streets in conjunction with them. (Me.) *Marden v. Portsmouth etc. Ry. Co.*, 476.

3. **STREET RAILWAYS, Duties of Drivers and Conductors of Toward Third Persons.**—The drivers and conductors of electric street railways have in general the same rights and duties with reference to other vehicles crossing their course that the drivers of omnibuses or any other vehicles have. (Me.) *Marden v. Portsmouth etc. Ry. Co.*, 476.

4. **STREET RAILWAYS.**—Between the Crossings, a Street Railway Car Necessarily Has Precedence Over Other Vehicles, because it cannot move from its track and is confined to one course, while other vehicles and teams can be moved with ease. (Me.) Marden v. Portsmouth etc. Ry. Co., 476.

5. **STREET RAILWAY CARS and Other Vehicles, Paramount Rights of the Former Between Crossings.**—As cars must be run upon tracks and cannot be turned out for vehicles drawn by horses, the former must have the preference, and all other vehicles must, as they can, in a reasonable manner, keep off the railway tracks, so as not to prevent the free and uninterrupted passage of cars. As to such vehicles, the railways have a paramount right, to be exercised in a reasonable and prudent manner. (Me.) Marden v. Portsmouth etc. Ry. Co., 476.

6. **STREET RAILWAY CARS and Other Vehicles.**—What is a reasonable use of a public street as between the cars of street railways and other vehicles is a question of fact dependent on the circumstances of each particular case, having reference to the manner in which street railways are compelled to be operated and the purposes for which they are designed. (Me.) Marden v. Portsmouth etc. Ry. Co., 476.

7. **STREET RAILWAYS, Crossing Without Stopping to Look and Listen.**—Whether the failure of a party injured to stop, look and listen before undertaking to pass in front of an electric street railway car constitutes negligence is a question of fact, while the failure to do so while attempting to pass in front of a steam car is a matter of law. (Me.) Marden v. Portsmouth etc. Ry. Co., 476.

8. **STREET RAILWAY CARS and Other Vehicles—Rights of at Crossings.**—The rights of street railway cars and other vehicles are equal. Neither has a paramount right over the other. (Me.) Marden v. Portsmouth etc. Ry. Co., 476.

9. **STREET RAILWAY CARS, Duties of Motorman of at Crossings.**—With respect to the motormen of electric and other motor cars at street crossings, the motormen, when approaching a public street crossing, must anticipate that any person approaching the cars from either side may drive his team on it, and the former must exercise all due care and have his car under such control as to be able to stop it at a crossing if necessary to avoid accident. (Me.) Marden v. Portsmouth etc. Ry. Co., 476.

10. **STREET RAILWAYS, Negligence in Speed of Cars of.**—The speed of a street railway car is a fact from which negligence may be inferred, and whether such speed in any particular case constitutes negligence is a question for the jury. (Me.) Marden v. Portsmouth etc. Ry. Co., 476.

11. **STREET RAILWAYS, Right of Persons Crossing to Presume that Care Will be Exercised.**—A person undertaking to cross the track of an electric street railway with a team and vehicle has a right to rely upon the assumption that the company and its agents will discharge their legal duty in approaching crossings by having their car under control. (Me.) Marden v. Portsmouth etc. Ry. Co., 476.

12. **STREET RAILWAYS, Contributory Negligence in not Looking and Listening.**—One about to cross the line of an electric street railway with his team is not necessarily required to look the whole length of the visible track to see if a car is coming, but only along the track far enough to warrant an ordinarily careful and prudent man, having in mind his own safety, under like circumstances, to conclude that no car is in such proximity. if properly managed, as

to endanger his safety. (Me.) *Marden v. Portsmouth etc. Ry. Co.*, 476.

13. **STREET RAILWAYS, When may be Adjudged Guilty of Negligence, and a Person Injured to be Free of Contributory Negligence.** If a person about to cross the track of an electric street railway with a team looks down the track and sees that it is clear for a distance of two hundred and forty feet, and then attempts to cross, and the motorman, running his car down a steep grade, in daylight, having such person in view all the time, who does not set his brakes for the purpose of controlling his car until within forty feet of the crossing, and a collision occurs, the street railway may be adjudged guilty of actionable negligence, and the person injured not to have been guilty of contributory negligence. (Me.) *Marden v. Portsmouth etc. Ry. Co.*, 476.

See Carriers.

SUMMONS.

See Process.

SUPPLEMENTARY PROCEEDINGS.

See Executions.

SURETYSHIP.

See Principal and Surety.

TAXATION.

In General.

1. **TAXATION, Charges Which Amount to.**—A statute respecting fees in probate which exacts a charge regulated by the value of the estate and provides for the payment into the county treasury of the moneys, they to become a part of the public funds, cannot be regarded as fixing compensation for services performed by public officers. The demand thus exacted is a taxation on property. (Wash.) *State v. Case*, 874.

2. **TAXATION—Moral Obligation to Pay Taxes.**—The fact that the assessment of real property is fatally imperfect as to description does not destroy the moral obligation to pay the taxes. The moral obligation to pay the amount justly chargeable is as great where the defect arises from an imperfect description as where it is the result of any other cause. (Cal.) *Couts v. Cornell*, 168.

3. **TAXATION—Bonded Indebtedness of Corporation.**—Under the statutes of Maryland, assessors are not authorized to measure the valuation of a corporation's property for purposes of taxation, by adding thereto and including therein the bonded indebtedness due by the company. (Md.) *Consolidated Gas Co. v. Mayor etc. of Baltimore*, 584.

4. **TAXATION—Appeal from Arbitrary Assessment.**—The supreme court cannot be required to sit as a board of review to revise the valuation placed by assessors on property for purposes of taxation; but when the record shows that a valuation has been imposed on property in a capricious, whimsical, or unwarrantable manner, instead of by the exercise of judgment, then such valuation is not an assessment at all. (Md.) *Consolidated Gas Co. v. Mayor etc. of Baltimore*, 584.

5. **TAXATION—Validity of Assessment—Presumption.**—While there is generally a presumption in favor of the correctness of an

assessment, this is not true of an assessment which is arbitrarily made and which is therefore really no assessment. (Md.) Consolidated Gas Co. v. Mayor etc. of Baltimore, 584.

Franchises and Easements.

6. **TAXATION—Franchise and Easement.**—The use to which a franchise permits an easement to be put is an essential element to be considered in placing a valuation on the easement for purposes of taxation. (Md.) Consolidated Gas Co. v. Mayor etc. of Baltimore, 584.

7. **TAXATION.**—The Value of the Easement of a Gas Company in the public streets is rightly included as an element in fixing an assessment on the tangible property employed in availing of that easement. (Md.) Consolidated Gas Co. v. Mayor etc. of Baltimore, 584.

8. **TAXATION.**—The Easement Acquired by a Gas Company in its occupancy of the public streets with its pipes and mains may be properly assessed as real estate. (Md.) Consolidated Gas Co. v. Mayor etc. of Baltimore, 584.

Homestead on Public Lands.

9. **HOMESTEADS—Taxation.**—Public land entered as a homestead is not subject to state taxation until a patent therefor is issued by the United States. (Wyo.) Board of Commissioners v. Shaffner, 971.

10. **TAXATION—Lien of—Tax on Homestead Claim Prior to Patent.**—State taxes levied and accruing against a homestead claimant on government land, for improvements on the land and for personal property, and which become delinquent prior to the issuance of the patent for the land by the United States, are not a lien on the land unless expressly made so by statute. (Wyo.) Board of Commrs. v. Shaffner, 971.

11. **TAXATION—Delinquent Taxes as Lien on After-acquired Property.**—Under a statute providing that in each year the unpaid taxes of that year shall become delinquent and that taxes upon real property shall be made a perpetual lien thereon, against all persons except the United States and the state, and that taxes due from any person on personal property shall be a lien on real estate owned by him, no lien is imposed on land acquired as a homestead from the United States government, for delinquent taxes levied against the homestead claimant for improvements on the homestead claim and for personal property, and accruing prior to the issuance of a patent for the land. (Wyo.) Board of Commrs. v. Shaffner, 971.

Lien of Tax.

12. **TAXATION—Lien of Tax.**—Taxes are not a lien unless expressly made so, and to authorize a sale of land for taxes, a lien must exist either created in terms by the statute itself or established by some official proceeding under the state. (Wyo.) Board of Commrs. v. Shaffner, 971.

13. **TAXATION—Lien of Tax—Limitation on.**—If a statute in terms makes a tax a lien on one species of property, it will not by intendment be extended to any other species of property. (Wyo.) Board of Commrs. v. Shaffner, 971.

14. **TAXATION—Lien of Tax—Limitation on.**—If a statute in terms makes a tax a lien on all property and rights of property of the person taxed, the lien will be limited to property and rights

owned when the tax accrued. (Wyo.) Board of Commrs. v. Shaffner, 971.

Notice of Tax Sale.

15. **TAX SALE, Constructive Notice of.**—A certificate showing the sale of property for delinquent taxes and giving a correct description of such property operates as constructive notice, and charges subsequent purchasers with the fact that a tax lien exists and is not satisfied by payment. (Cal.) Grant v. Cornell, 173.

TAX DEEDS.

See Injunctions, 2-5.

TAX RECEIPTS.

See Evidence, 1.

TENANTS IN COMMON.

In General.

1. **COTENANCY.**—The Using and Possessing of One Tenant in Common is to be taken as the using and possessing by his cotenant, and the occupation of one will be deemed to be in conformity to his right and title as tenant in common, and not adverse. (Mass.) Joyce v. Dyer, 603.

2. **COTENANCY**—Presumption from Entry Under a Conveyance Purporting to be of the Whole.—One receiving a conveyance from a cotenant purporting to be of the whole property and entering into possession thereunder will be presumed, nothing to the contrary being shown, to have entered under a claim of right to the fee of the whole. (Mass.) Joyce v. Dyer, 603.

Ouster and Adverse Possession.

3. **COTENANT**—Adverse Possession Against, Presumption of Knowledge of.—If one enters into possession of property under a conveyance from a cotenant, purporting to be of the whole, though it is not recorded, the other cotenant must be presumed to know that the possession so taken was adverse, where he knows that a building thereon is changed from a stable to a dwelling and occupied by the grantee and his heirs as a homestead for more than half a century, during all of which time his and their right to the exclusive possession is not questioned by anybody. (Mass.) Joyce v. Dyer, 603.

4. **COTENANCY.**—The Ouster by One Cotenant of Another Should be Inferred from long, exclusive, and uninterrupted possession by one without any possession or claim for profits by the other. (Mass.) Joyce v. Dyer, 603.

5. **COTENANCY**—Conveyance by One Cotenant—Adverse Possession.—A holding of exclusive possession by a purchaser for the statutory period of limitation, under a deed in severalty from one cotenant of the whole tract to a stranger to the title, vests a full and complete title in him, as against all of the cotenants not laboring under any disability. (Miss.) Gardiner v. Hinton, 726.

6. **COTENANCY**—Conveyance by One Cotenant—Adverse Possession—Record or Deed.—A purchaser who is a stranger to the title, and who holds exclusive possession of the whole tract for the statutory period of limitation under a deed in severalty, from one cotenant, obtains a full and complete title as against all of the cotenants not laboring under any disability, and the fact that such deed is not placed of record until long after it is executed, and

that suit is instituted by a cotenant to recover the land within the statutory period of limitation from the filing of the deed for record, is immaterial. (Miss.) *Gardiner v. Hinton*, 726.

7. **COTENANCY**—Conveyance by One Cotenant—Adverse Possession.—A vendee who is a stranger to the title and who purchases the whole tract under a deed in severalty from one cotenant, and then goes into and holds open, continuous and exclusive possession under a claim of right to the whole tract for more than the statutory period of limitation, acquires full and complete title thereto as against all of the cotenants not laboring under any disability, regardless of the question of notice, actual or constructive, to such cotenants. (Miss.) *Gardiner v. Hinton*, 726.

Note.

Tenants in Common. See *Cotenancy*.

TIMBER.

See *Deeds*, 7, 8.

TIME.

WORDS AND PHRASES—"Until."—The use of the word "until" generally implies an intention to exclude the day to which it refers, unless the contrary appears from the context of the statute or instrument in which such words is used. (Ala.) *Johnson v. State*, 17.

TRESPASS.

1. **TRESPASS**—Discharge of Rainwater.—No one has a right, by an artificial structure of any kind upon his own land, to cause the water which falls and accumulates thereon in rain or snow to be discharged upon the land of an adjoining owner, and such erection, if it causes the water to flow either in the form of a current or stream, or only in drops, works a violation of the adjoining proprietor's rights of property, and constitutes a trespass unless a right exists by express grant, or by prescription. (Wis.) *Huber v. Stark*, 937.

2. **TRESPASS**—Overhanging Eaves.—An invasion by one of the domain of another by projecting the eaves of his building over the premises of such other, but not to the prejudice of his occupancy of his land up to the boundary line, is remediable by suit to enjoin a continuous trespass, or by action to recover damages. (Wis.) *Huber v. Stark*, 937.

3. **TRESPASS**—Mitigation of Damages.—It is no ground for mitigation of damages caused to property of one person by a trespass thereon that if such property had been in a good state of repair, the wrongful invasion would not have damaged it. (Wis.) *Huber v. Stark*, 937.

TRIAL.

1. **TRIAL**—Indemnity Insurance, Reference to by Counsel.—On the trial of an action to recover for the alleged negligence of the defendant, it is improper and prejudicial error for counsel for the plaintiff, in the presence of the jury, to refer or call their attention to the fact that the defendant is indemnified from loss by a casualty indemnity company, and that one of its attorneys is present at the trial. (Wash.) *Stratton v. Nichols Lumber Co.*, 881.

2. **TRIAL**—Misconduct of Counsel.—It is prejudicial error entitling the losing party to a new trial for the counsel of his adversary, in the guise of questions proposed to witnesses, to place himself in the attitude of making alleged statements of fact, doing so repeat-

edly over the objections of opposing counsel. (Wash.) *Stratton v. Nichols Lumber Co.*, 881.

3. **JURY TRIAL**.—The Reading of Judicial Decisions to the Jury on the question of what constitutes a fixture has a tendency to confuse and bewilder, rather than enlighten, and the practice is not to be commended. (Wash.) *Filley v. Christopher*, 853.

4. **TRIAL**.—Remarks by Courts.—A statement by the court repeating correctly what a witness has just said, and in aiding a more perfect translation of what a witness has said through the aid of an interpreter, is not error. (Ill.) *Hock v. People*, 327.

5. **EVIDENCE**.—Order of Proof.—Affirmative matter in avoidance of plaintiff's cause of action is not admissible when it is sought to inject it into plaintiff's direct testimony and before he has closed his case. (Miss.) *Yazoo etc. R. R. Co. v. Grant*, 723.

6. **JURY TRIAL**.—The Rule that all Instructions must be Construed Together does not extend to instructions inherently erroneous and misleading. (Ark.) *Fletcher v. Eagle*, 100.

Note.

Trover by mortgagee of chattels, when maintainable, 433, 444, 440, 441.

TRUSTS.

See Limitation of Actions, 5, 6.

USURY.

1. **USURY**.—Building and Loan Associations.—Where a contract of a building and loan association provides for the payment of a fixed monthly sum as interest, and a further monthly sum as principal, so that while the principal debt is decreasing the interest payments remain the same, and, though at first legal, become, through the reduction of the principal, usurious before the maturity of the loan, the transaction is not relieved from the operation of the usury statute by a grant of a right to pay the entire debt at any time. (Idaho.) *Ford v. Washington National etc. Assn.*, 192.

2. **USURY**.—In Determining the Question of usury in the case of a transaction by a building and loan association the subject of inquiry is whether or not a contract has been made whereby, either directly or indirectly, a greater rate of interest may be charged than that authorized by law. (Idaho.) *Ford v. Washington Nat. etc. Assn.*, 192.

3. **USURY**.—The Defense of Usury may be Pleaded by anyone claiming under and in privity with the borrower. (Idaho.) *Ford v. Washington Nat. etc. Assn.*, 192.

4. **USURY**.—The Doctrine of Estoppel cannot be invoked to defeat the defense of usury. (Idaho.) *Ford v. Washington Nat. etc. Assn.*, 192.

5. **USURY**.—Stipulation for Payment of Taxes.—A mortgage which draws the highest legal rate of interest is not rendered usurious by a stipulation that the debtor shall pay the taxes on the debt or mortgage, if the statutes declare such a stipulation void. (Idaho.) *First Nat. Bank v. Glenn*, 204.

VENDOR AND VENDEE.

See Fraud, 2; Frauds, Statute of.

Nota.

Voir Dire. See Jury Trial.

WAREHOUSEMEN.

1. **WAREHOUSEMAN — Burning of Goods — Insurance.**—If a warehouseman contracts to store goods in a specified building, and the owner has them insured as located therein, but the warehouseman, without notice of the insurance, stores them in a different building, where they are destroyed by fire without negligence on his part, he is liable to the owner for their value. (Mich.) *Hudson v. Columbian Transfer Co.*, 679.

2. **STORAGE WAREHOUSE CORPORATIONS, Contracts of do not Assure Customers of Protection from Personal Violence.**—A contract between a storage warehouse company and its customers does not bind it to protect them while on its premises from personal violence or improper force on the part of its employés. (Mass.) *Fairbanks v. Boston Storage etc. Co.*, 646.

WARRANTY.

See Sales, 6-8.

WATER AND WATERCOURSES.

1. **SURFACE WATERS—Drainage into Natural Watercourse.**—The owner of lands through which a natural watercourse flows may accumulate and cast into such watercourse, in a body, the surface water falling upon lands adjacent thereto, without becoming liable to the lower riparian owner for damages if the natural capacity of the watercourse is not exceeded and overflow caused thereby. (Kan.) *Baldwin v. Ohio Township*, 414.

2. **SURFACE WATERS—Drainage into Natural Watercourse.**—An upper riparian proprietor cannot gather and divert surface water from its natural course of flowage and cast it into the natural watercourse flowing through his land, to the serious damage of the owner of the lower estate by overflow, but in order for the latter to recover damages, even for overflow or to have their continuance enjoined, they must be of a serious and sensible nature. (Kan.) *Baldwin v. Ohio Township*, 414.

3. **SURFACE WATERS—Drainage into Natural Watercourse.**—An upper riparian owner may divert at least incidentally, for a proper purpose and in good faith, such as for the purpose of agriculture, road making, or other proper betterments, the flow of the surface water from its natural course, especially when it is cast into a natural watercourse, where but little damage is occasioned to the lower riparian owner. (Kan.) *Baldwin v. Ohio Township*, 414.

4. **SURFACE WATERS—Drainage into Natural Watercourse to Improve Highway.**—Merely increasing the flow of water in a natural watercourse by draining surface water into it does not give a right of action, and riparian owners cannot complain when such increase is due to the building or improving of a public highway in good faith, and fairly within territory drained by such watercourse, and when its capacity is not exceeded and overflow caused thereby. (Kan.) *Baldwin v. Ohio Township*, 414.

Prescriptive Rights.

5. **A PRESCRIPTIVE RIGHT to Discharge Sawdust into a Stream** is not acquired by the exercise of such right for thirty years before the people of the state interposed by the enactment of legislation

regulating such right for the purpose of preserving fish in the brooks and rivers of the state. (Mass.) Commonwealth v. Sisson, 630.

See Constitutional Law, 7.

WILLS.

In General.

1. **WILLS—Illiteracy as Ground for Avoiding.**—If a testatrix is shown to have had great strength of mind, clearness of intellect, and immense capacity in the matter of looking after her property interests, and to have signed her will, her general illiteracy is not a sufficient circumstance to justify the setting aside of her will. (Ill.) Compher v. Browning, 346.

2. **WILLS, Bequest, When not to a Class.**—The bequest of the residue of the testator's estate to her younger children, E. G. C. and E. I. B., to be divided equally between them, is a separate bequest to each, and not one bequest to them as a class. Hence, on the death of E. G. C., during the life of the testator, E. I. B., does not take the residue, but the deceased, as to it, must be regarded as dying intestate. (Mass.) Best v. Berry, 651.

3. **WILLS.—Extrinsic Evidence, Though Consisting of a Memorandum in the Testator's Handwriting and by Him Signed,** is not admissible to control or alter the legal effect of the will, where there is no ambiguity on its face, taken in connection with all the surrounding facts, so that no doubt arises on the subject matter of a bequest of the identity of a legatee. (Mass.) Best v. Berry, 651.

Knowledge of Contents.

4. **WILLS—Testator's Knowledge of Contents.**—If a will is shown to have been prepared at the request of the testator, even under general directions, and is afterward executed in the manner provided by law and signed by the testator, it will not be set aside on the ground that he did not understand what it contained, except upon clear and satisfactory proof of that fact. (Ill.) Compher v. Browning, 346.

5. **WILLS—Want of Knowledge of Contents.**—If one of the grounds for assailing the validity of a will is that the testatrix was illiterate and did not know the contents of the will, the attention of the jury may be called to the questions whether the testatrix, at the time of the execution of the will, knew what it contained or fully understood its provisions, without the charge being open to the objection that it instructs upon isolated facts. (Ill.) Compher v. Browning, 346.

Undue Influence.

6. **WILLS—Undue Influence.**—If a testatrix of wealth, many business interests, and much property, employs a man, whom she subsequently makes one of her executors, as her agent, giving him full power of attorney to act for her, this alone does not show undue influence on his part, specially when such power of attorney is the only proper way of authorizing such agent to demand possession of her property from her former agents whom he succeeds. (Ill.) Compher v. Browning, 346.

7. **WILLS—Undue Influence.**—The facts that a confidential agent of a testatrix has drawn a will, or procured it to be drawn for her, and has been made executor or trustee thereunder, may be a suspicious circumstance, which will call for additional scrutiny as to the fairness of the transaction, but such fact alone does not in-

validate the will, when the other circumstances developed by the evidence show that there was no fraud, or imposition, or attempt to exercise undue influence. (Ill.) *Compher v. Browning*, 346.

8. **WILLS—Undue Influence.**—If a testatrix has been in the habit of employing attorneys living away from the town where she resided, the fact that her confidential agent employs such an attorney to draft her will does not tend to show undue influence on the part of such agent, nor that the will does not express her own wishes and intentions, especially when its terms are in accord with her previously expressed declarations. (Ill.) *Compher v. Browning*, 346.

9. **WILLS—Undue Influence—Former Declarations.**—If a will is charged to have been executed through undue influence, the declarations of the testator, made before its execution, are admissible by way of rebuttal to show his intention as to the disposition of his property, provided such declarations are in harmony with the provisions of the will as actually made. (Ill.) *Compher v. Browning*, 346.

10. **WILLS—Undue Influence—Burden of Proof.**—If the proponents of a will furnish prima facie evidence of the validity of the will, the burden of proof is then upon the contestant to substantiate his accusation that the will was executed under undue influence. (Ill.) *Compher v. Browning*, 346.

11. **WILLS—Undue Influence.**—Declarations made by a testatrix are not admissible in a proceeding to contest the will as tending to show the mental condition of the testatrix when the contestant has repeatedly admitted in open court that the testatrix was of sound mind and memory. (Ill.) *Compher v. Browning*, 346.

12. **WILLS—Undue Influence—Opinion Evidence.**—Proof that the testatrix was a woman easily influenced and open to flattery is not admissible to show the exercise of undue influence in the execution of the will. (Ill.) *Compher v. Browning*, 346.

13. **WILLS—Undue Influence.**—If a will is admitted to be that of a sane person, it is not sufficient to set it aside that the facts and circumstances proven are consistent with the hypothesis of undue influence, but it must also be shown that such facts and circumstances are inconsistent with a contrary hypothesis. (Ill.) *Compher v. Browning*, 346.

14. **WILLS—Undue Influence—Burden of Proof.**—If a will is contested for undue influence, the burden of proof is always upon the contestant to show such undue influence and so remains without shifting, until the end of the trial. (Ill.) *Compher v. Browning*, 346.

15. **WILLS.**—Undue Influence sufficient to invalidate a will must amount to such a degree of restraint and coercion as destroys the free agency of the testator. (Ill.) *Compher v. Browning*, 346.

16. **WILLS—Undue Influence—Conflict of Evidence.**—If the evidence is conflicting upon the question whether the execution of a will was brought about by undue influence, a court of review will not disturb the verdict of the jury unless it is clearly against the weight of the evidence. (Ill.) *Compher v. Browning*, 346.

Declarations of Testator.

17. **WILLS.**—Declarations of the Testator made before or after the execution of the will cannot be proven in order to invalidate it. (Ill.) *Compher v. Browning*, 346.

18. **WILLS.**—Declarations of a testator, made before or after the execution of the will, may be competent to prove mental condition, but not to show undue influence. (Ill.) *Compher v. Browning*, 346.

WITNESSES.

1. CRIMINAL LAW—Bigamy—Second Wife as Witness.—If there is an issue as to the fact of the first marriage or its validity, the second wife cannot be admitted as a witness against the husband on trial for crime, until the fact of the first marriage is established by proof. If the first marriage is admitted or proved, the alleged second wife is competent to testify against her alleged husband. (Ill.) Hoch v. People. 327.

2. CRIMINAL LAW—Bigamous Wife as Witness.—When a second wife is offered as a witness against one claimed to be her bigamous husband charged with another crime, the question of her competency is for the court, and, in deciding that question, the court is not only the judge of the law, but also of the questions of fact necessary to be decided. The court must act upon the evidence as presented at the time of the ruling, and if there is evidence of a first marriage, and that that wife is still living and not divorced, the fact that the witness is not the wife of the party to the suit is established, and she must be admitted to testify. (Ill.) Hoch v. People, 327.

3. CRIMINAL LAW—Bigamous Wife as Witness.—Proof that the first wife of a person accused of crime is living and undivorced overcomes all presumptions in favor of a second marriage, as to its validity, including any presumption as to death or divorce of the first wife, and renders the alleged second wife a competent witness against such accused person as to all facts except those relating to the first marriage. (Ill.) Hoch v. People, 327.

